



UNIVERSITAT<sup>DE</sup>  
BARCELONA

**From the effectiveness of the right to housing  
to the right to the city: a three-dimensional rationality  
for Brazil and Spain**

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UNIVERSITAT DE  
BARCELONA

FACULTAT DE DRET



PhD Programme in Law and Political Science  
Public International Law and International Relations

**FROM THE EFFECTIVENESS OF THE RIGHT TO HOUSING TO  
THE RIGHT TO THE CITY: A THREE-DIMENSIONAL  
RATIONALITY FOR BRAZIL AND SPAIN**

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**BARCELONA, 2017**





## Acknowledgements

I remain extremely grateful to the City of Barcelona and the challenging journey I have lived so far. A sea change for me that the crystal waters of Catalonia helped me cross. The scholarship offered by the Coordenação de Aperfeiçoamento de Pessoal de Nível Superior (CAPES) was undeniably a decisive support as well. I give many thanks also to the professor Dr. Juli Ponce Solé. A man of knowledge, high values and a patient adviser. His professionalism and friendship galvanize a different concept of academia. My sincere appreciation to Alexandre Douglas Zaidan de Carvalho's reading references, observations and critical views. A Brazilian pot of gold that I found *nel mezzo del cammin di nostra vita* as Chiara Ramos and Camille Mialot with intelligent insights and very positive energies. I am also indebted to Julian C. Juergensmeyer, Ryan Rowberry, John Travis Marshall, Leila Lawlor and Karen Johnston making the Center for the Comparative Study of Metropolitan Growth a gift from Georgia State University. As one of the idealizers and founders of the Study Space Programme, many thanks to Colin Crawford and his brilliant mind helping me with his comparative studies in property system. For friendship and revising my texts in English, although all faults are mine with my obsession in writing eternally, Luciano Alves Bezerra. I am grateful to Sílvia Beatriz Nogueira Souza, Miguel Sánchez-Arjona González, Federico Parra and Eduardo Pérez for their friendship, happy moments and the marvellous universe they carry inside. Thanks are also due to my family for supporting me and remembering me their love is unconditional. My mother, Marinalva Lopes Migliari, a noble heart. My father, *in memoriam*, an eternal messenger of joy. To my brothers and sisters that have taught me to be a better person in some way. My nieces and nephews whose dreams I follow in their beautiful spirits. Thanks for Anders Löfstrand and his patience with my habit of talking for hours. I also have in mind Olle and Lena Granath for their warm love. Last but not least, Carolina Löfstrand, consider yourself heartily thanked. I will forever be beholden to you and your love.



## Abstract

The conflict between property system and the right to housing has evolved into a more complex inquiry since the beginning of the present research. Our initial analysis on the effectiveness of the social function in ownership discovered in tribunal decisions how restricted was the understanding of property concept. The liberal perception of non-interference in the economy of real estate market reduced the legal debate about the internal limits of property to a financial binary relation, for instance, individuals affected by mortgages and credit institutions, tenants and non-residential landlords, families living in vulnerable socioeconomic conditions and investors. However, the housing problem causes yet a certain legal inquietude since the number of non-occupied properties and the cost of rents are still increasing in Brazil and Spain. Examining the data available for both countries, we found a macroeconomic variable in urban development and housing access intimately linked to stock exchange markets. In addition, the absolute notion of property right is an obstacle inherited from the civil law tradition that impedes the openness of the ownership system to its social dimension. The aim of our thesis is the effective defence of the right to housing as a legal instrument associated with the social function of property and as a connecting factor to other rights in urban context. Our hypothesis requires a three-dimensional rationality for adequate judgments beyond the task of tribunals. A set of reasons of how both societies can limit the transnational real estate speculation, overcome the civil law tradition in an inert tension with democratic sovereignties and use the social function like a legal category so that the effectiveness of the right to housing serves as a turning point for the right to city.

**Keywords:** right to housing, right to the city, social function of property, civil society, real estate investments.





## Resumen

El conflicto entre el sistema de propiedad y el derecho a la vivienda se ha convertido en una investigación más compleja desde el comienzo del presente trabajo. Nuestro análisis inicial sobre la efectividad de la función social de la propiedad identificó en decisiones de tribunales un ejercicio de comprensión muy estricto del concepto de propiedad. La percepción liberal de la no injerencia en la economía del mercado inmobiliario redujo el debate legal sobre los límites internos de la propiedad a una relación binaria financiera, por ejemplo, individuos afectados por hipotecas e instituciones de crédito, inquilinos y propietarios no residenciales, familias que viven en condiciones de vulnerabilidad socioeconómica e inversores. Sin embargo, la vivienda causa todavía cierta inquietud jurídica, ya que el número de propiedades no ocupadas y el costo de los alquileres siguen aumentando en Brasil y España. Examinando los datos disponibles para ambos países, encontramos una variable macroeconómica en el desarrollo urbano y el acceso a la vivienda íntimamente vinculados a los mercados bursátiles. Además, la noción absoluta de derecho de propiedad sigue siendo un obstáculo heredado de la *civil law* que impide la apertura del sistema de propiedad en su dimensión social. El objetivo de nuestra tesis es contribuir a la defensa efectiva del derecho a la vivienda como instrumento jurídico asociado a la función social de la propiedad y como factor de conexión con otros derechos en el contexto urbano. Nuestra hipótesis requiere una racionalidad tridimensional para juicios adecuados más allá de la tarea de los tribunales. Un conjunto de razones de cómo las dos sociedades pueden limitar la especulación inmobiliaria transnacional, superar la tradición del *civil law* en tensión inerte con las soberanías democráticas y utilizar la función social como categoría jurídica para que la efectividad del derecho a la vivienda sirva de punto de inflexión para el derecho a la ciudad.

**Palabras clave:** derecho a la vivienda, derecho a la ciudad, función social de la propiedad, sociedad civil, inversiones inmobiliarias.



## Resumo

O conflito entre o sistema de propriedade e o direito à moradia tornou-se uma indagação mais complexa desde o início da presente pesquisa. Nossa análise inicial sobre a eficácia da função social da propriedade identificou em decisões judiciais um exercício de compreensão muito estreita sobre o conceito de propriedade. A percepção liberal da não interferência na economia do mercado imobiliário reduziu o debate jurídico sobre os limites internos da propriedade para vínculos financeiros binários, por exemplo, pessoas afetadas por inadimplência de suas hipotecas versus instituições de crédito, inquilinos contra propriedades de pessoas jurídicas, famílias em condições de vulnerabilidade socioeconômica contra investidores. No entanto, a habitação ainda causa alguma inquietude legal, já que o número de imóveis desocupados e o custo de aluguéis continuam a aumentar no Brasil e na Espanha. Com base em análise de dados disponíveis para ambas realidades, encontramos uma variável macroeconômica no desenvolvimento urbano e o acesso a moradias intimamente ligados aos mercados de ações. Além disso, a noção absoluta sobre o direito de propriedade continua a ser um obstáculo herdado da tradição do direito civil que impede a abertura do sistema de propriedade a dimensões sociais. O objetivo da nossa tese é contribuir para a defesa efetiva do direito à moradia como instrumento jurídico associado à função social da propriedade e como fator de conexão para outros direitos em contexto urbano. Nossa hipótese requer uma racionalidade tridimensional para julgamentos adequados além da tarefa dos tribunais. Um conjunto de razões sobre como as duas sociedades podem limitar a especulação imobiliária transnacional, superar a tradição do direito civil em tensão inerte com soberanias democráticas e usar a função social como uma categoria legal para que a efetividade do direito à habitação sirva enquanto ponto de inflexão para o direito à cidade.

**Palavras-chave:** direito à moradia, direito à cidade, função social da propriedade, sociedade civil, investimentos imobiliários.



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## INTRODUCTION



## **1. Property economic concept as a relevant matter for contemporaneous democracies**

Inquietudes related to the use of the property are not a phenomenon of our era. Although land occupation has changed along history, the usufruct of ownership shows us how the legal forms of traditional *imperium*, *dominium* and *possessio* are still residual in the interpretation of our contemporaneous rationale behind ownership. The notion of society also influenced the definition of property, because *societas* was a consortium of owners and heirs guaranteed by land use in ancient Rome, despite the fact that property could not dictate the public order. Between the end of the Middle Ages and the beginning of Modernity, that abstraction on property was attacked and changed to serve the political concentration of power created by sovereigns. It is important to mention we understand sovereignty as an indivisible body in which the making of law in parliaments, the administration of lands and justice belong to the unit of the ruling classes. In that context, mainly the legal and political relations between the end of the XVI century, the limits of the ownership used to be strongly operated by personal relations. The hands of a single monarch, an oligarchy or a sovereign state set the contractual limits of the right to property based upon an individual wish for power. A series of consequences of that perception gave owners of the land the power to constitute the employment of physical force to assert their authority through fear. However, it was during the Modernity that the concept of law on property rights gained different forms including the economic dimension that was not a prime concern in the Roman civil law.

The property right evolution and its internal limits, that is to say, the general principles involving private and public relations, nurtured socioeconomic complexities along time. On the one hand, penalties on vacant properties and the role of its social function, for example, are legal matters for legislatures, public administrations and tribunals. In theory, the division of powers and competences that must be observed with the help of the law in order to regulate land ownership may collide with private interests. On the other hand, speculative usufruct of property and global real estate firms investing in non-residential dwellings are probably making vulnerable international obligations assumed by States thought to defend housing or urban rights. The idea of bringing a social dimension to property issues has also been connected to very abstract

notions pointing out that housing and cities perform a social function. Different from the civil law tradition, the internal limits in the age of constitutionalism of democratic societies tend to expand the definition of the property social use differentiating residential and non-residential ownership to contain abuses. The quantity of vacant houses in Brazil and Spain, for instance, has grown along the last decades and that process is intimately connected to the way both countries conceive property limits and its usufruct.

When the 2008 global economic crisis happened, the concept of social function seemed an alien legal aspect for speculative real estate firms and subprime mortgages. It did not interfere with the escalation of high marginal returns in public debt systems associated to purely pecuniary purposes since the economic international order was used to overlook the protection of housing rights in national legal systems. The constitutional mechanisms could be used to impede abuses of speculative funds and greedy investors, although the effectiveness of the social function of property remains a taboo in that case. However, the social function was on the spot again when general principles for the internal limits on ownership, such as progressive taxes for non-residential investments in order to mitigate speculation on the property market, was seen an effective legal category to face that time of intense socioeconomic difficulty. Moreover, the limitation of property has been used to put forward the right to adequate housing in the agendas of civil society organisations, although not enunciating their claims through a legal jargon to make evident how vacant houses in the hands of non-residential owners violate their rights. In other words, the demands for the application of constitutional parameters and the redefinition of the property concept lead the democratic powers to confront global economic powers and prioritize housing rights for all. Nowadays, the fact of approximately 3.4 million houses being empty in the Spanish society has provoked an enormous conflict of interest involving proprietors. However, it is essential the distinction of what type of owners we address our criticism, i.e., banks, real estate firms and stock exchange property market. The Brazilian case is more dramatic. There are about 7.2 million housing units non-occupied and 72.7% of them in urban areas. We will indicate the figures in both countries and other national contexts in the present thesis. Therefore, the object of our initial inquiry examines the global speculative

dimension as an impediment for the effectiveness of the right to housing if property is considered an absolute right.<sup>1</sup>

## 2. The object and the hypothesis for adequate judgments

We insist on the idea of being critical of a transnational property system not only as a task for judges, public administrations and legislatures, but also as an attitude that belongs to civil society for the construction of an updated concept of the right to property. It is an amicable view of a democratic alternative for a social usufruct of ownership as a category to limit property as a fundamental right and bridge a great abyss of class. In addition, an understanding of the economic speculative dimension for States is quintessential to provide law courts an updated concept of property for their decisions. In other words, if national legal systems start making their judgments using socioeconomic criteria and international commitments assumed by the States, the conception of property will find their ways to reconnect ownership to residence since global real estate firms tend to root their decisions on less conflictive financial gains. Nevertheless, the tension between investors and civil society's demands leads us to our second inquiry into the fact civil law tradition is still interpreted ignoring property market in its macroeconomic extent. When the 2008 global crisis destabilised national economies, political powers had to decide either obstructing the property system abuses or changing their internal legislation.<sup>2</sup> The legal uncertainty generated by transnational

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<sup>1</sup> See the data and statistics published by the *Instituto Nacional de Estadística. Censos de población y vivienda 2011* [on-line]. España en cifras, 2014. [Accessed on 1 October, 2016]. Retrieved from <[http://www.ine.es/prodyser/espaa\\_cifras/2014/files/assets/basic-html/page45.html](http://www.ine.es/prodyser/espaa_cifras/2014/files/assets/basic-html/page45.html)>. Read also the report with more information elaborated by the *Ministério das Cidades. Secretaria Nacional de Habitação* [on-line]. Déficit habitacional 2008, pp. 43-44. [Accessed on 2 August, 2016]. Retrieved from <[http://www.cidades.gov.br/images/stories/ArquivosSNH/ArquivosPDF/DHB\\_2008\\_Final\\_2011.pdf](http://www.cidades.gov.br/images/stories/ArquivosSNH/ArquivosPDF/DHB_2008_Final_2011.pdf)>. In 2011, the housing deficit in Brazil was 5.4 million as pointed out by the studies of IPEA (Instituto de Pesquisa Econômica Aplicada). The economic development of the country has contrasted to the social reality. Check the following document for more details *Instituto de Pesquisa Econômica Aplicada* [on-line]. Nota técnica estima o déficit habitacional Brasileiro. [Accessed on 13 September, 2016]. Retrieved from <[http://www.ipea.gov.br/portal/index.php?option=com\\_content&view=article&id=18179](http://www.ipea.gov.br/portal/index.php?option=com_content&view=article&id=18179)>.

<sup>2</sup> The importance of commercial and credit banks as two basic pillars for a financial system controlled by the State is indispensable for the construction of alternatives in an economy. During the 2008 crisis, many countries could not address the contingency due to the absence or insufficiency of state banks in having offered financing lines for different productive sectors other than construction. The idea of public institutions is to provide societies with the guarantees of recovering from critical structural insecurities in mortgage lending systems, especially in situations where there are high levels of unemployment, income concentration and public debt interest rates. Read Englund, P. (1999). The Swedish banking crisis: roots and consequences. *Oxford Review of Economics Policy*, 15(3), 80-97.

investors in urban context for ownership caused an enormous stress on executive and legislative powers. So, what was thought to be another financial issue to be solved like the years before revealed the weakness of national sovereignties.<sup>3</sup>

As an opportunity to exchange views with doctrinal studies in law, we decided to make a comparison using constitutional parameters and international legislation to limit the speculative usufruct of the right to property. That contrastive perspective is the path to a third inquiry, that is to say, if the analyses of constitutional rights include the social function of property in that new context of an international crisis involving the property system. As a turning point in our work, the 1978 Spanish Constitution and the 1988 Constitution of the Federative Republic of Brazil are used either by tribunals or referred by civil society movements to construe the social function of property. For a more complex rationality, we allude to the decisions made by justices, but also the critical understanding of civil organisations against those economic and public administrative policies that do not include a social legal category to support an effective the right to housing. It is important also to say that both magna charters guarantee the right to property in their constitutional texts, but imposing limits for an absolute concept of property system. In that sense, our hypothesis is a composite of three dimensions for adequate assessments of the right to ownership unravelling transnational speculative capital in real estate businesses, civil law tradition in tension with democratic sovereignties and the social function as a legal category belonging to society including State institutions. Therefore, the more the economic, traditional and constitutional judgments are made incorporating residence as a social legal interest to limit abuses in ownership, the less public administrations will be captured by the capital of global real estate firms in urban context.

### **3. Structure of the thesis: institutional and non-institutional aspects**

The first chapter of the thesis is an economic debate on how the supply-demand theory is not a convenient model for an adequate rationality on housing matters. We listed a number of countries and scrutinised their official data for non-occupied properties to understand if there were a behaviour that could elucidate price formation.

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<sup>3</sup> Subirats, J. (2011). ¿Qué democracia tenemos?. In *Otra sociedad, ¿otra política?* (pp. 13-27). Barcelona: Icaria.

As we show in the beginning of our work, it is not possible to explain why the number of vacant housing units grows while the prices rise for rents and property acquisition. In theory, the expansion of the housing market should lower the imminent hefty prices for families and individuals as it happened just before 2008 global crisis. Other aspect we point out has to do with the fat profits for the urban real estate firms as a direct influence of their speculative power in cities development. Businesses in that branch of investments are usually allured by national governments permitting high marginal returns for mortgage, housing credits and public debt system. Therefore, the macroeconomic assessment fits better the analysis to explain how price formation varies positively and not the opposite. We also highlight that the level of employment and the impoverishment of the working class are the two dependent variables for speculative real estate investments since the aggregate demand potentially expands consumerism. For our purposes, we make some considerations on the Brazilian and Spanish economies in order to set the stage for the first adequate rationality that will support the following chapters. The idea is to broaden the perception of how speculative funds are one of the most decisive facets for the understanding of the actual right to property in both countries. In addition, how housing price formation leads us to a relative reduction of the supply in an open market and the increasingly oligopolistic nature of non-residential owners. Real estate firms also have a stock of land parcels in very urbanised cities to control the supply, but intimately linked to the international preferences of real estate investors. So, an initial adequate rationality on that global economic dimension of ownership favours the understanding of how the usufruct of the property has become a non-residential right used by a speculative market deciding their interests beyond national borders.

The second chapter of the present work emphasizes the importance of creating a particular rationality related to the civil law tradition about ownership. We understand that life, liberty and property have been objects of historical approaches and the first two generated unquestionable theories to the exercise of a dignified life. This is why it is relevant to insist on the right to property as a strategy to de-centralise the economic power and limit ownership for residence out of the realm of economic matters. However, when we read the Ancient commentators as the philosopher and advocate Marcus Tullius Cicero; or the agronomist Lucius Junius Moderatus Columella before

the Justinian reforms in the VI a.d, they used to refer to the right to property or its use for productive enterprises as an element for citizenship or a legal topic in the field of private contracts. That tradition evolved over the years into an absolute concept between the Medieval Ages and the 16<sup>th</sup> century. So, the notion of *imperium*, *dominium* and *possessio* started being used for a personal construction of ownership to support the political power of sovereigns. The lack of differentiation of what was public and private produced an arbitrary exclusion of the peasants from land access and made them vulnerable under the personal laws of kings or the Catholic Church: “the church rejected the Roman maxim that ‘what pertains to the corporation does not pertain to its members’. According to canon law, the property of a corporation was the common property of its members [the privileges of high representatives], and the corporation could tax its members [a duty of all the faithful] if it did not otherwise have the means of paying a debt”.<sup>4</sup> Consequently, the civil law tradition inherited by the modern sovereignty carried the seeds of an absolute, personal and emotional concept of the right to property that is incompatible with democratic regimes.<sup>5</sup> It is another facet that helps us understand our constant difficulty in setting internal limits for the right to property, that is to say, private proprietors using the social conditions to take pecuniary advantages, if the historical and socioeconomic complexity changes. It is an adequate judgment that must be used to assess critically the speculative dimension aforesaid.

The third chapter makes explicit the rationality of the social function as a legal category to limit the absolute use of the right to property. The history of social norms in the Brazilian and Spanish constitutional magna charters poses some interesting contradictions from traditional forms of State-private relation mediated by ruling classes, that is to say, proprietors. Nevertheless, it is necessary to take into consideration the possibility of more civil contestation with the appearance of urban social movements linked to city issues and mainly affected by the global speculative property market that has made democracies more vulnerable. Yet the mechanism of social function of property seems to be a more juridical matter for legislators and judges, civil society organisations have progressively presented their demands from international and

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<sup>4</sup> Berman, H. J. (1983). The papal revolution and the canon law. In *Law and revolution: the formation of the western legal tradition* (p. 219). Cambridge: Harvard University Press.

<sup>5</sup> We use “moral” in the sense of economic, social and cultural principles for the construction of human dignity. Property system cannot disrespect other fundamental and social rights.



constitutional legal frameworks. The working class of São Paulo Municipality, São Paulo, Brazil; and the Ajuntament de Terrassa, Catalonia, Spain, are two of our examples from a comparative perspective to show how social platforms influenced legislatures to apply the social function rationality. Both urban grassroots movements understand ownership must be used with the purpose of residence with its internal limits also based on the general interest. Yet there are many singularities between them, they are very close to public administrators and legislators to defend the use of property through the effectiveness of the right to housing.

The fourth chapter delves into a comparative exercise about the judgments from ordinary and constitutional courts on conflicts related to the right to property. In Brazil and Spain, the tribunals' decision involving ownership tend to reproduce excesses of formalities. The selected cases show how courts are not oriented by the effects of owners' abuses, social function of property as an internal limit or proprietors owing public administrations local taxes. The decisions from the 1980s and 1990s have recurrent issues on protocols whether the plaintiffs rely on procedural matters in a proper way or not. Furthermore, judgments from high courts on the unconstitutionality of legislative acts, administrative expedients and individual claims do not usually refer to the social function of property as part of a fundamental limit in questions of general interest involving the right to property. Only a decade ago, we could have a different perspective with reference to the social function when the City of São Paulo started imposing progressive taxes on empty housing units using the criteria of space and time. However, that practice was questioned by owners and generated a long legal battle to solve the conflict of competences. The same occurred in the City of Terrassa on the use of the right to property when the local public administration began imposing some orders against banks or real estate firms for non-occupied properties.<sup>6</sup> The effectiveness

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<sup>6</sup> See Zweigert, K., Kötz, H. & Weir, T. (1998). *An introduction to comparative law* (3rd ed.). New York: Oxford University Press. According to the authors "Comparative lawyers compare the legal systems of different nations. This can be done on a large scale or on a smaller scale. To compare the spirit and the style of different legal systems, the methods of thought and the procedures they use, is sometimes called *macrocomparison*. Here, instead of concentrating on individual concrete problems and their solutions, research is done into methods of handling legal materials, procedures for resolving and deciding disputes, or the roles of those engaged in the law. For example, one can compare different techniques of legislation, styles of codification, and methods of statutory interpretation, and discuss authority of precedents, the contribution made by academics to the development of the law, and the diverse styles of judicial opinion. Here too one could study the different ways of resolving conflicts adopted by different legal systems, and ask how effective they actually are. Attention may be focused on the official state courts: how is the business of proving the facts and establishing the law divided between attorneys and judges? What

of the social function through progressive taxes and administrative actions are part of an adequate judgment that is expected by civil society as a more democratic usufruct of ownership belonging to non-residential proprietors.

The fifth chapter suggests an adequate judgment on how urban space may become a more dignified place to live through the right to housing. International organisations, agreements made by cities and urban grassroots movements corroborate an agenda with more protagonism for citizenship in demanding the coordination of the three previous rationalities to make more effective the right to housing. The collective participation in the decision-making process, transparency and public administrations closer to citizens are indispensable for the construction of humanised settlements. With an ample definition of the right to housing opposed to speculative non-residential ownership, societies are putting practice the idea of an affordable and decent place to live as a legal connecting factor to other rights. The more urban matters are decided by direct forms of representation, the more the concept of the right to city idealised by Henri Lefebvre is constructed with civil participation. The roles of the *Movimento dos Trabalhadores Sem-Teto* and the *Plataforma de Afectados por la Hipoteca* have been essential for making public how cities struggle to get free from the aggressiveness of the real estate markets' projects.<sup>7</sup> One of the ideas of the chapter is to show a powerful counter-argument about the macroeconomic nature of transnational economic forces imposing public policies for cities to benefit few investors. We call the attention to the right to the city as an intellectual construct that results from the effectiveness of the right to housing for the purposes of our thesis. It does not mean housing is a central topic for all urban studies, but mainly the decision-making process. According to Henri

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special arrangements, if any, are made for small claims? But one should not confine one's study to the state courts and judges: one should take account of all actual methods of settling disputes. Studying the various people engaged in the life of law, asking what they do, how, and why, is a very promising field of work for comparative lawyers". And also "Sociology of law aims to discover the causal relationships between law and society. It seeks to discover patterns from which one can infer whether and under what circumstances law affects human behaviour and conversely how law is affected by social change, whether of a political, economic, psychological, or demographic nature. This is an area where it is very difficult to construct theories, but if one can support one's theory with comparative data from other nations and cultures, it will be much more persuasive", pages 5-10.

<sup>7</sup> "In the absence of effective urban planning, the consequences of this rapid urbanization will be dramatic. In many places around the world, the effects can already be felt: lack of proper housing and growth of slums, inadequate and outdated infrastructure – be it roads, public transport, water, sanitation, or electricity – escalating poverty and unemployment, safety and crime problems, pollution and health issues, as well as poorly managed natural or man-made disasters and other catastrophes due to the effects of climate change". See *UN-Habitat at a glance* [on-line]. *United Nations Habitat for a better future* [Accessed on 16 July 2016]. Retrieved from <<http://unhabitat.org/about-us/un-habitat-at-a-glance/>>.

Lefebvre, the only organised nuclei able to nurture urban planning for a more inclusive life in cities are the ones who live, work and participate in the city lives. It is also relevant to point out that the construction of space does not exclude experts at property system, constructors, urban geographers, engineers, architects, urbanists, real estate lawyers and other professionals to impose an ideological model of city emanated from a sort of dictatorship of the majority. Nevertheless, people must be entitled to the usufruct of the urban surplus value as a direct benefit of wealth production.

For the French philosopher, the right to the city is a political urban thought that translates the urgent task to a representative and effective political system. We did not identified in the Brazilian and Spanish urban grassroots movements defending the right to housing a common agenda on human settlements, care for the commons and the direct exercise of democracy suggesting a three-dimensional rationality. However, they have taken their first steps in that sense since the United Nations Conference Habitat III, the document *Quito Declaration on Sustainable Cities and Human Settlements for All*, but yet to articulate a proto-right based on an international rationality towards the right to the city. Therefore, the effectiveness of the right to housing is an undeniable part of an important process for urban realities in which city priorities are for individuals not for markets. An affordable and dignified housing is complemented by legitimate demands for drinkable water, minimum sanitary conditions, public safety, individual protection, access to public means of transportation, work, public or private services like schools, hospitals, parks, green areas, commerce and more opportunity for women.

#### **4. Justification and theoretical propositions**

We do not use in the present thesis the idea of methodology in the sense of cause and consequence of a certain analysis that may lead us to a single solution of an issue. Our intention is initially the construction of three-dimensional rationality to reconnect the property system to an affordable and decent right to housing based on residential purposes. The first rationale corresponds to the first chapter of the thesis on how the formation of prices in speculative economies has to do with the real estate firms making property an absolute non-residential right. The second one in the second chapter is a set of historically traditional aspects about the concept of the property in different forms of the civil law tradition, such as, *dominium*, *concessio*, *possessio*, but with traits tending

to absolute meanings of property to forge modern sovereignties. The last one in the third chapter recovers the birth of the social function of property as a legal figure in constitutionalism to limit ownership abuses and even make proprietors contribute to society as a form of retribution to the safe long-term benefits from public investments. State institutions should be open to a dynamic socioeconomic reality and embody the notion of not closing the formal operation of the law as a system immune to changes.<sup>8</sup> By virtue of doing so, we conceive a favourable terrain for an adequate rationality in three different dimensions to evaluate the actual abuses of the right to property relying on speculation, international capital and high marginal returns in urban planning. Bearing in mind our object, that is to say, the usufruct of ownership exercised either by the proprietor or the possessor, the triangular understanding leads us to the importance of the residential use of the property and the social function serving as a legal category to limit internally ownership. The reading of the fourth chapter tends to make clear how far we are from a social and democratic view on constitutional property parameters for the most vulnerable people in Brazil and Spain.

That rebellious methodology unifying different areas of knowledge, but mostly law and economics, had been introduced by the critical legal studies movement much before the 2008 global crisis. It is a strategic reflection on law opening an window of opportunity for the construction of a more democratic right to property with a

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<sup>8</sup> Innovative or even strange uses of the law as an open system in which the social and cultural realities are part of the juridical rationality are more present in the perception of the legal debate than in its formal structure. The professor Eduardo García de Enterría suggests: “La apertura esencial de la institución hacia la vida, por su conexión rigurosa con la experiencia de un círculo determinado de problemas; la presencia en su seno de valores superiores, cuya realización plena no es nunca alcanzable; la articulación siempre móvil entre las distintas instituciones, según el grado de su distinto desarrollo o los cambios parciales introducidos en el sistema, que se prolongan a todo el conjunto; la significación distinta que de un mismo y único problema puede resultar de una pluralidad de proyecciones desde otros tantos centros institucionales [...]; la posibilidad de ‘invención’ de nuevos principios por una casuística cada vez más apuradamente analizada [...], o por obra de la doctrina, hacen del pensamiento institucional algo necesariamente vivo y dinámico, en cuyo incesante fluir encuentra justamente su expresión la auténtica vida del Derecho. Intervenir activamente en ella es la pasión del verdadero jurista—y también su honor más seguro —”. See Enterría, E. G. (1984). *Reflexiones sobre la ley y los principios generales del derecho*. Madrid: Civitas. The reflection of José Luís L. Aranguren corroborates Enterría’s ideas saying: “[...] eso que se conoce con el nombre de derecho natural cumple una pluralidad de funciones que... consisten, en definitiva, en mantener abierto el derecho a la totalidad de la cultura (en cuanto a sus fundamentos metajurídicos) y de la sociedad (las gentes, es decir, el mundo entero, por una intención de “derecho universal”, al menos incoactivamente), y a la historia, en su pasado (derecho natural como histórico, frente al racionalismo jurídico abstracto) y hacia el futuro (derecho natural como progresista y revolucionario en sentido político-social, frente a la perpetuación de situaciones recibidas de poder). Esta función de abertura es, a mi parecer, [...] lo esencial del derecho natural”. See Aranguren, J.L.L (2013). *Ética social, sociología y política*. In *Ética y política* (p. 36). Madrid: Biblioteca Nueva.

transparent social criterion. Therefore, our three-dimensional rationality reveals the way the appropriation of ownership is faster in economic relations than in legal formalities resulting in an asymmetric relation between law and capital, i.e., a system idealised to be stable and the other indeterminate in itself: “The relative stability of private law worked to strip this discovery of its significance. It perpetuated, in direct contradiction to the thesis of the legal indeterminacy of the market, the idea that certain varieties of private property and contract were the natural and necessary legal basis of a market economy, with limited scope for variation”. Consequently, institutions are demanded by the formalities of private law and property system to support them in their constant search for a safe institutionalism as if the capital were a human body with fundamental demands: “The same way of thinking [that] could then easily be applied to democracy and to civil society as well: they, too, were claimed to have a natural and necessary institutional form”. Yet economic, legal and political issues are thought to promote stability, democratic regimes end up clashing with their own constitutional models since the limits of any external variation are constantly revised by the need of States in financing themselves through private contracts: “[...] the established institutional and ideological order, expressed in law, is an indivisible system, with inherent legal substance, not just a loose and contingent amalgamation of compromises, impositions, and accidents. For the jurist, this logic was most clearly revealed in the basic categories of private law, especially the law of contract and of property. Public law was to be evaluated chiefly by the standard of its ability to support, or of its power to subvert, these private rights”.<sup>9</sup>

Giving more substance to our three-dimensional rationality on property system captured by global capital, we understand the concept of ownership as a bundle of rights in which the private contract cannot perfectly meet all social, political and even economic demands that may surround the agreement of obligations between parts. As the contingency usually affects the legal structure of political regimes, the demands for rights in society may vary significantly. So, it is explicit in our work the intention of limiting the usufruct of property belonging to non-residential owners such as real estate firms, banks and financial institutions whose sole aim is the making of markets for speculation with high marginal returns in deregulated economies. Moreover, we show

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<sup>9</sup> Unger, R. M. (2015a). The context, the movement and the book. In *The critical legal studies movement: another time, a greater task* (p. 8). New York: Verso.

how some civil society actors call the attention to the constitutional parameters to put in practice a more balanced use of the property system in housing issues and urge public administrators to face the global model of ownership dictated by speculative global forces. At that point, doctrinal law interpretation has a propensity to understand ownership under the umbrella of a fundamental right, but in fact without socioeconomic and human traits: “The proponents of retro doctrinalism criticize the idea of property as a bundle of relations. They emphasize that property as the ‘law of things’ has a particular architecture, determined by its function within the structure of a market economy. They oppose the account of property as a bundle of relations – of distinct powers that can be disassembled and vested in different kinds of right-holders – on the ground that it mistakenly views the legal relations governed by the law of property as shapeless clay that can be reshaped at will”.<sup>10</sup> Beyond the dogmatic views on the right to property, we had to include economic data, constitutional historical analyses and judgments from courts.<sup>11</sup> The power of real estate firms, banks and investors to access the formal litigations at courts, concentrate power in legislatures and impose their social *status* as owners are yet the impediments for a democratic property use.<sup>12</sup>

According to the professor Roberto Mangabeira Unger, the brilliance of law has not yet overcome some of the obstacles market imposes for the democratic societies: “The genius of contemporary law is manifest in a number of its most characteristic

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<sup>10</sup> Unger, R. M. (2015b). The context, the movement and the book. In *The critical legal studies movement: another time, a greater task* (pp. 38-39). New York: Verso. For the complexity of law beyond legal issues and international components in tribunals’ decision with a Luhmannian theoretical contribution, see Neves, M. (2013). *Transconstitucionalismo*. São Paulo: Martins Fontes.

<sup>11</sup> “[...] la sociología jurídica o el análisis económico del derecho están prácticamente ausentes (si bien esas disciplinas no consisten únicamente en un conjunto de investigaciones empíricas, sino que contienen un arsenal conceptual cuyo conocimiento sería igualmente de gran importancia para el jurista [...]).” See Atienza, M. (2007). Prólogo. In Courtis, C. & Atienza, M. (Eds.). *Observar la ley: ensayos sobre metodología de la investigación jurídica* (pp. 9-12). Madrid: Editorial Trotta.

<sup>12</sup> Calabresi, G. (2003). An introduction to legal thought: four approaches to law and to the allocation of body parts. *Stanford Law Review*, 55(6), 2113-2151. Read “Others, like Critical Legal Studies or Legal Realism, are an interesting combination (mishmash, some would say) of more than one approach. Thus, while some of the Legal Realists are best described as practitioners of ‘Law and...’ approaches, others were really Legal Process scholars, whose concern with which institutions were best suited to decide certain issues happened to be quite different from the later, and more famous, Harvard Legal Process practitioners. Finally, some of the work of the Realists was closer to what I have described as Law and Status than to anything else [...] More recently Critical Legal Scholarship shows an analogous mixture. Some in the school rely heavily on outside disciplines like philosophy, literary criticism, and even economics. Others like Roberto Unger have appealed for a return to a doctrinalism of the most formalistic. Still others, like Duncan Kennedy, are, at least in part, process scholars”. See Calabresi, G. (2003). An introduction to legal thought: four approaches to law and to the allocation of body parts. *Stanford Law Review*, 55(6), 2030.

ideas. [...] They, and all those that we might add to them, fail to outline a program of social reconstruction. They nevertheless represent part of the conceptual and institutional equipment that we need if we are to give effect to the goal of the self-construction of society and to the projects of democratizing the market and deepening democracy that advance this goal. They are more than lifeless tools; they represent fragments of a way of thinking about law and about society in the spirit of that aim”.<sup>13</sup> The idea of democratising the capital has to do with the logic of a plural view on wealth distribution in which economy may be more amicable to continuous changes lawfully claimed by civil societies and not influenced by the gains of a worldwide system based on property accumulation without precedents: “One of the two most important such projects is a democratized market economy, uncommitted to a single version of itself and hospitable to permanent disruption and innovation. The other such project is a deepened, high-energy democracy that through the sets of institutional innovations I earlier sketched meets the triple test of mastering the structure, weakening the power of the dead [for instance, tradition of property system] over the living, and diminishing the dependence of change on crisis”.<sup>14</sup>

The Brazilian and Spanish transition to democracy was a decisive period for the making of a generous consensus across their particular political spectra. As the political economy and forms of property accumulation were the nuclei of dissensus, the different forces around both constituencies made a huge effort to guarantee the return of liberties, fundamental, social, civil and political rights leaving ownership wealth out of the citizenship construction. Profits, speculation and de-regulated markets were not understood the core of the social function of property as an internal limit for absolute use of property. Furthermore, the realm of politics was excessively coopted by an idea of democratic legality while the opulence and its production not included as parts of the sovereignty of the States. Since the end of the 1970s, the elites of the capital have used the system of property to safely reproduce their gains. Therefore, the gap between the effectiveness of rights for society and the lassitude of obligations for ownership accumulation permitted socioeconomic distortions such as concentration of income,

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<sup>13</sup> Unger, R. M. (2015a). The vocation of legal thought now. In *The critical legal studies movement: another time, a greater task* (pp. 68-69). New York: Verso.

<sup>14</sup> Unger, R. M. (2015b). The vocation of legal thought now. In *The critical legal studies movement: another time, a greater task* (p. 72). New York: Verso.

oligopolistic market formation worldwide, banks, real estate firms and large non-residential proprietors devoted to speculative investments. Believing in a fairy-tale narrative against State corruption, neoliberal agendas all over the world gave a vow of celibacy to not lead promiscuity amongst the ideology of a pure marketable citizenship. In other words, the political intervention for the establishment of democracy would be the one of not intervening in the market and that realm would be the one responsible to mediate human conflicts through money. Asymmetries and lack of transparency linking public powers to economic elites are some of the structural reasons explaining the 2008 global crisis. The system of property, housing and city construction are central in that process for a new methodology supporting adequate judgments and bringing back non-residential ownership to democracy through its social function or even forging an abstract view on citizenry, right to consumerism and capital: “Thus did a pseudo-democratization of credit replace a real redistribution of wealth and income. A fragile credit democracy came to stand in the place of a property-owning democracy”.<sup>15</sup>

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<sup>15</sup> Lothian, T. & Unger, R. M. (2011). Crisis, slump, superstition and recovery: thinking and acting beyond vulgar Keynesianism. *Columbia University Center for Law & Economic Studies*, 1(394), 17.





CHAPTER I. THE BRAZILIAN AND SPANISH ECONOMIC RIGHT TO PROPERTY



## 1. The absolute right to property through the deregulation of the property prices

Property has been more and more an object of many studies in academia. Yet a myriad of aspects involving the topic, we select initially supply-demand theory to test if only the domestic economic forces give support to the juridical category of the right to property. Secondly, there is a macroeconomic assessment on the current global forms of real estate investments entering deregulated worldwide markets with the creation of new global financial paradigms for property, housing and urban planning. These two initial reflections proportionate a more transparent debate on how ownership has been used as a domestic good or service more and more out of the national boundaries control. So, our first adequate judgment depends on two aspects interconnected, that is to say, how prices are formed in national economies and if not the international dimension of it coming from foreign speculative funds. At that point, we basically refer to banks, real estate agencies and stock exchange markets negotiating transnationally housing services with only pecuniary motivation.<sup>16</sup> The present chapter aims to make more evident that we are facing a new concept of the right to property with ineffective internal limits from constitutional systems, although there are legal instruments for such task in the cases of Brazil and Spain.

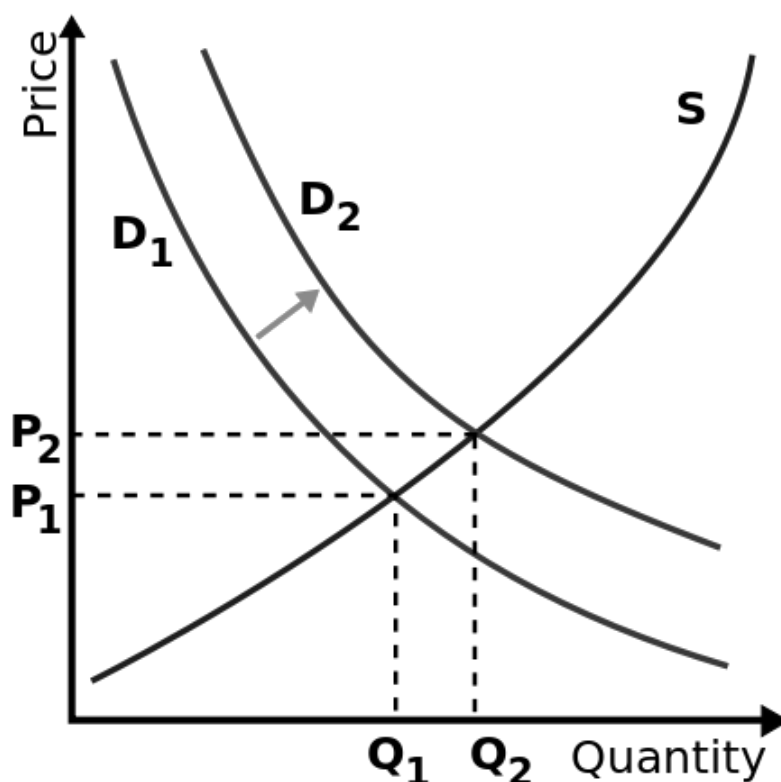
Proportion in national markets for products to be sold is theoretically one of the variables to be considered in the formation of prices. Yet it is not common, the study of supply and demand helps us understand how right to property has been lately used in economies supposedly formed by perfect structures of ownership. Therefore, assuming in theory that the equations for supply-demand functions must depend on relatively stable conditions, we have two scenarios. Firstly, the more people buying one empty housing unit, the higher the price if there is a shift in the demand function from the ( $D_1$ ) to the ( $D_2$ ) for  $x$  dwellings along the same supply function ( $S$ ) as the Figure 1 shows. On the other hand, the less people for one single digit of any other product in a non-monopolistic nor oligopolistic market, the lower the price taking into consideration a reduced demand on ( $S$ ) respecting *ceteris paribus* principle. Both cases are directly

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<sup>16</sup> We do not refer to individual proprietors along the present thesis as a participative agent along what we call the property economics nor to those who possess two or three properties.

proportional since  $p = kx$  and the costs play a decisive role in the determination of prices. <sup>17</sup> It is important to say we assume the fact that global economy had been gradually expanded as it happened between 2000 and 2007 for the housing market, respectively, the year after the 1999 Asian financial crisis and the previous period the housing bubble subprime events shook Wall Street with a cascading effect to other economies.

Figure 1

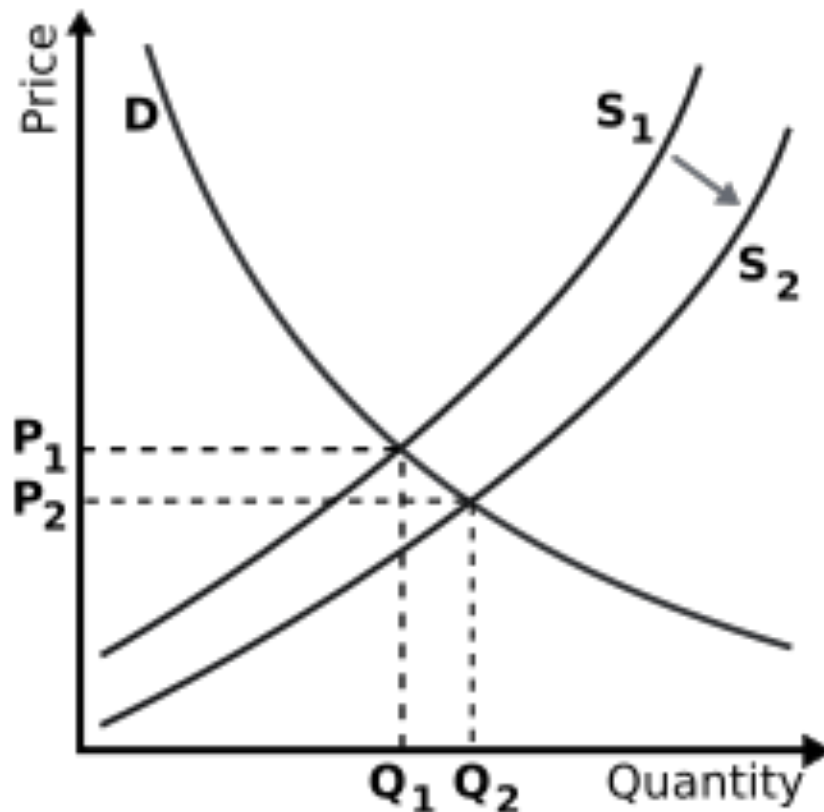


Secondly, it is also true that the theory defends the market by itself can produce more units of goods and diminish the price of them without any drastic shift in the demand curve for housing units. It is the case of supplying the market with more dwellings expanding the supply from ( $S_1$ ) to ( $S_2$ ) on the same demand function ( $D$ ), i.e.,  $p = \frac{k}{x}$  as we see in the Figure 2. In that case, innovation, technology and large-scale production are some of the reasons to reduce the costs seen in the first scenario with all other variables remaining constant *ceteris paribus* and the induced demand premiss

<sup>17</sup> Price is equal  $p$ . A single empty housing unit ( $k$ ) and the quantity of buyers ( $x$ ).  $\mathbb{N}^* = \mathbb{N} - \{0\}$ .

operating. Vacancy rate corresponds to the difference between a higher housing supply and a lower housing demand.

**Figure 2**



As a domestic exercise of supply-demand theory, we selected a sample of thirty-nine nations and one administrative region representing top investments for global real estate present in assets management firms and stock exchange markets. We scanned the official data of empty housing units and related them with the total of population in each country. The proportion for unoccupied dwelling varies similarly for some countries regardless of the continent, economic specificities and national market contrasts. Demography has been an important variable for the formation of prices once supply incurs also in future potential consumers. All countries listed have had their populations relatively stable or even increasing during the last decade. It is also true except for the years after the 2008 global financial crisis, price increase was overwhelmingly a reality

for the access to housing as well. Once supply depends on the costs of production that are usually assumed as national for housing construction, we will ignore for the present section on property economics in the domestic realm the financial conditions to develop real estate market.

**Table 1 – Proportion of Vacant Housing Units per Individuals ( $\omega$ )<sup>18</sup>**

Country	Total Population ( $\gamma$ )	Empty Housing Units ( $\beta$ )	Individuals per Vacant Housing Units ( $\omega$ )
Algeria	39.667.000	1.665.037	23,8
Argentina	40.100.000	2.494.618	16,1
Austria	8.670.690	796,450	10,9
Bangkok	6.796.000	146,181	49,49
Belgium	11.000.638	745,295	14,8
Bolivia	10.059.856	142,748	70,5
Brazil	190.755.799	6.163.846,00	30,9
Canada	33.476.690	932,442	35,9
Chile	15.621.622	694,112	22,5
China	1.371.000.000	64.000.000	21,4
Colombia	48.919.331	2.389.462	20,5
Denmark	5.724.456	151,776	37,7
Ecuador	14.483.499	457,618	31,6
Egypt	91.801.129	3.700.000	24,8
Finland	5.498.450	300,000	18,3
France	66.227.466	2.640.000	25,1
Germany	82.200.000	3.500.000	23,5
Greece	9.904.286	2.249.813	4,4
Hong Kong	7.346.000	49,429	148,6
India	1.210.193.422	24.670.000	49,1
Ireland	4.757.976	259,562	18,3
Italy	59.433.744	7.072.984	8,4
Japan	126.930.000	8.195.600	15,5
Malaysia	31.700.000	892,099	35,5
Mauritius	1.265.000	27,838	45,4
Mexico	110.610.075	4.600.000	24,0
Morocco	33.848.242	598,129	56,6
New Zealand	4.728.112	2,357	2006,0
Norway	4.979.955	210,809	23,6
Portugal	10.374.822	735,128	14,1
Singapore	5.607.000	308,814	18,2
South Africa	55.653.654	664,201	83,8

<sup>18</sup> All data about population and empty housing units are referred in the bibliographical section at the end of the present thesis.

Spain	46.815.916	3.443.365	13,6
Sweden	9.963.469	26,202	380,3
Switzerland	8.237.100	56,518	145,7
Tunisia	11.154.000	219.009	50,9
UK	65.110.000	600,179	108,5
United States	318.700.000	17.897.000	17,8
Uruguay	3.163.763	253,176	12,5
Venezuela	27.227.930	634,509	42,9

MIGLIARI, W. Table 1 was elaborated by the author.

Curiously, the worldwide consumer price index showed the opposite direction of property prices. The costs for the average consumer while acquiring a basket of goods, which includes housing rents also, has decreased since 2008. The idea is to evaluate if there is any relation between the number of potential consumers and the housing price index. So the formation of prices for domestic products seems to have two behaviours. One of them is what we described *prima facie* in the Figure 1 at which the level of prices suffered from a surplus with the increase of the demand taking into consideration there is almost no idle capacity evolved. The other performance is closer to the events occurring in the Figure 2. Latin America & Caribbean, Euro Zone, North America, East Asia & Pacific, Middle East and North Africa present the same pattern for inflation, consumer price as it is shown by the World Bank and World Development Indicators in Chart 1. Although the stagnation of global economy has broken the rhythm of price levels for daily life services and goods, the shortening of the aggregate demand caused by the 2008 global economic crisis did not lower prices indexes for real properties in a long-term period.

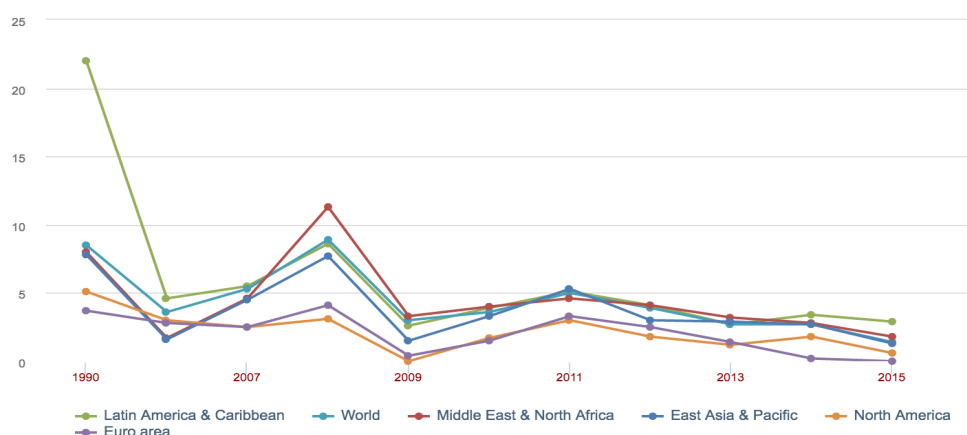
Yet real properties suffered from nominal devaluation under certain intervals just after the housing bubble event, cycles of surplus credit for high-income borrowers and elevated interest rates offered by credit institutions have made the prices increase. So, the number of empty housing units in Table 1 does not match with the phenomenon of the Figure 2 in the long run, that is to say, the more the goods the less the prices. Moreover, the total amount of mortgages initiated a new cycle in 2013 since the 2008 year crisis without following the inflation variation in Spain.<sup>19</sup> The Brazilian case is

<sup>19</sup> See *Instituto Nacional de Estadística. Notas de Prensa* [on-line]. Estadística de hipotecas (H) diciembre 2016 y año 2016. Datos provisionales, 2017 [Accessed on 6 January 2017]. Retrieved from [http://www.ine.es/prensa/h\\_prensa.htm](http://www.ine.es/prensa/h_prensa.htm). The 11/2009 Act for Real Estate Investments Trusts in Spain, *Ley de Sociedades Anónimas Cotizadas de Inversión en el Mercado Inmobiliario*, in the articles 3 and 9,



very similar once the Programme “Minha Casa Minha Vida” has given much input to the national economy elevating the scale, but having to face the growing of land prices through speculative contracts of private owners.<sup>20</sup> So, neither the Figure 1 nor the Figure 2 can explain why the prices have varied positively. In Brazil and Spain, the number of vacant houses has flooded markets not able to buy or rent a decent place to live as if they were in a perfect market. This is an important judgement on the relation of prices and the access to property, but mainly the absolute aspect of a right forged by capital forces that starts being delineated with new negative externalities.

**Chart 1. Inflation, Consumer Price (Annual %)**



Retrieved from [www.worldbank.org](http://www.worldbank.org)

regulates the supply and taxes on real profits made by the investors. In general, the regime permits the firms to operate exempt from State taxes if they run the business with at least 5 million Euros and making available 80% of their wealth for the supply of rents. It is an ambiguous legal mechanism. On the one hand, it reinforces and stimulates the control in the formation of prices for a long-term period, since the investors create a reserve of market without short-time limit to rent the units. That timing favours the speculation of higher prices and, consequently, affecting the working class looking for housing supply. On the other hand, it is a service with general interest that gives the impression government is working for the regulation of the property market with strict rules since the firms must comply with a long list of criteria to be entitled to run their business.

<sup>20</sup> See the document published by the *Ministério das Cidades. Secretaria Nacional de Habitação* [online]. Programa Minha Casa Minha Vida, 2015 [Accessed on 9 December 2016]. Retrieved from [http://www.sedhab.df.gov.br/mapas\\_sicad/conferencias/programa\\_minha\\_casa\\_minha\\_vida.pdf](http://www.sedhab.df.gov.br/mapas_sicad/conferencias/programa_minha_casa_minha_vida.pdf). The Act 12.424/2011, regulating the programme for housing construction “Minha Casa Minha Vida”, clause V, guarantees long-term interest rates in a very low price for the firms willing to take part of the federal project while the Brazilian State pays higher interest rates. So, the property market has a double face in Brazil. It gets credit from the government to construct houses paying around 7% per year and invests the surplus value after selling the units for the working class with the help of the public credit. The public debt system remunerates at least around 11.25% in interest rates per year with the inflation in decline. Again, the formation of prices is central to understand the economic power creating a new domain in the property right. Retrieved from <http://www.bndes.gov.br/wps/portal/site/home/financiamento/guia/custos-financeiros/taxa-de-juros-de-longo-prazo-tjlp> and <https://www.bcb.gov.br/Pec/Copom/Port/taxaSelic.asp>

So, our first inquiry on urban real properties responding supply-demand theory is initially answered with examples where the housing supply has always been in the centre of social policies, but not always succeeding in avoiding empty dwellings. In Finland, for example, where the welfare state system yet not so vigorous as before but still alive, we find that number of people per vacant housing unit is around eighteen. A similar figure is found in United States where there are seventeen potential buyers per empty dwelling. In terms of price, the U.S. Federal Housing Financial Agency showed real properties doubled their prices for the Americans.<sup>21</sup> Just few months before 2008, the American housing index confirmed that dwellings doubled their prices for more than twice compared to the 1990 decade.<sup>22</sup> The Finish case followed the same trend in the sense that the real estate prices rose progressively after the housing bubble crisis in 2008, although not in the same proportions observing the figures in the U.S. economy. When we go into details we see the Nordic economy index presenting housing prices slumping between 2008 and 2009, but suddenly reaching the same level and even surpassing possible losses in real values in 2010. The City of Helsinki has higher prices than those properties on the outskirts of Finish urban areas, but all of them above 50% and 30% respectively compared to the 2005 index base.<sup>23</sup> Subsidies for housing as a social right in Finland, Sweden and Norway did not necessarily mean the level of prices has been more stabilised. If we check the numbers of vacant houses in the United Kingdom, where we have 108 people per housing unit, the supply-demand theory is intuitively noticed only for the supply function once the housing price index rises as well. Austria, Belgium and Denmark obey the same rules for prices in the Euro zone trend with more expensive properties.<sup>24</sup> These nations have accumulated ten, fourteen

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<sup>21</sup> Taking into consideration property markets tend to imperfection, slum clearance, urban renewal and housing construction are not effective if there is an output gap related to unoccupied housing units. See Olsen, E. O. (1969). A Competitive Theory of the Housing Market. *The American Economic Review*, 59(4), 612-622. The author also states that taxes on housing units with elevated prices and subsidies for lower-income strata are more effective for correeting market distorsions.

<sup>22</sup> See the report elaborated by *Federal Housing Finance Agency. News release* [on-line]. FHFA house price index Up 0.7 percent in August 2016 [Accessed on 25 October 2016]. Retrieved from [http://www.fhfa.gov/AboutUs/Reports/ReportDocuments/HPI\\_10252016release.pdf](http://www.fhfa.gov/AboutUs/Reports/ReportDocuments/HPI_10252016release.pdf)

<sup>23</sup> See the document elaborated by the *Official Statistics of Finland (OSF). Real estate prices* [on-line]. Appendix figure 1. Price development for single-family house plots, index 2005=100, 2<sup>nd</sup> Quarter 2016 [Accessed on 27 October 2016]. Retrieved from [http://www.stat.fi/til/kihi/2016/02/kihi\\_2016\\_02\\_2016-09-05\\_kuv\\_001\\_en.html](http://www.stat.fi/til/kihi/2016/02/kihi_2016_02_2016-09-05_kuv_001_en.html)

<sup>24</sup> See the data elaborated by the official institutes in *People & Society, Housing, Stock of Buildings and Dwellings* [on-line]. Statistics Austria [Accessed on 9 December 2016]. Retrieved from

and thirty-seven residents for each empty dwelling respectively. Other countries with more social policies have had more potential consumers for vacant housing units than United States too. Even with programmes for housing construction in large scale, mainly for post-World War II reconstruction, France and Germany present twenty-five and twenty-three individuals per vacant housing unit.

It is important to mention that the Scandinavian countries, United Kingdom and France are the leaders of social housing agenda in Europe for historical investments in low-income strata. Yet the experiments of this group have been relatively successful compared to other experiences in Europe, other countries do not see them necessarily as pioneering models. In order to enrich our debate, we categorise a second group in the European continent represented by Ireland and Italy. These nations are the ones mainly where property system combined private and social dwelling programmes for the composition of the housing stock. During the 2000 years, the supply for housing and credit was considered moderate to some authors. Nowadays, they present eighteen and eight people per empty housing unit and an ascending housing index price as well. Dublin shows a phenomenon that seems to be very eloquent to Ireland with reference to the increasing housing price index. From 2011, the Irish economy has given a rapid response to the national economic growth and the effect of a bigger gross domestic product tends to make more expensive the prices of dwellings.<sup>25</sup> From a wider perspective, Italy can be considered the exception in terms of housing price index once land surplus values decreased in the national level since 2012.<sup>26</sup> However, it is also true

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[http://www.statistik.at/web\\_en/statistics/PeopleSociety/housing/stock\\_of\\_buildings\\_and\\_dwellings/dwellings/index.html](http://www.statistik.at/web_en/statistics/PeopleSociety/housing/stock_of_buildings_and_dwellings/dwellings/index.html); Belgium. *Données Démographiques and Logements classiques selon le régime d'occupation, le type de bâtiment et la période de construction* [on-line]. Tableau 3 [Accessed on 9 December 2016]. Retrieved from [http://www.census2011.be/download/downloads\\_fr.html](http://www.census2011.be/download/downloads_fr.html) and Denmark. *Statistics Denmark* [on-line]. Dwellings by County [Accessed on 9 December 2016]. Retrieved from <http://www.statbank.dk/BOL105>.

<sup>25</sup> See *Central Statistics Office of Ireland. CSO statistical publication, 2017* [on-line]. Residential property price index, 2016 [Accessed on 8 January 2017]. Retrieved from <http://www.cso.ie/en/releasesandpublications/ep/p-rppi/rppidec2016/>. See also an academic review on the issue in Duffy, D., Mc Inerney, N. & McQuinn, K. (2015). Macprudential policy in a recovering market: too much too soon?, *ESRI*. 2015, 1(500), 01-35.

<sup>26</sup> See *Instituto Nazionale di Statistica. Housing Price Index, 3rd Quarter 2015* [on-line]. The housing price index [Accessed on 12 October 2016]. Retrieved from <http://www.istat.it/en/files/2016/01/CS-HPI-provQ32015.pdf?title=House+prices+-+8+Jan+2016+-+Full+text+and+Methodological+notes.pdf>

that Rome, Bologna, Firenze and Genoa still have the most expensive square metre in the country.<sup>27</sup>

The third European group is composed by Greece, Portugal and Spain as very close real property markets once they are predominantly organised by self-construction. The notion of access to a dwelling is traditionally private oriented in these countries. Portugal has one vacant housing unit per 14 residents while Spain 13 and Greece 4. The population of Spain between 4 and 5 times more multiplies the housing drama because of that demographic factor. Yet they have had experiments for social housing, these models were realised in very low-scale proportion compared to their whole property systems. Nowadays, this is the paradigm for the Eastern Europe after the Berlin's Wall Fall once before that time State housing was the way to access a place to live. The housing stock in ex-socialist countries was rapidly redirected to a dominantly private property market since the year of 1989.<sup>28</sup> Yet many cultural and economic singularities in this group, they are similar in the way their contemporaneous dwelling stocks rely on complex mortgage property systems. In terms of price, the outlier is Greece with a decreasing level of housing prices since 2009. We call the attention to the housing costs specifically that were elevated sixteen points compared to 2009 consumer price index.<sup>29</sup>

The housing market in Africa is a very intriguing study case. The rapid process of urbanisation, the economic growth of some economies under democratic systems and a relatively stable household expenditure contrast with the same phenomenon of elevated prices for housing units. Algeria and Egypt have twenty-three and twenty-four people for each vacant house. Tunisia, Morocco and South Africa have fifty, fifty-six and eighty-three individuals per one empty dwelling. They are all in the top twenty

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<sup>27</sup> As follows: "Tra gli SLL metropolitani, i prezzi delle case superano mediamente i 3.000 euro al metro quadro in quello di Roma e i 2.000 euro in quelli di Bologna, Firenze, Genova, Milano e Venezia", p. 12. See Manzoli, E.; Mocetti, S. (2016). I prezzi delle case e il gradiente centro-periferia: evidenze dalle città italiane. *Questioni di economia e finanza, Banca d'Italia*, 1(348), 01-36.

<sup>28</sup> Read the document by the Eurostat Statistics Explained. *Housing price statistics* [on-line]. House price index, 2016 [Accessed on 3 January 2017]. Retrieved from <[http://ec.europa.eu/eurostat/statistics-explained/index.php/Housing\\_price\\_statistics\\_-\\_house\\_price\\_index](http://ec.europa.eu/eurostat/statistics-explained/index.php/Housing_price_statistics_-_house_price_index)>.

<sup>29</sup> See the information published by the Hellenic Statistical Authority. *Press release, 2016* [on-line]. Consumer price index, 2016 [Accessed on 3 January 2017]. Retrieved from [http://www.statistics.gr/en/statistics?p\\_p\\_id=documents\\_WAR\\_publicationsportlet\\_INSTANCE\\_qDQ8fBKKo4IN&p\\_p\\_lifecycle=2&p\\_p\\_state=normal&p\\_p\\_mode=view&p\\_p\\_cacheability=cacheLevelPage&p\\_p\\_col\\_id=column-2&p\\_p\\_col\\_count=4&p\\_p\\_col\\_pos=1&documents\\_WAR\\_publicationsportlet\\_INSTANCE\\_qDQ8fBKKo4IN\\_javax.faces.resource=document&documents\\_WAR\\_publicationsportlet\\_INSTANCE\\_qDQ8fBKKo4IN\\_ln=downloadResources&documents\\_WAR\\_publicationsportlet\\_INSTANCE\\_qDQ8fBKKo4IN\\_documentID=208079&documents\\_WAR\\_publicationsportlet\\_INSTANCE\\_qDQ8fBKKo4IN\\_locale=en](http://www.statistics.gr/en/statistics?p_p_id=documents_WAR_publicationsportlet_INSTANCE_qDQ8fBKKo4IN&p_p_lifecycle=2&p_p_state=normal&p_p_mode=view&p_p_cacheability=cacheLevelPage&p_p_col_id=column-2&p_p_col_count=4&p_p_col_pos=1&documents_WAR_publicationsportlet_INSTANCE_qDQ8fBKKo4IN_javax.faces.resource=document&documents_WAR_publicationsportlet_INSTANCE_qDQ8fBKKo4IN_ln=downloadResources&documents_WAR_publicationsportlet_INSTANCE_qDQ8fBKKo4IN_documentID=208079&documents_WAR_publicationsportlet_INSTANCE_qDQ8fBKKo4IN_locale=en)

economies in Africa. Mauritius is among one of the top ten most competitive sub-Saharan markets with forty-five inhabitants for each unoccupied place. According to the Centre for Affordable Housing Finance in Africa, North Africa still struggles with an imperfect competition in which is evident a steady demand dealing with undersupply. As the house prices are relatively higher than low-middle labourer income, vacant dwellings in Algeria, Egypt, Morocco and Tunisia do not meet the financial profile working class salaries. The access to credit is also a dilemma once: “In spite of the high levels of homeownership (up to 80 percent in Tunisia, and over 90 percent in Libya) and negative slum growth, affordability is a major problem across North Africa, particularly for low and middle income households. Housing prices are rising in all North African countries. As a result, housing is becoming difficult to afford due to steady demand and undersupply which caused a housing shortage”.<sup>30</sup>

If the level of prices for housing obeyed supply-demand theory, the case of Latin America would be close to the European housing market. Expensive mortgages, but low deficit number of houses for those who are looking for a dignified place to live. Argentina presents sixteen people per housing unit while Colombia twenty, Chile twenty-two and Mexico twenty-four. The realities of Brazil and Ecuador are similar with thirty and thirty-one potential consumers per vacant dwelling. Venezuela has forty-two people per empty unit and Bolivia the most competitive market observed with approximately the number of seventy individuals per unoccupied place. Uruguay has the best statistics with twelve nationals per vacant house. Nevertheless, quantitative schemes do not conform the totality of the issue for the Latin-Americans, but also the quality of the housing units in the region. The process of self-construction and poorly private entrepreneurship have led the process of urbanisation to a huge level of informality. The city of slums, townships and hives highly dense reveals the construction of a parallel State economy in which the absence of public investments supporting housing programmes is the reality. So, sanitary conditions, means of

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<sup>30</sup> See the document *Housing Finance in Africa. A review of some of Africa's housing financial market* [on-line]. Yearbook South Africa 2016 [Accessed on 29 December 2016]. Retrieved from <http://www.housingfinanceafrica.org/>. Read also the document *United Nations. United Nations Settlements Programme, 2011* [on-line]. Affordable land and housing in Africa, United Nations Settlements Programme, United Nations Habitat, vol. 3, 2011 [Accessed on 29 December, 2016]. Retrieved from [http://www.iut.nu/Literature/UnHabitat/Asia\\_AffordableHousing\\_2011.pdf](http://www.iut.nu/Literature/UnHabitat/Asia_AffordableHousing_2011.pdf)

transportation and public safety are insufficient considering the relevance of these services for the development of human capital.

The difficulty of many families for the access of a dignified place to live is not so different in Asian cities. The United Nations Habitat reports in the document *Affordable Land and Housing in Asia* that: “Access to adequate and affordable housing is a current and growing problem in a majority of countries in Asia”. Moreover, the African narrative is repeated in Asia. There are many households still struggling in financing their own homes once the economic strata, in which gross amount of credits are available, do not have the appropriate profile: “In some cases it is not that housing is too expensive but rather that incomes are too low. In other cases incomes are relatively high but housing supply and finance is limited and hence expensive. All over Asia households are forced to live in inadequate housing, mostly in slums and informal settlements, because there is an insufficient supply of better quality housing at a cost they can afford”.<sup>31</sup> Demography is another issue of uneasy solution once all Asian metropolitan areas and cities are growing. With more than 40 million people arriving in urban zones per year in that region of the planet. The rapid changes in old rural surroundings generate also a model of development based upon an inevitable binomial relation of inclusion and exclusion. So, the statistical reference for such challenge says it would be needed approximately 20,000 new housing units per day to satisfy mainly lower-income families.<sup>32</sup> China and India have twenty and forty-nine residents for each empty housing unit respectively while 170 and 109 people are living in slums: “Southern Asia has the largest percentage of urban population living in slums (35.0 per cent) and Western Asia the smallest (24.6 per cent), however the absolute slum population in Eastern and Southern Asia is similar, around 190 million in 2010”.<sup>33</sup>

With such number of consumers, any domestic urban developer would think there is a paradise path to be accomplished, although housing market do not seem to be

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<sup>31</sup> Read the document elaborated by the *United Nations. United Nations Settlements Programme* [on-line]. *Affordable land and housing in Asia*, vol. 2, 2011 [Accessed on 2 March 2015]. Retrieved from [http://www.iut.nu/Literature/UnHabitat/Asia\\_AffordableHousing\\_2011.pdf](http://www.iut.nu/Literature/UnHabitat/Asia_AffordableHousing_2011.pdf)

<sup>32</sup> See *Asian Development Bank. Urbanization and sustainability in Asia: good approaches in urban and region development* [on-line]. Case studies of good practice [Accessed on 3 December 2015]. Retrieved from <https://www.adb.org/sites/default/files/publication/27965/urbanization-sustainability.pdf>. Read Buckley, R. M. & Kalarickal, J. (2005). Housing policy in developing countries: conjectures and refutations. *World Bank Research Observer*, 20(2), 233-257.

<sup>33</sup> Read the document elaborated by the *United Nations. United Nations Settlements Programme* [on-line]. *Affordable land and housing in Asia*, vol. 2, 2011 [Accessed on 2 March 2015]. Retrieved from [http://www.iut.nu/Literature/UnHabitat/Asia\\_AffordableHousing\\_2011.pdf](http://www.iut.nu/Literature/UnHabitat/Asia_AffordableHousing_2011.pdf)

mused on that gold mine. For the case of those families living under rental contracts, Hong Kong has a very intriguing figure since almost half of its housing stock is represented by a public rental programme: “With the exception of Singapore and Hong Kong, in all countries the construction of affordable housing has not matched urban growth. Urban residents face a lack of housing options that are affordable and well located. The result has been the widespread proliferation of slums and informal settlements throughout Asian cities”.<sup>34</sup> It is probably the State intervention one of the reasons to keep the prices controlled when we observe the statistical number of hundred forty-eight individuals per housing unit.<sup>35</sup> On the other hand, the Metropolitan Region of Bangkok has 6.796.000 million people and 146,181 vacant dwellings.<sup>36</sup> Therefore, there are approximately forty-six unoccupied units for inhabitants and the low-income strata of the society the ones struggling to have access to affordable housing credit.<sup>37</sup> Since the year of 2009 till the present moment, the housing price index for Thailand shows that the prices are from thirty to seventy per cent more expensive.<sup>38</sup>

When we come back to the worldwide index graph produced by the World Bank, it is descending the proportion of money from families and individuals dedicated to goods and services to satisfy their needs. Why would not that be possible for housing if most of the countries regardless of developed or developing economies liberated their markets for all goods including real property? Why investors observing supply-demand

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<sup>34</sup> Read the page 3 of the *United Nations. United Nations Settlements Programme* [on-line]. Affordable land and housing in Asia, vol. 2, 2011 [Accessed on 2 March 2015]. Retrieved from [http://www.iut.nu/Literature/UnHabitat/Asia\\_AffordableHousing\\_2011.pdf](http://www.iut.nu/Literature/UnHabitat/Asia_AffordableHousing_2011.pdf)

<sup>35</sup> See *Census and Statistics Department. The government of the Hong Kong special administrative region* [on-line]. Hong Kong statistics [Accessed on 3 December 2016]. Retrieved from <http://www.censtatd.gov.hk/hkstat/sub/bbs.jsp>. Read also *Housing and land supply. Secretary for transport and housing* [on-line]. Press release, 2013 [Accessed on 3 December 2016]. Retrieved from <http://www.info.gov.hk/gia/general/201501/28/P201501280481.htm>

<sup>36</sup> Read the text published by the *Data Collection Survey on Housing Sector on Thailand. National Housing Authority* [on-line]. Final report, Japan international cooperation agency and international development center of Japan, Inc., 2013 [Accessed on 3 December 2016]. Retrieved from [http://dhds.nha.co.th/gisfs/internet/content/620\\_166\\_0.pdf](http://dhds.nha.co.th/gisfs/internet/content/620_166_0.pdf). About the figures of Bangkok, read the document elaborated by the *National Statistics Office. Ministry of Information and Communication Technology* [on-line]. Population characteristics, 2005-2006 [Accessed on 4 December 2016]. Retrieved from [http://web.nso.go.th/en/survey/pop\\_character/pop\\_character.htm](http://web.nso.go.th/en/survey/pop_character/pop_character.htm)

<sup>37</sup> Yap, Kioe Sheng (1996). Low-income housing in a rapidly expanding urban economy. Bangkok 1985-1994. *TWPR*, 18(3), 307-323.

<sup>38</sup> Bank of Thailand, Housing Price Index. Base 2009 = 100. Houses in condominium had 70% surplus value compared to detached-dwellings. The prices of the national lands were valued at least 30% more expensive. See *Bank of Thailand. Service Manager Katharit (66(0)2283-6880) Chakree (66(0)2283-5603)* [on-line]. House price index commercial bank mortgage loan, 2016 [Accessed on 4 December, 2016]. Retrieved from <http://www2.bot.or.th/statistics/ReportPage.aspx?reportID=680&language=eng>

logic do not stay in a mid or long-term period operating in a very profitable market taking into account the support governments have given in bouts of cash-flow insolvency? <sup>39</sup> Our primary conclusion is that financial institutions investing in real estate markets and urban construction are not originated from national credits in its totality. If it were, the emphasis of United Nations Habitat reports would not call the attention to the international composition of the private assets for more mortgage credits. <sup>40</sup> Secondly, investments in dwelling construction, urban infrastructure and also the projects evolving means of transportation have been object of international public-private investors as we will see in the next section. Third, supply-demand rationality is reduced to those socioeconomic strata with higher-incomes looking for real property mortgages once again credited by non-national rating agencies looking for more solid investments.

Property does not seem to be a national good in its totality under supply-demand theory uniquely. The elevation of prices in international markets tend to be embedded in household final consumption expenditure in a long-term period. The explanation for that transnational phenomenon is simply motivated by the prices of dwellings belonging to international capitals. Exchange rates, level of interests for loans to serve families in debt and imported materials to develop urban projects are some of the variables national economies cannot control. It is visible that inflation rates have decreased since 2008 in a worldwide scale and how basic products in basket affected by the international costs of production. Nevertheless, the costs of assets managed by real estate companies followed the opposite. When we check the data of the Chart 2 for constant values till 2010, the trend on price levels is crystal clear.

The data on housing price index for Brazil and Spain confirm the trend that was presented by the Chart 2. Yet the national real estate investments are affected by short-

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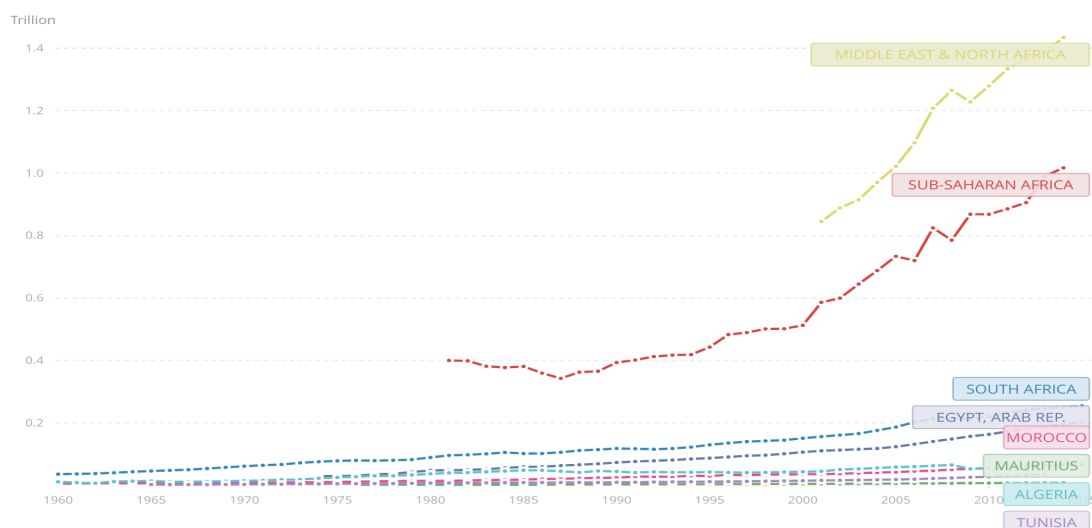
<sup>39</sup> Technically the person has the assets to honour their debts, but not appropriately, that is to say, money. Nevertheless, the debtor may use their real properties, moveable or immovable, to pay the credit.

<sup>40</sup> According to Raquel Rolnik, who was the rapporteur of United Nations Habitat between 2008-2014, the right to housing has been under serious changes over the last decades: “In the late 1970s a dramatic shift occurred in housing policies, starting with North America and Europe, followed later by developing countries in Latin America, Asia, Africa and by formerly planned economies. This shift, supported by predominant economic doctrine, called for the transfer of activities from State control to the private sector and for unrestricted free markets and free trade. This view soon gained hegemony, shaping the policies of States, international financial institutions and development agencies. The effects of this approach on housing policies across the globe have been dramatic and well documented (ibid.)”. See *United Nations. General Assembly* [on-line]. Report of the special rapporteur A/67/286 [Accessed on 5 December 2016]. Retrieved from <http://www.ohchr.org/Documents/Issues/Housing/A-67-286.pdf>



term events, along the years they are prone to recover eventual losses. The case of the Brazilian economy is an example of a market that even under the negative externalities of the 2008 crisis has not been operated over the demand function. Other aspect is that Brazil has serious problems with concentration of income and access to credit for lower-working classes is extremely limited. On the other hand, Spain has faced a serious crisis since 2008 and the unemployment exploded in the country with serious consequences for the unskilled labourers. The level of prices for daily life goods has decreased and the housing price index initially showed the same trend.

**Chart 2. Household Final Consumption Expenditure (constant 2010 US\$)**



Retrieved from [www.worldbank.org](http://www.worldbank.org) <sup>41</sup>

## 1.1. The absolute right to property in global real estate markets

The demand for new places to live has not been a new topic for the State of

<sup>41</sup> We strongly advise to bear in mind the definition of the World Bank for the concept: “Household final consumption expenditure (formerly private consumption) is the market value of all goods and services, including durable products (such as cars, washing machines, and home computers), purchased by households. It excludes purchases of dwellings but includes imputed rent for owner-occupied dwellings. It also includes payments and fees to governments to obtain permits and licenses. Here, household consumption expenditure includes the expenditures of nonprofit institutions serving households, even when reported separately by the country. This item also includes any statistical discrepancy in the use of resources relative to the supply of resources. Data are in current U.S. dollars”. See *The World Bank. Household Final Consumption Expenditure (Constant 2010 US\$), 2016* [on-line]. World Bank national accounts data, and OECD national accounts data files. [Accessed on 5 December 2016]. Retrieved from <http://data.worldbank.org/indicator/NE.CON.PRVT.KD?end=2015&locations=ZA-MU-EG-MA-DZ-TN-ZQ-ZG&start=1960&view=chart>

California. We will use two different years and two different tragic experiences, though very similar to each other with reference to demand and supply theory. In 1906, an earthquake shook San Francisco and left behind a complete destruction. The natural disaster led people also to set fire in the remains of their houses, because the majority had an insurance guaranteeing a compensation in cash for fire. The following days were chaotic and the public powers could not measure the real reason of destruction among ruins, ash and stones. The average was around five families or individuals looking for houses every day and that demand confronted with a generous supply. Curiously, in 1946, the housing deficit in California was a critical even the region was not affected by any tectonic phenomenon. Its legislators and governor had reported the problem and including the newspaper the *Chronicle* called the attention to that issue.<sup>42</sup> However, all the debate around the topic had its premisses in a full capacity of producing dwellings locally. The decision for more or less housing units is assumed just for a moment in our counterargument as a decision-making process. Doing so, the economic forces and the factors of production, we may include also technical, architectural and engineering expertise, are only financed by national credit and savings.

Irvin Fisher describes a supposed scenario in which individuals were over-indebted and, as a consequence of an avid desire of all borrowers for liquidity and foreseeing the risk of default, they fall into a generalised crisis of confidence. The excess of credit for firms, families and individuals represents some of the causes of future uncontrolled defaults since lenders rely on a certain prospect of time, interest rates and profits being embarrassed by any payment proceeded before the time established by both parts in a contract.<sup>43</sup> Nevertheless, we may add Fisher's prognostics

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<sup>42</sup> "Durante los primeros cinco días del año [1946] en total hubo sólo cuatro avisos que ofrecían casas o departamentos en alquiler, comparado con las 64 ofertas en un día en mayo de 1906, y nueve avisos que que ofrecían cambiar habitaciones en San Francisco por habitaciones en otras partes. Pero en 1946 había 30 avisos diarios de personas que pedían casas o departamentos en alquiler, contra sólo cinco en 1906 luego del gran desastre. Durante el mismo período en 1946, hubo alrededor de 60 avisos por día de casas en venta, contra 19 en 1906". Read the complete text in Stigler, G. J. (2008). *¿Viviendas o techos? El actual problema habitacional*. In Friedman, M. (Ed.). *La economía monetarista* (pp. 192-207). Barcelona: Biblioteca Económica Gedisa.

<sup>43</sup> On page 349, the author affirms: "In summary, we find that: (1) economic changes include steady trends and unsteady occasional disturbances which act as starters for cyclical oscillations of innumerable kinds; (2) among the many occasional disturbances, are new opportunities to invest, especially because of new inventions; (3) these, with other causes, sometimes conspire to lead to a great volume of over-indebtedness; (4) this, in turn, leads to attempts to liquidate; (5) these, in turn, lead (unless counteracted by reflation) to falling prices or a swelling dollar; (6) the dollar may swell faster than the number of dollars owed shrinks; (7) in that case, liquidation does not really liquidate but actually aggravates the

is mainly dedicated to a non-global financial view and more amicable to national bank systems: “For practical purposes, we may roughly measure the total national debt embarrassment by taking the total sum currently due, say within the current year, including rent, taxes, interest, installments, sinking fund requirements, maturities and any other definite or rigid commitments for payment on principal”.<sup>44</sup> We may add he departs from a very singular context dating back to 1929 economic crisis in which over-indebtedness was also linked to a window of opportunity for capital and national speculation: “Easy money is the great cause of over-borrowing. When an investor thinks he can make over 100 per cent per annum by borrowing at 6 per cent, he will be tempted to borrow, and to invest or speculate with borrowed money. This was a prime cause leading to the over-indebtedness of 1929”. For the author, the rapacious desire for high capital returns lies at the root of all financial crises as a self-destructive greed for real economies.<sup>45</sup> So, the direct effect of lessened money, deposits and the velocity of money in a market is understood by Irving Fisher as different from speculative economies since trade revival in his analyses did not produce any local increase in the level of prices. However, the phenomenon of economic instability is also originated by the need countries have to finance their projects regardless of the level of interest rates they have to tackle with. We may add that the two world wars in the first half of the twenty century deepened not only the international atmosphere of belligerency but also imposed a financial global interdependency from which nations are not free.<sup>46</sup>

In 1969, Milton Friedman published an article defending the importance of monetary policies in national economies. For him, low level of interest rates and states interfering in the economy were some of the causes for an uncontrolled increase of the aggregate demand. The result of an abundant quantity of money in the market was the

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debts, and the depression grows worse instead of better, as indicated by all nine factors; (8) the ways out are either via *laissez faire* (bankruptcy) or scientific medication (reflation), and reflation might just as well have been applied in the first place”. See Fisher, I. (1933a). The debt-deflation theory of great depressions. *Econometrica*, 1(4), 337-357.

<sup>44</sup> Fisher, I. (1933b). The debt-deflation theory of great depressions. *Econometrica*, 1(4), 345.

<sup>45</sup> “The over-indebtedness hitherto presupposed must have had its starters. It may be started by many causes, of which the most common appears to be *new opportunities to invest at a big prospective profit*, as compared with ordinary profits and interest, such as through new inventions, new industries, development of new resources, opening of new lands or new markets. Easy money is the great cause of over-borrowing”. See Fisher, I. (1933c). The debt-deflation theory of great depressions. *Econometrica*, 1(4), 348.

<sup>46</sup> Read also Eichengreen, B. (2001). Instabilidade entre as guerras. In *A globalização do capital: uma história do sistema monetário internacional* (pp. 75-130). São Paulo: Editora 34.

inflation and the defying power in offering real capital returns to investors. Money started being substituted by other kinds of assets in order to preserve the total wealth of capital owners. As a liberal mind, he criticises Keynes' ideas on employment, stability and economic growth. For Friedman, unemployment is one of the natural causes of a "fully operative market process". Stability of prices and rapid growth demand certain sacrifices, but never combining jobs, government spending on social welfare state and other excesses of fiscal policies. Milton Friedman questions the idea of an economic development based exclusively upon the governmental expenditure regarding the stimulation of the economy while looking for the increase of taxation on consumerism. The American economist supported also his ideas agreeing with the fact long-term interests should no more be unlimited: "In a talk published in 1945, E. A. Goldenweiser, then Director of the Research Division of the Federal Reserve Board, described the primary objective of monetary policy as being to 'maintain the value of Government bonds.... This country' he wrote, 'will have to adjust to 2 1/2 per cent interest rate as the return on safe, long-time money, because the time has come when returns on pioneering capital can no longer be unlimited as they were in the past'".<sup>47</sup> Other examples are used by Friedman to defend his point of view on the false methodologies of fiscal policies to recover the American economy after 1929 crisis.<sup>48</sup> The American economist went further in his argumentation, but mainly observing those possible policies devoted to protect national economies such as the "exchange rates, the price level as defined by some index, and the quantity of a monetary total – currency plus adjusted demand deposits, or this total plus commercial bank time deposits, or a still broader total".<sup>49</sup> But what do the theories of Fisher and Friedman have in common?

Both economists assume that the monetary expansion indicates one of the causes for over-indebtedness. Following their rationale, such generous money supply is

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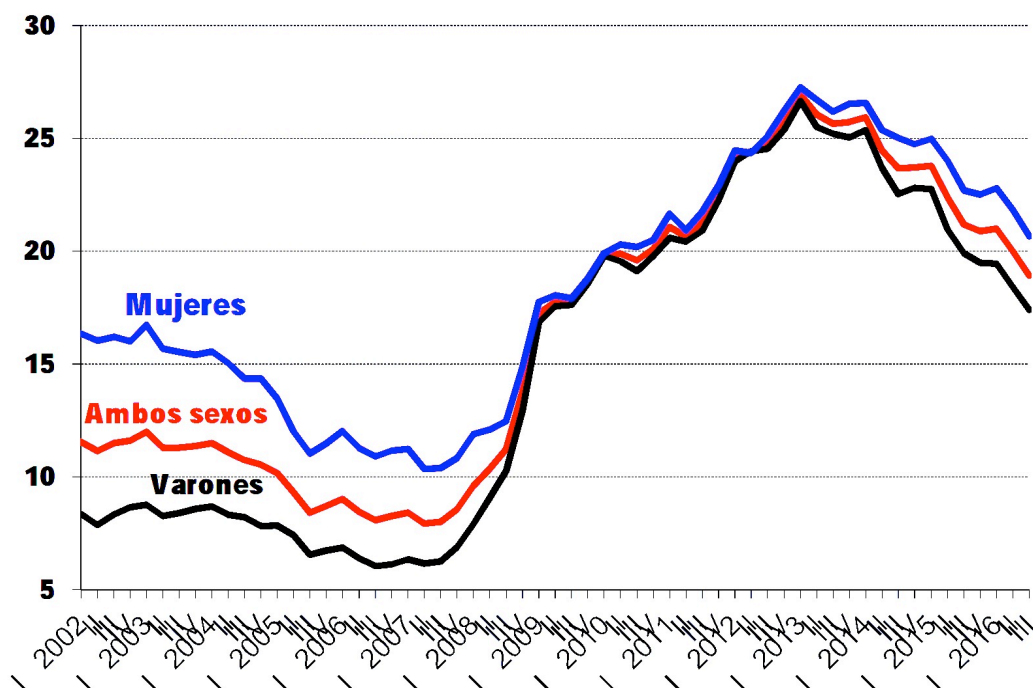
<sup>47</sup> Friedman, M. (1968a). The role of economic policy. *The American Economic Review*, 58(1), 3.

<sup>48</sup> "In a book on Financing American Prosperity, edited by Paul Homan and Fritz Machlup and published in 1945, Alvin Hansen devotes nine pages of text to the 'savings-investment problem' without finding any need to use the words 'interest rate' or any close facsimile thereto [5, pp. 218-27]. In his contribution to this volume, Fritz Machlup wrote, 'Questions regarding the rate of interest, in particular regarding its variation or its stability, may not be among the most vital problems of the postwar economy, but they are certainly among the perplexing ones' [5, p. 466]. In his contribution, John H. Williams – not only professor at Harvard but also a long-time adviser to the New York Federal Reserve Bank – wrote, 'I can see no prospect of revival of a general monetary control in the postwar period' [5, p. 383]". See Friedman, M. (1968b). The role of economic policy. *The American Economic Review*, 58(1), 4.

<sup>49</sup> Friedman, M. (1968c). The role of economic policy. *The American Economic Review*, 58(1), 15.

extremely perverse in its effects. Since there is an excess of capital, the capacity to produce is then in that environment of abundant credit elevated and the level of prices tend to increase in a long-term period.

**Chart 3. Unemployment, Annual Rates (%) 2002-2016 (Spain)**



Source: *Instituto Nacional de Estadística* [on-line]. Encuesta sobre Población Activa. Tercer Trimestre de 2016 [Access on 19 January 2017]. Retrieved from <http://www.ine.es/daco/daco42/daco4211/epa0316.pdf>

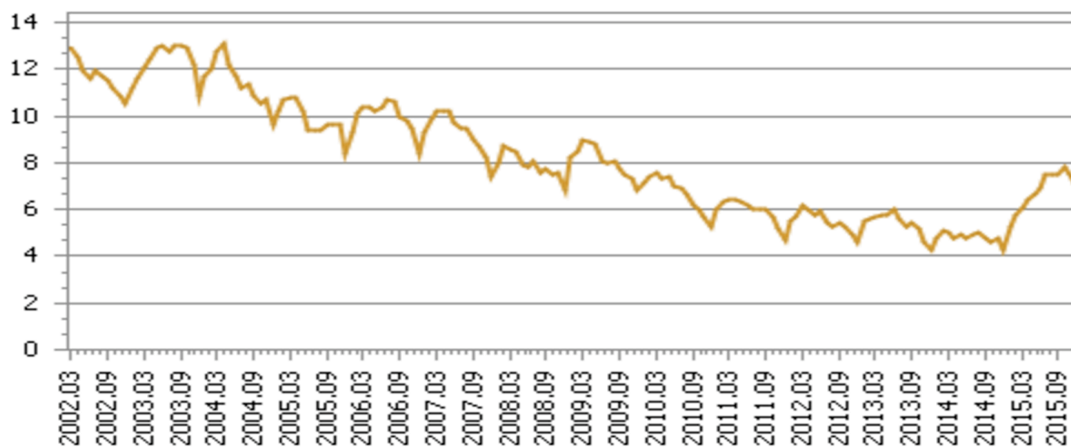
The level of gross wages will be higher, because employers felt motivated to expand their costs hiring more labourers. The output will stimulate consumption and inflation appears. From this point on, the effects of a monetary expansionist policy are supposed to be contractive for the purchasing power, production and unemployment rates. It is also predicted by both authors the case of deflation in which the level of prices go down and the consumers earn more real purchasing power by the increase of their real balances of wealth in a short period. However, as Milton Friedman affirms, the spiral for a violent decrease of the price levels happens inevitably once profit rates tend to be diminished by the producers while consumers are waiting for still lower prices.<sup>50</sup> Irving Fisher and Milton Friedman still see unemployment as one of the most

<sup>50</sup> Both authors along the articles we used in the present section mention the case of deflation as a manner

worrying variables that any government should not simply remove from their political agendas, but tackling with inflation targets.

Inflation and unemployment are very important aspects for the working class. They are decisive for the determination of prices as we can see in Brazil and Spain, because the monthly housing rents and mortgage payments reflect the level of salaries. The housing price indexes for both countries vary with the levels of unemployment. If unemployment goes up, the level of gross wages will obey the same negative trend line in a long-term period. Therefore, there is no reason to believe that any housing index prices will behaviour equally or even present any sort of increase while people have their purchasing power reduced. In Spain, for example, unemployment affected 20.9% of the economically active population in 2015 while 18.91% in 2016. The red line in Chart 3 expresses the level of unemployment for both women and men. The black one represents men and the blue one women. In the third section of the present section, we will present the concept of poor demography and how women are the most vulnerable individuals in urban contexts.<sup>51</sup>

**Chart 5. Unemployment, Annual Rates (%) 2002-2015 (Brazil)**



Source: *Instituto de Pesquisa Econômica Aplicada* [on-line]. Taxa de ocupação no Brasil [Accessed on 19 January 2017]. Retrieved from <http://www.ipeadata.gov.br/ExibeSerie.aspx?serid=38401>

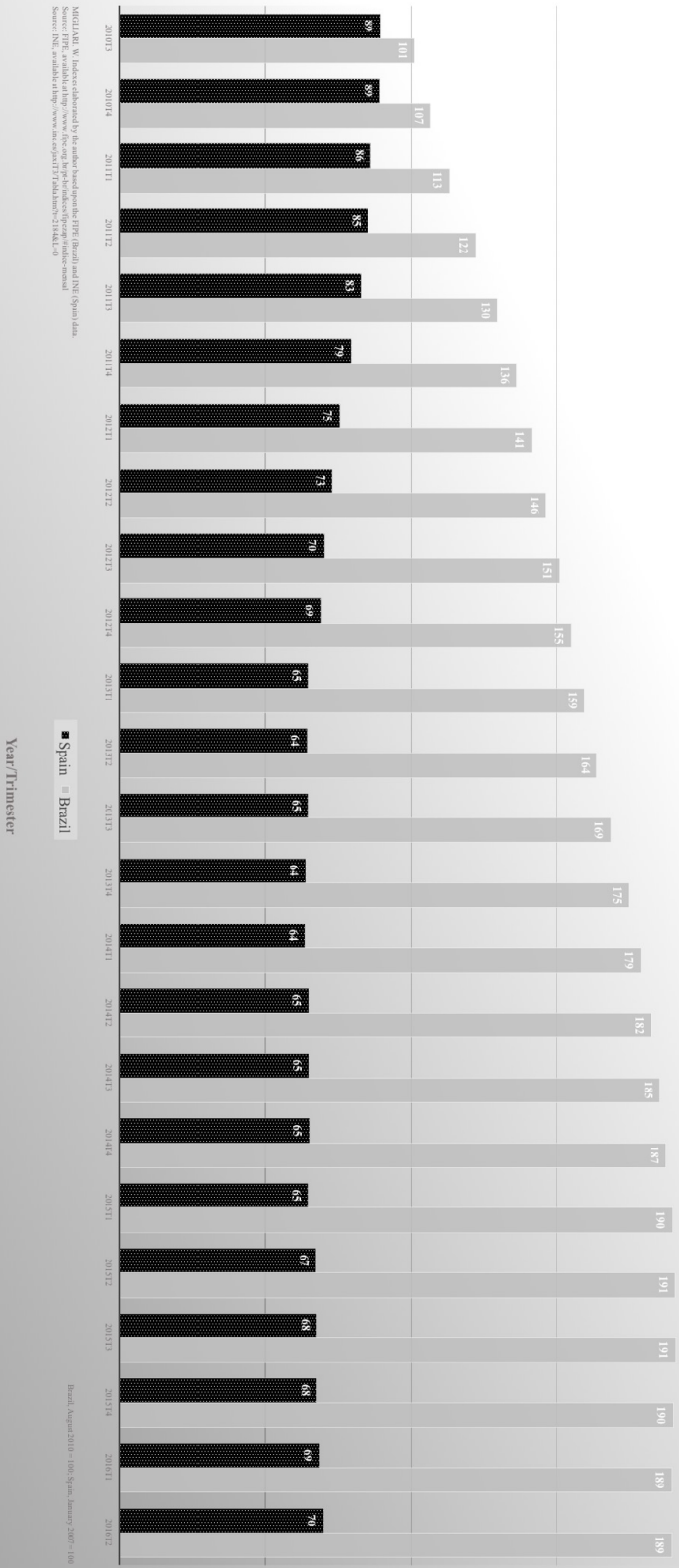
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to make consumers richer in real terms. However, Irving Fisher is the economist who connects *Pigou Effect* to the spiral decrease of the price levels till firms go bankrupt.

<sup>51</sup> See *Instituto Nacional de Estadística. INEbase: operaciones estadísticas: clasificación por temas* [on-line]. Tasa de paro por distintos grupos de edad, sexo y comunidad autónoma, 2016 [Accessed on 10 December 2016]. Retrieved from <http://www.ine.es/jaxiT3/Datos.htm?t=4247>

Chart 4

# National Housing Price Index



The previous data showed the property prices varying in Brazil and Spain in the Chart 4, but not a match for the theoretical approaches of Fisher and Friedman in long-term analyses. One of the reasons for that has to do with the level of unemployment as a macroeconomic and not a pure microeconomic variable.<sup>52</sup> The fall or rise affecting the prices of the properties does not correspond with levels of unemployment as the Charts 3 and 5. When we check the level of property equities in Spain decreased and kept stable, but even in periods of low inflation rates as the 2.99% in 2010; 2.38% in 2011 and 2.9% in 2012. However, from that point on, the level of prices decreased a little, but immediately came to stability and slightly recovered. The inflation was 0.3% in 2013; in 2014 and 2015, the Spanish economy presented a deflation of -0.1% and -0.3% respectively. The year 2016 presented an inflation rate of 1.5%.<sup>53</sup> So, the housing price index had a slight real gain from 2012 on and the years of deflation in 2014-2015 generated a bigger distance between the level of prices and purchase parity power. In other words, investors, individuals or families who bought properties in Spain between 2010 and 2016 paid less in real terms compared to those ones before 2008 when the prices were inflated. Nevertheless, it is from 2013 on that the prices in properties stopped rising, but the effects of the housing bubble crisis with a giant number of defaults in mortgages combined with the unemployed *poor demography*.<sup>54</sup> In addition, the Spanish housing index started going up again in 2014 varying six units from the first trimester of 2014 to the second of 2016. The Brazilian case showed a slight fall in 2013, but the low demand did not affect drastically the level of prices.

The decrease of real value for the working class salaries in local economies and the increase of global real estate assets in few hands impose structural limits for the poorest in urban context. A sort of standardised global urban planning as a result of different levels in purchase power parity among those who work and produce in cities.

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<sup>52</sup> For the data showing higher unemployment rates for women compared to the statistics for men, read the report elaborated by the *Instituto de Pesquisa Econômica Aplicada* [on-line]. Carta de conjuntura – mercado de trabalho 4º trimestre 2016, p. 4 [Accessed on 19 January 2017]. Retrieved from [http://www.ipea.gov.br/portal/images/stories/PDFs/conjuntura/161219\\_cc33\\_mercado\\_trabalho.pdf](http://www.ipea.gov.br/portal/images/stories/PDFs/conjuntura/161219_cc33_mercado_trabalho.pdf).

<sup>53</sup> Read the report on prices for consumers by the *Instituto Nacional de Estadística. Banco de Series Temporales* [on-line]. Índice de precios al consumo, 2016 [Accessed on 18 December, 2016]. Retrieved from <http://www.ine.es/consul/serie.do?s=IPC117049&c=2&nult=100>

<sup>54</sup> About the number of mortgages in contracts registered between 2015 and 2016 increased 14.5% representing 22.983 housing units. Far from the figures of 3.4 million unoccupied houses as seen in the 2010 Census. See *Instituto Nacional de Estadística. Notas de Prensa* [on-line]. Estadística de hipotecas (H), marzo 2016 [Accessed on 14 April 2016]. Retrieved from <http://www.ine.es/daco/daco42/daco426/h0316.pdf>



Mortgage system is the other face of that balanced-misbalanced accumulation of wealth once its operation relies on the selling of housing products in which possession for residence cannot be guaranteed as an effective right by constitutional charters. Between 2007 and 2012, the Spanish society witnessed more than 416,000 cases of housing mortgage foreclosures. In Catalonia, there are more than 448,000 empty-unoccupied houses while the price of rents or real estate values are still rising. In the 2001 census, the National Institute of Statistics pointed out there were 283,155 empty housing units of a total of 2.6 million houses in Barcelona. The figures are combined with an impoverished working class that have seen their rights less effective in constitutional terms. The richest city in Catalonia had more than 10% of its houses empty and being object of real estate speculation while the number of unemployed people is still high. In another Catalan region, Lleida, the number of vacant housing units increased from 29,626 in 2001 to 37,165 in 2011.<sup>55</sup> In Spain, there are more than 3.4 million empty housing units. Banks, real estate agencies and funds are the main proprietors of the units for non-residential purposes.

In Brazil, there are 7.2 million non-occupied units and around 70% of them in urban areas where the GINI index shows an enormous concentration of income. Only in the South East region of the country, more than 2 million housing units are currently vacant in urban zones. In Minas Gerais, the figure is around 509,023 places; in Espírito Santo, 117,404; Rio de Janeiro, 478,473 and São Paulo, 990,481.<sup>56</sup> In 1990, the number of slums was exactly 3,183 and, in 2010, the figures doubled up to 6,329. Places where the State does not exist to enforce basic constitutional rights have the absence of effective rights determining the process of urban exclusion.<sup>57</sup> Furthermore, land price usually affects the level of mortgages and legal conflicts as it is quite common after the 2014 political and economic crisis in the country. The breaches of property business contracts has recently reached 40% of the new properties negotiated.<sup>58</sup>

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<sup>55</sup> *Instituto Nacional de Estadística* [on-line]. Censos de población y vivienda 2011: una nueva etapa en la estadística demográfica [Accessed on 10 January 2017]. Retrieved from <http://www.ine.es/>

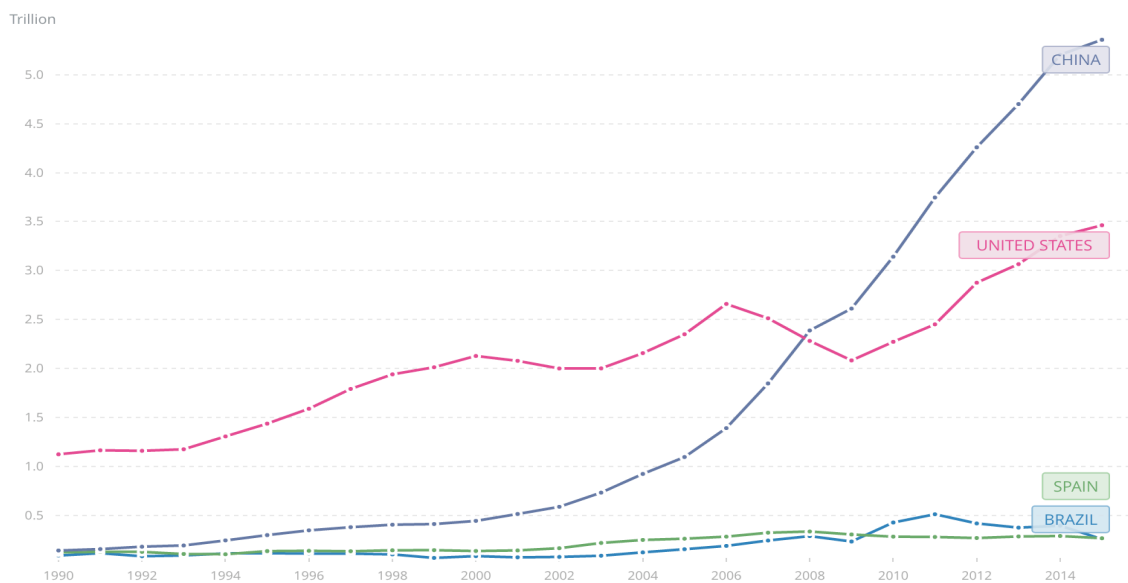
<sup>56</sup> See *Ministério das Cidades. Secretaria Nacional de Habitação. Fundação João Pinheiro* [on-line]. Déficit habitacional municipal no Brasil 2010 [Accessed on 10 January 2017]. Retrieved from <http://www.fjp.mg.gov.br/index.php/docman/cei/deficit-habitacional/216-deficit-habitacional-municipal-no-brasil-2010/file>

<sup>57</sup> See *Instituto Brasileiro de Geografia e Estatística* [on-line]. Table 01, tabela de resultados segundo as grandes regiões, as unidades da federação e os municípios [Accessed on 10 January 2017]. Retrieved from [http://biblioteca.ibge.gov.br/visualizacao/periodicos/92/cd\\_2010\\_aglomerados\\_subnormais.pdf](http://biblioteca.ibge.gov.br/visualizacao/periodicos/92/cd_2010_aglomerados_subnormais.pdf)

<sup>58</sup> See the report published by the *Ministério da Fazenda* [on-line]. Notícias. Firmado acordo para reduzir

After showing the direct relation between unemployment and property prices, we have two considerations that we consider essential to our analysis. The first one is connected to the economically active labour force. The unemployed are the ones excluded from property market once credits will not be given to those who does not have a stable income. The second one is intimately related to the level of defaults in mortgages which derive primarily from individuals and families economically inactive. What reasons could explain the fact housing prices and the unemployment level have a correlation? Among them, one has to do with the wage rate. As a macroeconomic price, it is expected to be as highest as possible in order to be compatible with the amount of investments. If not, employees have their purchasing power reduced compared to the result of the aggregate demand. The other consideration involves the accumulation of the gross savings, which is the disposable income including credit in the market less the monthly consumption. In Brazil and Spain, families have struggled a lot to honour their debts.

**Chart 6. Gross Savings (current US\$)**



Source: *World Bank* [on-line]. Gross Savings (current US\$) [Accessed on 19 January 2017]. Retrieved from <http://data.worldbank.org>

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litígios na compra e venda de imóveis [Accessed on 10 January 2016]. Retrieved from <http://www.fazenda.gov.br/noticias/2016/abril/governo-federal-judiciario-consumidores-e-incorporadoras-firmam-acordo-para-reduzir-litigios-relacionados-aos-contratos-de-compra-e-venda-de-imoveis>

So, even for those who have been working for many years and saving their capital, the quantity of money left for each individual, family and small proprietors are not enough to pressure the property system through real estate mortgages. So, the salaries are kept low without enough amount of money for national consumers having access to credits in order to expand their consumption on housing as we see in Chart 6 on gross savings. If the market of property has not been consumed in all its strength by the locals, who are the other clients then?

### **1.2. The absolute right to property and its international financial complexity**

It makes sense for some economists that investments in land, urban development and real estate are usually connected to economic policies from which all the successful financial results tend to benefit locals. Immoveable properties are not considered tradable goods by the literature and hardly contribute to foreign direct investments from the perspective of a common proprietor or resident. However, we assume the right to property has become a factor of production for speculative global investments through rental income and sales. Real estate investment trusts, for example, have mutual funds from country to country with rental and mortgage portfolios. The capital of investors is transformed into a volume of money called assets and then used to negotiate properties in huge quantities. Once the ownership is formed, this type of business can sale, rent or offer credits to banks in form of mortgages. So, real estate participating in international stock exchange markets look for profits letting, selling or financing properties.

On the one hand, individuals and families tend to invest in real estate regarding basic needs such as housing, vacation and some of them small returns on the usufruct of their properties. On the other hand, the real gains between buy-and-sell time, goals and right usufruct are reduced to the interests of international enterprises with money leveraged in stock exchange markets based upon the marginal returns on investments. When Irving Fisher and Milton Friedman thought on monetary policies arguing with the Keynesian ideas, they both did not take into account the marginal efficiency from capital invested. They suggested an important review on the debate related to market profits, but mostly pointing out they should be kept by governments as high as possible to compensate eventual investor losses from exchange rates, indexation or even

expansionist monetary policies with interest rates on capital. Moreover, they did not present the international bank crises explaining the long-term form of accumulation in real estate changing property system in a sophisticated and invisible form of capital. Then, last but not least, how and when did a considerable amount of gross capital in real properties rapidly abandon poor national frontiers in 2008? We suggest a long answer to that phenomenon divided in two theoretical approaches. Initially that the avid marginal returns of international real estate investors lead global bank crises based upon the property system. The Keynesian ideas respond partially to the problem while Carmen M. Reinhart and Kenneth S. Rogoff contribute enormously to a more complete analysis once banking crises have a connection to the marginal returns in mortgage systems and the sustainability of that model of credit with a transnational component. Then, the fact that the real estate appetite for capital accumulation of international investors have been reliable on a supposed model of finances in which a portion in capital from poor nation wealth is taken for granted as a commodity. We use the model of Heckscher-Ohlin to make important considerations about.

Nowadays, real property is used as an important factor of production. It is a crucial dependant variable of traditional and modern theories on the long-term process for the capital accumulation. Nevertheless, the euphoric debate on the legal apparatus corroborating economic results positively harvested by the few richest percentage of global population is not new. After the I World War, John Maynard Keynes pointed out the factors of production playing a central key in his considerations for the capital accumulation in Europe. He also considered heavy the burden for the conflict losers. So, for him, Germany and Austria could bear the excess of international debts and the pressure of producing monstrous positive returns in the balance of payments to support the Treaty of Versailles (1919). The central issue for the European peace was mainly how to give back to the proprietors what the conflict got away from them. The same happened after the World War II when the plans of reconstruction in cities like Warsaw and many others in Germany. Evidently the English economist could not predict or emphasise the role of property as a means of production in an international financial system as we observe along the present work. Nonetheless, the process of indefinite accumulation of capital for J. M. Keynes is a worrying issue: “But it requires, I suggest, considerable amendment if it is to be applied to a world in which the accumulation of

wealth for an indefinitely postponed future is an important factor; and the greater the proportionate part played by such wealth-accumulation the more essential does such amendment become”.<sup>59</sup> We may say the first fifty years of the twenty century were the period of massive investments in real estate entrepreneurship mainly caused by the wars and a period of wealth accumulation for certain international investors as well.

John Maynard Keynes disagrees with some of his interlocutors about the fact bankers or investors hoard their capital in order to reduce the velocity of money: “I cannot agree that ‘in modern monetary theory the propensity to hoard is generally dealt with [...] as a factor operating to reduce the ‘velocity’ of money”. So, for the British economist, there are many other factors connected to the greed of investors in being paid back as higher as possible even during critical economic times if money owners may decline unattractive taxes of capital return. He says: “On the contrary, I am convinced that the monetary theorists who try to deal with it in this way are altogether on the wrong track”.<sup>60</sup> One possible reason behind his doubts on the economic analysis with a huge emphasis on the velocity of money is related to the international aspect of an absolute pragmatism in the nature of wealth accumulation. Nowadays, we extend that characteristic to real estate investments. Other element is connected to the impacts on the property system re-construction after 1945. For the time being Keynes wrote his argumentations saying the interest rate was what could really determine the marginal efficiency of the capital and, consequently, the wealth accumulation. So, it is acceptable the view that the national wealth could not determine the economic development of European countries since the end of the I World War. According to Keynes, it is the real average of capital returns destined to the owners of wealth or property that influence really the marginal efficiency. Therefore, knowing the level of household incomes in a society is an indispensable fact to the determination of the wealth increase: “Thus the marginal efficiency of capital is not determined, unless the level of money-income is given”.<sup>61</sup> In other words, capital and property system would never divorce since the premisses for wealth accumulation, investments and returns depend more and more on

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<sup>59</sup> Keynes, J. M. (1937a). The general theory of employment. *The Quarterly Journal of Economics*, 51(2), 209-223.

<sup>60</sup> Keynes, J. M. (1937b). The general theory of employment. *The Quarterly Journal of Economics*, 51(2), 210-211.

<sup>61</sup> Keynes, J. M. (1937c). The general theory of employment. *The Quarterly Journal of Economics*, 51(2), 222.

property system. That contractual condition affects and redefines the property concept, but also demanding new criteria for the access to housing.<sup>62</sup>

In the book *This time is different*, Carmen M. Reinhart and Kenneth S. Rogoff in suggest banking crises in 1997 and 2008 are evidently rooted in such uncontrolled speculative markets involving housing and infrastructure construction sector.<sup>63</sup> Taking into consideration the number of bank crises since independence or 1800, Spain has had 8 and Brazil 11; since 1945, Spain 2 and Brazil 3. From the perspective of how public and private assets are managed, we find certain similarities on mortgage system much alive in these two emerging countries yet the Brazilian and Spanish realities are entirely different from an economic perspective.<sup>64</sup> The other case is the Asian crisis and how it is connected to the uncontrollable quantities of foreign investments leaving the East Asian economies in 1997. The financial scenario reached insolvency when the baht was devalued and then the fear for bankruptcy in Thailand gained rapidly the whole region. The interpretations for such event may vary based upon the assumption we select to evaluate the Thai government meeting its financial obligations. However, the exchange rate was thoroughly committed to the economic chaos and the property system one of the basilar lack of control in economy: “Had Thailand responded to the fall in property by floating the baht and moderately tightening monetary and fiscal policies, the Asian

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<sup>62</sup> Thomas Piketty’s thesis translated mostly the inquiries John M. Keynes could not observe at his time. In *Capital in the twenty-first century*, Piketty refers to the fact that: “Similarly, I ruled out the idea of excluding residential real estate from capital on the grounds that it is ‘unproductive’, unlike the ‘productive capital’ used by firms and government: industrial plants, office buildings, machinery, infrastructure, and so on”. The French author also avers: “The truth is that all these forms of wealth are useful and productive and reflect capital’s two major economic functions. Residential real estate can be seen as a capital asset that yields ‘housing services,’ whose value is measured by their rental equivalent”. In other words, real estate assets in general deals with the price of the soil and its value endures as a component of the gross capital formation for firms, families and individuals: “Other capital assets can serve as factors of production for firms and government agencies that produce goods and services (and need plants, offices, machinery, infrastructure, etc. to do so). Each of these two types of capital currently accounts for roughly half the capital stock in the developed countries”. See Piketty, T. (2014). *Capital in the twenty-first century*. Cambridge: The Belknap Press of Harvard University Press. Read the whole section “Capital and Wealth” in the Chapter Income and Output.

<sup>63</sup> The complexity of bank crises rely on some aspects. Housing mortgages is one of them. Read “For the study of banking crisis, three features of the data set underlying this book are of particular note. First, to reiterate, our data on banking crises go back to 1800. Second, to our knowledge, we are the first to examine the patterns of housing prices around major banking crises in emerging markets, including Asia, Europe, and Latin America. Our emerging market data set facilitates comparisons across both duration and magnitude with the better-documented housing price cycles in the advanced economies, which have long been known to play a central role in financial crises”. See Reinhart, C. M., & Rogoff, K. S. (2011). *This time is different: eight centuries of financial folly* (pp. 141-143). New Jersey: Princeton University Press.

<sup>64</sup> Reinhart, C. M., & Rogoff, K. S. (2011). *This time is different: eight centuries of financial folly* (pp. 141-173). New Jersey: Princeton University Press.

financial crisis could have been largely avoided”.<sup>65</sup> It is true the 1997 crisis was very much similar to the 1929 in the sense they both had to face lack of confidence among investors.

International system crises are usually caused by the runs private banks cannot avoid, but we call the attention to the fact the capital does not have as its destiny the national frontiers: “In practice, banking systems have many ways of handling runs. If the run is on a single bank, that bank may be able to borrow from a pool of other private banks that effectively provide deposit insurance to one another. However, if the run affects a broad enough range of institutions, private insurance pooling will not work”.<sup>66</sup> We corroborate the notion that as soon as there is a signal of probable default from public or private borrowers, the trust of investors melts into the air. The capital evaporates and it is rapidly allocated in different parts of the globe. Therefore, the desire is for significant gains and safe liquidity in stock market shares in different parts of the world. Real estate assets were a central element connecting the price of the soil as a national wealth to volatile amounts of foreign capitals: “An example of such a run is the U.S. subprime financial crisis of 2007, because problematic mortgage assets were held widely in the banking sector”. Reinhart and Rogoff point out also the exchange rate crises as a variable “[...] experienced by so many developing economies in the 1990s, [...] of a systemic financial crisis affecting almost all banks in a country”. Regardless of the nature in stock market shares, the loss of the confidence is generalised: “In crises represented by both of these examples [subprime and exchange rate crises], it is a real loss to the banking system that eventually sets off the shock”. In addition, the authors say: “The shock may be manageable if confidence in the banking sector is maintained. However, if a run occurs, it can bankrupt the entire system, turning a damaging problem into a devastating one”.<sup>67</sup> In other words, the nominal values of the assets connected to property prices will temporarily decrease in times of crises, but the access to housing through property system is also reduced as a consequence of massive levels of unemployment. Therefore, real estate firms have their properties vacant with a long-

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<sup>65</sup> Radelet, S.; Sachs, J. (2000). The onset of the East Asian financial crisis. In Krugman, P. (Ed.). *Currency crisis* (pp. 136-137). Chicago: University Chicago Press.

<sup>66</sup> Reinhart, C. M., & Rogoff, K. S. (2011). *This time is different: eight centuries of financial folly* (pp. 141-173). New Jersey: Princeton University Press.

<sup>67</sup> Reinhart, C. M., & Rogoff, K. S. (2011). *This time is different: eight centuries of financial folly* (pp. 141-173). New Jersey: Princeton University Press.

term positive externality for them, that is to say, expensive non-occupied houses for unemployed people will reduce the supply for those without income. That situation will produce higher prices for both strata of the population, i.e., those who pay rents and mortgages. As the above-mentioned, the effect of a global economic crisis is intimately linked to an international formation of prices with a huge impact on local economies and the right to housing is one of the pieces of a domino effect.<sup>68</sup>

Heckscher-Ohlin Trade Theory was elaborated during the very end of the 1920s as a result of long years of studies in political economy, liberalism and international commerce by the two Swedish authors. Yet their ideas are contemporaneous to the Keynesian and liberal debate embracing the years of the two World Wars of the XX century, it is probably one of the most appropriate intellectual approaches that till that moment may explain the current international phenomenon on speculative real estate managements. Heckscher-Ohlin's ideas state countries are relatively abundant either in capital or labour. In a sense, the Brazilian and Spanish economies are scarce in savings compared to other countries, as we showed in the Chart 6, but both abundant in labour with high annual rates of unemployed people as seen in the Charts 3 and 5. The other aspect of that trade theory is the international production of commodities being exported from poor nations as an essential factor of production for those central economies. The model of Heckscher-Ohlin did not predict such behaviour in international commerce once it is contradictory the fact non-wealthy countries exporting capital. At this point, we apply the concept of *factor-intensity reversal* from the trade theory to the reality poor nations generate money in order to export it.<sup>69</sup> Therefore, with the objective of satisfying the appetite for real estate investments in global scale, emerging or peripheral economies sacrifice labour unit costs on the promise foreign capital will come. Re-phrasing partially the theory, poorer nations add a ratio of their capital factor, in which they are not intensive, on their list of commodities obeying a certain elasticity in the

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<sup>68</sup> The right to housing is used in a broad sense in connection to other rights as defined by the General Comments elaborated by the Committee on Economic, Social and Cultural Rights, Office of the United Nations High Commissioner for Human Rights. See Chapter V of the present thesis.

<sup>69</sup> The World Trade Organisation states: "Construction and related engineering services includes construction work for buildings and civil engineering, installation and assembly work, building completion and finishing work. Architectural and engineering services are classified as part of 'professional services'; and that "The financial services sector plays a critical role in any modern economy. The bundle of institutions that make up an economy's financial system can be seen as "the brain of the economy", providing the bulk of the economy's need for many functions". See *World Trade Organization. Sector-by-Sector Information* [on-line]. Services sectoral classification list [Accessed on 3 January 2016]. Retrieved from [https://www.wto.org/english/tratop\\_e/serv\\_e/serv\\_sectors\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/serv_sectors_e.htm)



price of the money imported. As interest rate is the price of the money for national poor economies, international real estate firms will raise their prices to supply more capital in poor nations. There is a direct correlation between the quantity of global capital and its price for speculative financial markets. If all poor nations dispute to make available more and more quantities of primary surplus, the international supply will be abundant. So, national governments tend to rise the interest rates to attract global investors.<sup>70</sup> Such behaviour is explained observing that the price of the money, which is the interest rate, follows the international growth of the capital supply.

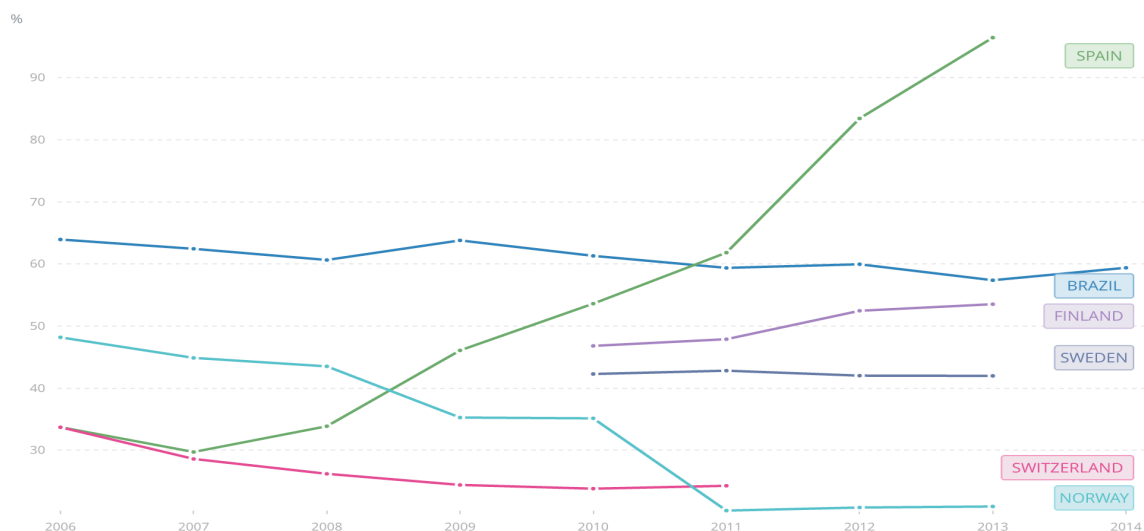
Another consequence of hosting foreign savings to invest in labour is the pressure on the exchange rate. The devaluation of the national currency is a way to control those assets sent to international markets, which will be changed into dollar as reserve currency, via importation, investments in foreign firms and stock exchange markets. However, this is a risky policy since investors lose their confidence with the manipulation of the exchange rate. The other option is the system of public debt, which is usually applied as an alternative to guarantee a relative stability of the exchange rate and control the quantity of national currency circulating. For Heckscher-Ohlin Trade Theory, the search for infinite primary surplus would be an invention, but it certainly accommodates the fact governments use public debts paying higher interest rates in the international market as an investment. Up to a certain extent, the global bank crisis in 2008 reveals the belief of those nations that were interested in making profits with their abundant capital and the ones that purported they could survive in an infinite model development always offering labour plus primary surplus.<sup>71</sup> The Brazilian public debt has decreased slightly till 2011 when the prices of the commodities started going down. Since then the government expenditure on capital remuneration kept rising up after a short decline in 2013. The Spanish public debt is more dramatic. It was 27% in 2007 and exploded to 96% of the Gross Domestic Product. The Chart 7 illustrates well the scenario.

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<sup>70</sup> The opposite is presented by Ronald Findlay since the author affirms the inelasticity of the inputs supply for production factors. See Findlay, R. (1995). *Factor proportions, trade and growth*. Cambridge: MIT Press.

<sup>71</sup> Jones, R. (1956). Factor proportions and the Heckscher-Ohlin theorem. *Review of Economic Studies*, 24(1), 1-10.

**Chart 7. Central Government Debt, Total (% of GDP)**



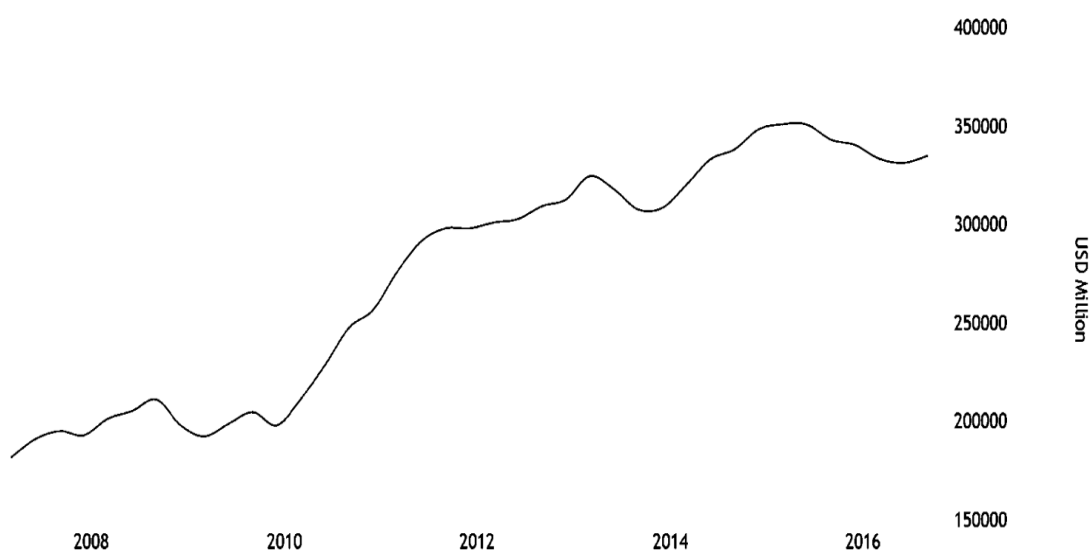
Source: *World Bank* [on-line]. Central government debt, total (% of the GDP) [Accessed on 19 January 2017]. Retrieved from <http://data.worldbank.org/>

As we have mentioned before, housing construction is usually defined as non-tradable good. Moreover, it is expected to be consumed inside the State frontiers, so a non-tradable good. However, as we have seen, supply-demand theory does not respond satisfactorily to the housing prices variation based upon domestic demand, low interest rates and expansionist monetary policies. On the one hand, it is true the construction sector is nationally financed through the production of commodities such as cement, plaster and iron. However, there is considerable demand for capital from foreign direct investments. On the other hand, it is also true foreign direct investments have also gained a new dimension when global real estate capital starts projects for housing and urban policies.<sup>72</sup> Non-national real estate investments, which are mostly controlled by

<sup>72</sup> Brazil and Spain had their Olympic Games with massive investments from abroad respectively 2016 and 1992. Urban development for public-private partnerships is taken for granted as a window of opportunity also to develop the local infrastructure as it happened also in Cape Town. Nevertheless, the new facilities do not necessarily converge on city dwellers. Fitch Ratings given to the São Paulo Municipality was AA+ in national level and BBB- in global scale for what is commonly said “good payer”. Transportation, tourism and services are some of the areas investors try to multiply their assets. See *Fitch Ratings. Publicações* [on-line]. Fitch Atribui Pela Primeira Vez Ratings 'BBB-'/AA+(bra)' ao Município de São Paulo. Perspectiva negativa [Accessed on 6 February 2016]. Retrieved from [www.fitchratings.com.br](http://www.fitchratings.com.br). For Barcelona, we can see in Moody’s Report: “The Baa2 rating reflects the city’s good budgetary management and solid financial fundamentals in recent years, which have ensured a high self-financing capacity and, as a result, a limited debt burden. This is mainly reflected in high gross operating balances (20% of operating revenue on average for 2010-14) and moderate debt levels (41% of operating revenue in 2014). The rating also reflects Barcelona’s good liquidity position, with abundant cash on hand and limited debt obligations”. See *Moody’s Investors Service* [on-line]. Moody’s changes

worldwide stock exchange markets, have been disputing the access to property system with national consumers. Although the nature of the business may be expressed in offices, residence or simply the usufruct of the right to property through rental markets, it is aggressively connected to speculative investments. The financial crises in 1997 and 2008 have been the object of numerous analysis, but real estate is undeniably one of the elements of the debate. So, capital from poor nations given as a commodity to allure foreign capital, the unemployment rates and countries abundant in capital factor are intimately intertwined with the construction sector.

**Chart 10. Brazilian Total Gross External Debt**



Source: *Trading Economics* [on-line]. Banco Central do Brasil. Brazilian Total gross external debt [Accessed on 20 March 2017]. Retrieved from <[www.tradingeconomics.com](http://www.tradingeconomics.com)>.

Heckscher-Ohlin Trade Theory was complemented years later by Wassily Leontief when he pointed out countries abundant in capital export also labour-intensive goods. We suggest the opposite as well since Brazil and Spain export capital paying higher level of interest rates while they are intensive in labour.<sup>73</sup> After that, the Charts

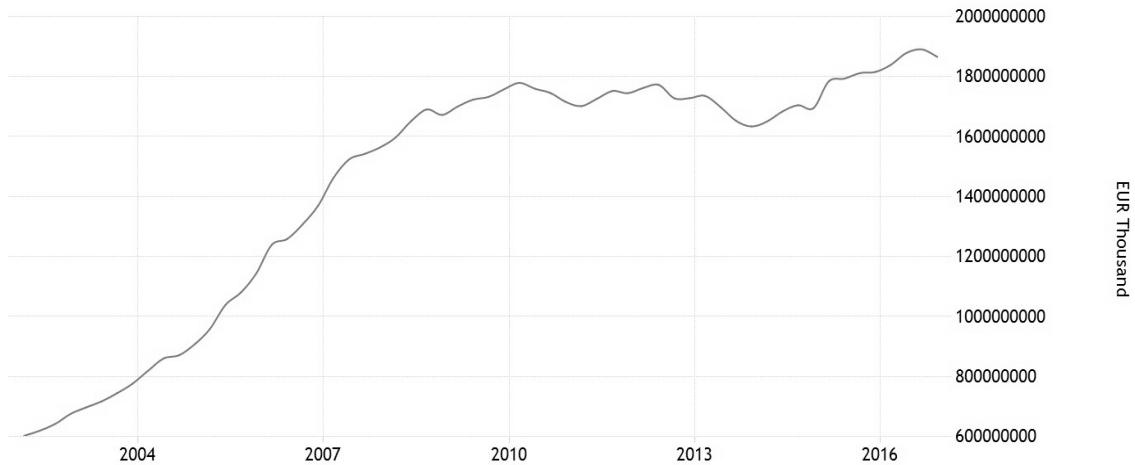
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outlook on ratings of 14 Spanish sub-sovereigns to stable from positive; ratings affirmed [Accessed on 4 June 2016]. Retrieved from [https://www.moodys.com/research/Moodys-changes-outlook-on-ratings-of-14-Spanish-sub-sovereigns--PR\\_343979](https://www.moodys.com/research/Moodys-changes-outlook-on-ratings-of-14-Spanish-sub-sovereigns--PR_343979)

<sup>73</sup> See Leontief, W. (1953). Domestic production and foreign trade: the American capital position re-examined. *Proceedings of the American Philosophical Society*, 97(4), 332–349. The resonance of the last economic crisis started being felt by the Brazilian economy in 2011, but mainly appearing during 2015-2016 with the government revenue decreasing through commodities. The programme *Minha Casa, Minha*

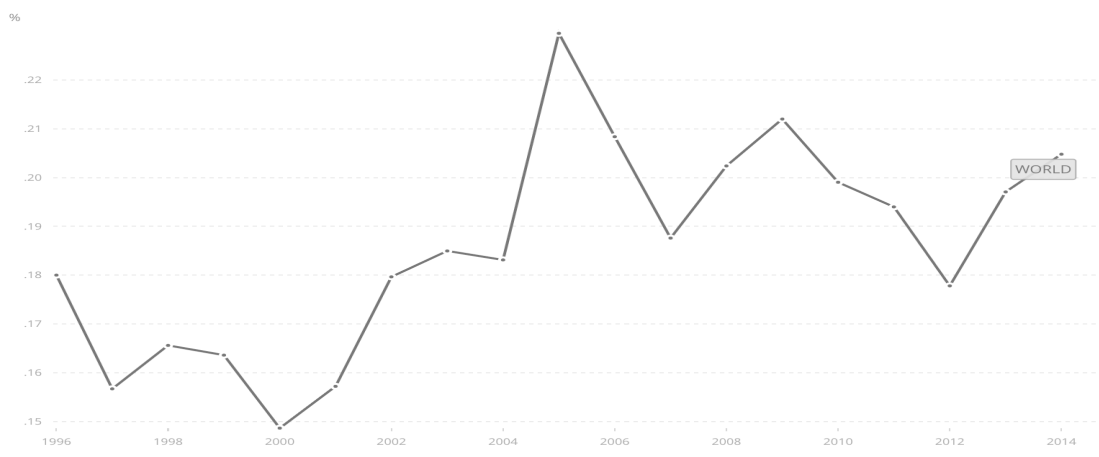
10 and 11 indicate the external gross debt increase of Brazil and Spain. The Chart 12 the world numbers in average.

**Chart 11. Spanish Total Gross External Debt**



Source: *Trading Economics* [on-line]. Banco de España. Spanish total gross external debt [Accessed on 20 March 2017]. Retrieved from <[www.tradingeconomics.com](http://www.tradingeconomics.com)>.

**Chart 12. World External Debt**



Source: *World Bank* [on-line]. World external debt (net official development assistance received or % of GNI) [Accessed on 15 March 2017]. Retrieved from <<http://data.worldbank.org>>.

*Vida* has contributed to the high levels of cement production, but already in decline with restrictive monetary policies. See *Ministério da Fazenda. Tesouro Nacional* [on-line]. Relatório Anual do Tesouro Nacional 2016, pp. 47-50 [Accessed on 6 September 2016]. Retrieved from <http://www.tesouro.fazenda.gov.br/documents/10180/246449/RATN+Vers%C3%A3o+Final/a5b09e66-57ab-4a33-ae3-62d84dd606b9>

## 2. A global absolute right to property: external dependent variables and correlations

In order to advance in how the macroeconomics of real estate investments work, we point out two variables that are globally present in urban realities regardless of the profile of the countries for capital or labour intensive factors. The first one refers to the *socioeconomic complexity* which means the world population growth combined with the urban poverty. Such amalgam is what we define as *poor demography* in cities where individuals are exposed to precarious jobs and salaries, but mainly women as the heads of their families facing a complex arrangement of factors caused by the concentration of income. It is an urban process in which the land production is based upon property values and massive lucrative returns. As the Oxfam Report says: “[...] individuals have benefited from urbanization and the associated increase in land and property values; the commodity price boom has enriched natural resource owners from Brazil to Indonesia; and privatizations, some of which have taken place on dubious terms, have also led to lucrative returns for new private owners”. The 2015 Oxfam report calls the attention to the formation of “crony sectors” or simply those areas of capital investments forged by monopolistic or state-oriented practices in which most of financial benefits are privatised.<sup>74</sup> In addition, the data about poverty is intimately linked to urban context and women are the ones more exposed to low-paid jobs in cities: “Women make up the majority of the world’s low-paid workers and are concentrated in the most precarious jobs. Meanwhile, chief executive salaries have rocketed. CEOs at the top US firms have seen their salaries increase by more than half (by 54.3%) since 2009, while ordinary wages have barely moved. The CEO of India’s top information technology firm makes 416 times the salary of a typical employee there. Women hold just 24 of the CEO positions at Fortune 500 companies”.<sup>75</sup>

Another aspect of the *poor demography* relies on the absence of a democratic view of urban planning in which the accessibility of basic and affordable goods must be

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<sup>74</sup> Oxfam. *An economy for the 1%. How privilege and power in the economy drive extreme inequality and how this can be stopped* [on-line]. 210 Oxfam briefing paper [Accessed on 8 January 2017]. Retrieved from <<https://www.oxfam.org/en/research/economy-1>>.

<sup>75</sup> Read the pages 4-5 of Oxfam. *An economy for the 1%. How privilege and power in the economy drive extreme inequality and how this can be stopped* [on-line]. 210 Oxfam briefing paper [Accessed on 8 January 2017]. Retrieved from <<https://www.oxfam.org/en/research/economy-1>>.

scarce regardless of geography in order to generate advantages for few. In other words, the effectiveness of rights is understood as an impediment for the economic prosperity and free-initiative, either in slums in developing countries or on the outskirts of rich cities, once the depression of salaries from whom work and produce must serve as a tool to generate excess of money and unequal distribution. The reasons for that are found in neoliberal models of socioeconomic projects with huge impulse since the 1970s as it was aforementioned about the dissent between marginal returns.<sup>76</sup> Therefore, a supply-demand democratic structure of city production has become lately an urgent topic for different international forums. Beyond the Oxfam's task, for example, the *United Nations Habitat III Programme on Housing and Sustainable Urban Development Conference* refers to the urban phenomenon affirming that: "In the absence of effective urban planning, the consequences of this rapid urbanization will be dramatic. In many places around the world, the effects can already be felt: lack of proper housing and growth of slums, inadequate and outdated infrastructure". So, the insufficient quantity of capital invested by public policies in city context to re-distribute the surplus value, which has to do with a selective agenda for housing construction and credit devoted to upper middle class in the system of property, reduces the effectiveness of other rights.

The concept of *poor demography* is more evident as a new complexity when its reproduction depends on the restriction of the use of property in democratic political regimes through the housing access. According to the UN expertise, the right to housing is progressively limiting the standards for the access to: "roads, public transport, water, sanitation, or electricity". In addition, that unequal urban process results in a logic defined by the *Habitat III Programme on Housing and Sustainable Urban Development Conference* as a series of actions: "escalating poverty and unemployment, safety and crime problems, pollution and health issues, as well as poorly managed natural or man-made disasters and other catastrophes due to the effects of climate change".<sup>77</sup> In a sense, there is a negative consequence from real estate capital in urban planning once

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<sup>76</sup> Just to clarify that notion of marginal returns, Keynesian ideas are prone to monitor the action of the private sectors since the remuneration of the speculative capital is historically based upon public investments. Milton Friedman started a counter-argument during the 1970s saying that interference had generated the constitution of inefficient and monopolistic or oligopolistic services controlled by the States. Revisit the Section II of the present chapter on the macroeconomics of the property system and its context.

<sup>77</sup> See *UN-Habitat at a glance* [on-line]. United Nations Habitat for a better future [Accessed on 16 July 2016]. Retrieved from <<http://unhabitat.org/about-us/un-habitat-at-a-glance/>>.

the assets amassed cannot exist without an urban increasing of the population combined with an exponential level of poverty. It is a new global socioeconomic structure of city capital accumulation dependent on forms of urban concentration of income. Yet on the effects of an international movement of capital affecting locally the rights of citizens, the *poor demography* has an intimate relation to the access of goods and the externalities in real estate markets. The decrease of real value for the working class salaries in local economies and the growth of global real estate assets in few hands impose structural limits for the poorest in cities. A worldwide way of consumerism affects those who work and produce in cities diminishing their purchase power parity as well.

In Brazil, the urban issue is worse. The notion of *poor demography* puts in poverty in cities combined with around 7.2 million non-occupied units. There are 70% of them in urban areas where the GINI index shows an enormous concentration of income. Only in the South East region of the country, more than 2 million housing units are currently vacant in urban zones. In Minas Gerais, the figure is around 509,023 places; in Espírito Santo, 117,404; Rio de Janeiro, 478,473 and São Paulo, 990,481.<sup>78</sup> In 1990, the number of slums was exactly 3,183 and, in 2010, the figures doubled up to 6,329 as a continuous process of *poor demography*. Places where the State through its municipal public administrations have enforced basic constitutional rights with the access to a dignified and affordable place to live.<sup>79</sup> Moreover, land price is usually related to mortgages supply and legal conflicts derived from their defaults after the 2014 political and economic crisis in the country. The breaches of real property contracts, for instance, is surround 40% of those new properties negotiated in the last years.<sup>80</sup> As aforesaid in the first section on supply-demand theory of the our thesis, the production of urban peripheries and high levels of informalities have corroborated a formal neoliberal

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<sup>78</sup> See *Ministério das Cidades. Secretaria Nacional de Habitação. Fundação João Pinheiro* [on-line]. Déficit habitacional municipal no Brasil 2010 [Accessed on 10 January 2017]. Retrieved from <<http://www.fjp.mg.gov.br/index.php/docman/cei/deficit-habitacional/216-deficit-habitacional-municipal-no-brasil-2010/file>>.

<sup>79</sup> See *Instituto Brasileiro de Geografia e Estatística* [on-line]. Table 01, Tabelas de resultados segundo as Grandes Regiões, as Unidades da Federação e os municípios [Accessed on 10 January]. Retrieved from <[http://biblioteca.ibge.gov.br/visualizacao/periodicos/92/cd\\_2010\\_aglomerados\\_subnormais.pdf](http://biblioteca.ibge.gov.br/visualizacao/periodicos/92/cd_2010_aglomerados_subnormais.pdf)>.

<sup>80</sup> *Ministério da Fazenda* [on-line]. Notícias. Firmado acordo para reduzir litígios na compra e venda de imóveis [Accessed on 10 January, 2016]. Retrieved from <http://www.fazenda.gov.br/noticias/2016/abril/governo-federal-judiciario-consumidores-e-incorporadoras-firmam-acordo-para-reduzir-litigios-relacionados-aos-contratos-de-compra-e-venda-de-imoveis>

project in which the *poor demography* is quintessential. As it is exposed by the Charts 10, 11 and 12, a desperate response to scenario forces city governments to enter into high levels of debts promising juicy fruits in capital returns while holding back risky investments. It is also a false premiss in which urban policies with enormous interest rates and premiums for real estate firms will compensate the individuals of the *poor demography* in a long term. The second dependent variable is a new *socioeconomic complexity* and it comes from a macroeconomic perspective of the real estate investments. The Brazilian and Spanish societies are scarce in capital savings, since they are players of the Heckscher-Ohlin Trade Theory abundant in labour factor.

The figures seen in the Charts 10, 11 and 12 refer to the total gross of external debt for both countries make explicit that affirmation. Such behaviour is explained by the desperate need of emerging economies to look for the equilibrium of their own national accounts to finance themselves with more external debt regarding foreign direct investments depend on urban economies. Although Brazil and Spain have known fat years for construction market before the 2008 crisis, we point out the lean ones coincided with also the growth of private speculative wealth. Real estate firms have lead the worldwide forces in a new context of impoverished urban working class. The Chart 12 shows us an ascending trend line in external debt for global economies. It is also true the external debt is devoted to welfare projects not clearly linked to speculative enterprises, but undeniably corny sectors are dependable on urban economies. So, which companies and funds are we talking about? The Table 2 (i and ii) introduces a list of the first fifty international real estate firms that manage domestic savings abroad affecting locally the urban economies with foreign investments with extraordinary compensation.

The innovation in transferring the capital from developed economies to the poorer countries or regions relies basically on the price of land with rising marginal returns. Before traspassing the national frontiers, the assets are stocked in open exchange markets and then sent to developing countries. The jargon “assets under management” refers to the amount of capital from private savings in regions abundant in capital factor remunerated by direct or indirectly public money.



## 2.1. The correlations in real estate investments for a new concept of property

For these firms, urban properties and infrastructure are the priority. In order to make easier how the territorial range of the foreign direct investments for real estate business, we listed the names and codes of each firm operating globally as it is shown in the Table 2. The Table 3 identifies the geographical distribution of the capital managed by the firms aforesaid. On the one hand, the numbers in the column Pondering AUM INDEX represent the degrees in terms of territory, i.e., the higher the number the more omnipresent the capital in global stock exchange markets. It is a criterion that makes easier the evaluation of the contry sectors's impact without updating constantly the absolute numbers of their assets under investments and market capitalisation. On the other hand, the digits in the column Pondering MARKET CAP INDEX are the real equity of the firms escalating geographically and how the finances are established in relation to the assets administered. The numbers vary from 1 to 5 showing the more the regions the firms are the more the proportion of their values compared to the assets they manage. At the same time, we understand that such *socioeconomic complexity* operates in two dimensions. One of them is probably a fixed portion of the capital from the assets under management destined to lever shares in real estate stock exchange markets. The other one is related to the flow of cash coming from new investors in risky stock exchange markets. The summing-up is that the abundand capital factor is stocked in funds and, then, these companies start hunting urban policies for city infrastructure, commercial buildings and residential real estate projects combined with mortgage systems.

All projects must show the same pattern, that is to say, the financial returns on land and the transformation of the space must be more attractive than other sectors of the economy. That capital is usually supported by legal contracts varying in private, public and public-private partnerships. The access to credit reveals the *socioeconomic complexity* embeds the *poor demography* as a reality: "In spite of the high levels of homeownership (up to 80 percent in Tunisia, and over 90 percent in Libya) and negative

**Table 2 – First Fifty International Real Estate Investments (i)**

	REAL ESTATE COMPANIES	NATIONAL, REGIONAL & GLOBAL	STOCK EXCHANGE MARKET CODE	AUM (Billion US\$)	MARKET CAP (Billion US\$)
	Aberdeen Asset Management	Europe & Americas	ADN: LN London	402.00	6.00
	Alpha Investment Partners	Australia, Hong Kong, Japan, Singapore, South Korea & Taiwan	KPELY: US New York	26.00	6.90
	Ampcorp Properties Berhad	London, Madrid, Tokyo & Malaysia	APRO: MK Kuala Lumpur	0.29	0.12
	AMP Capital	Australia, Europe & Asia	AMP: AU Sydney	120.00	10.20
	Ares Real Estate Advisers (Bargains' subsidiary)	North America, Luxembourg, London & Paris	ACRE: NYSE New York	10.40	0.37
	Aviva Investors	Australia, Europe, Singapore & Taiwan	AVI: LN London	390.00	22.50
	AXA Real Estate	Asia, Europe, Middle East & Canada	AXA SA CF: SP Paris	66.00	58.90
	BlackRock	Asia, Latin America, Europe & North America	BLK: US New York	222.00	61.30
	Blackstone Group L.P.	Asia, Europe, Latin America & North America	NYSE: BX New York	102.00	28.00
	Brookfield Asset Management	Australia, China, Brazil, Europe, North-America & India	BAMF: US New York	250.00	33.90
	CBRE Global Investors	Americas, Asia & Europe	CBG: US New York	87.90	9.10
	Charter Hall Group	Australia & Europe	CHC: AU Sydney	18.00	1.40
	Columbia Property Trust Inc.	U.S.	CXP: US New York	5.00	2.50
	Conciviles	El Salvador, Peru and Venezuela	BVC Bogota	\$8.00	0.31
	Credit Suisse Hedging-Griffo	Africa, Americas, Asia Pacific, Europe & Middle East	CS: US New York	1.214.00	29.00
	Deka Immobilien Investment/Westinvest	Global	DEKEDST:GR Frankfurt	4.70	0.03
	Deutsche Asset & Wealth Management	Germany, Europe & International Market	Deutsche AWM: GR Frankfurt	53.60	21.70
	Dexus Property Group	Australia, Canada & Europe	DXS: AU Sydney	84.00	6.30
	Global Logistic Properties	China, Brazil, Japan & United States	GLP: SP Singapore	39.00	6.80
	Goldman Sachs Group Inc.	Africa, Americas, Asia, Europe & Australia.	GS: New York	1.290.00	73.00
	Hines	Australia, Brazil, China, Europe, India, South Korea & North-America, Australia	OTC: HIRT New York	93.20	1.29
	Investa Property Group	Australia	IOF: AU Sydney	8.90	1.80
	J.P. Morgan Chase & Co	Buenos Aires, São Paulo, Canada & U.S.	JPM: US New York	2.400.00	242.00
	Japan Real Estate Investments Corporation	Japanese Cities	8952:JP Tokyo	8.60	7.04
	Jones Lang LaSalle Inc.	Asia, Australia, Europe & North America	JLL:US New York	59.70	4.20
	Legal & General Property	Asia, Europe and North-America	LGEN London	957.70	16.00
	Lend Lease	Australia & Europe	LLC:AU Sydney	16.59	5.80
	Lone Star Funds	Asia, North America & Western Europe	STAR:US New York	65.00	0.80
	M&G Real Estate	Asia, Australia & Europe	MGHI London	34.00	0.86
	Mertin Properties SOCIMI S.A.	Portugal & Spain	MRL: SM Madrid	10.40	4.60
	Metric Investment Advisors	Africa, Americas, Asia, Europe & Middle East	NYSE: MET New York	510.00	56.00
	Mirae Asset	China, Hong Kong, Korea, India, Taiwan, Vietnam, UK & U.S.	Global KRX Busan & Seoul	100.00	2.00
	Mitsubishi Estate	China, Japan, Singapore, UK & U.S.	TKS (8602) Tokyo	45.00	27.00
	Morgan Stanley	Asia, Europe & U.S.	MS: US New York	83.50	72.00
	Oak Tree Management	Asia, Europe & North America	OAK: US New York	100.00	6.20
	PGIM Real Estate Investors	Americas, Asia Pacific & Europe	PRU: US New York	66.50	42.00

**Table 2 – First Fifty International Real Estate Investments (ii)**

Principal Real Estate Investors	Australia, Asia, Europe & United States	PIREX: US Nasdaq	50	14.10
Prologis	Americas, Asia & Europe	PLD: US New York	31.3	25.00
QIC	Australia & North America	QIC: AU Sydney	58	0.03
Real Estate Investment Trust/ NAREIT	North America	REIT Ciudad de México	1,099	743.00
Rockcastle Global Real Estate Company Limited	Australia, Canada, France, Hong Kong, Johannesburg, Netherlands, New Zealand, UROC: SI Johannesburg/ROCK.N0000 Port Luis	SARE: N0101 Port Luis	1.1	2.30
Sanlam Africa Core Real Estate Investments Limited	Accra, Dar es Salaam & Lagos	STD Life London	0,983	0.01
Standard Life Investments	Asia, Australia, Europe & United States	STWD: US New York	19.5	8.76
Starwood Property Trust	Europe & United States	TREX: US Nasdaq New York	10.3	5.10
TH Real Estate	Asia Pacific, Europe & United States	GPT: AU Sydney	97	20.21
The GPT Group	Australia & Europe	TCN: CN Toronto	14	9.70
Tricon Capital Group	North America	UBS: US New York	3.1	0.74
UBS Global Asset Management	Australia, Asia, Europe & United States	NYSF: UDR New York	670	60.40
UDR, Inc.	U.S.	EPR: US New York	7.6	9.21
Westbrook Partners	London, Munich, Paris, Tokyo and United States		50	4.20

**Table 3 – Indexes for Assets Under Management and Market Capitalisation<sup>81</sup>**

Stock Exchange Code	Pondering AUM Index	Assets Under Management (Billion US\$)	Pondering MARKET CAP Index	Market Capitalisation (Billion US\$)
APRO: MK Kuala Lumpur	1	0,292	1	0,120
SARE.N0101 Port Luis	1	0,983	1	0,010
8952:JP Tokyo	2	8,600	3	7,040
DEKEDST:GR Frankfurt	2	4,700	1	0,030
IOF: AU Sydney	2	8,900	2	1,800
ROC: SJ Johannesburg/ROCK.N0000 Port Luis	2	1,100	2	2,300
ACRE: NYSE New York	3	10,400	1	0,372
AXA SA CF:SP Paris	3	66,000	4	58,900
BVC Bogotá	3	58,000	1	0,308
CBG: US New York	3	87,900	3	9,100
CHC: AU Sydney	3	18,000	2	1,400
Deutsche AWM: GR Frankfurt	3	53,600	3	21,700
DXS: AU Sydney	3	84,000	3	6,300
EPR: US New York	3	50,000	2	4,200
Global KRX Busan & Seoul	3	100,000	2	2,000
GLP: SP Singapore	3	39,000	3	6,800
GPT: AU Sydney	3	14,000	3	9,700
JLL:US New York	3	59,700	2	4,200
KPELY: US New York	3	26,000	3	6,900
LLC:AU Sydney	3	16,590	3	5,800
MGHI London	3	34,000	2	0,860
MRL: SM Madrid	3	10,400	2	4,600
MS: US New York	3	83,500	4	72,000
OAK: US New York	3	100,000	3	6,200
OTC: HIRT New York	3	93,200	2	1,290
PIREX: US Nasdaq	3	50,000	3	14,100
PLD: US New York	3	31,300	3	25,000
PRU: US New York	3	66,500	4	42,000
QIC: AU Sydney	3	58,000	1	0,028
STAR:US New York	3	65,000	2	0,797
STD Life London	3	19,500	3	8,760
STWD: US New York	3	10,300	3	5,100
TIREX: US Nasdaq New York	3	97,000	3	20,210
TKS (8802) Tokyo	3	45,000	4	27,000
ADN: LN London	4	402,000	3	6,000
AMP: AU Sydney	4	120,000	3	10,200
AV/: LN London	4	390,000	3	22,500

<sup>81</sup> The historical series selected covers the 2016 data stated by the fifty firms on their webpages.

BAM:US New York	4	250,000	4	33,900
BLK: US New York	4	222,000	4	61,300
LGEN London	4	957,700	3	16,000
NYSE: BX New York	4	102,000	4	28,000
NYSE: MET New York	4	510,000	4	56,000
UBS: US New York	4	670,000	4	60,400
CS: US New York	5	1214,000	4	29,000
GS: New York	5	1290,000	4	73,000
JPM: US New York	5	2400,000	5	242,000
REIT Ciudad de México	5	1099,000	5	743,000

Source: MIGLIARI, W. Figures collected from official webpages of the real estate firms listed.

slum growth, affordability is a major problem across North Africa, particularly for low and middle income households. Housing prices are rising in all North African countries. As a result, housing is becoming difficult to afford due to steady demand and undersupply which caused a housing shortage”.<sup>82</sup> Therefore, in order to make easier the reading of the Table 2, the Table 3 systematises a numerical classification respecting proportionality with more accurate correlations among numbers. Another aspect seen in Table 3 to be considered is the market capitalisation as a risky activity based upon the logic of herding. It means the firms aforementioned usually lead the confidence of the real estate market. If the biggest investors decide to move to a certain market, the smallest ones will do the same even not being completely aware of the local reality. Other behaviour is tail risks and derivatives as they occurred in 2008 housing crisis which means the remuneration of the capital is apparently shielded by endless securities not backed by real economy through the transference of investments to construction markets. In addition, the gap between the assets under management and market capitalisation in the portfolio of these fifty firms corroborates the multiplication of intermediary undertakings putting at risk the capital factor from wealthy countries. Investors assume debts with higher rewards compared to what national economies can pay,

<sup>82</sup> See *Housing Finance in Africa. A review of some of Africa's Housing Financial Market* [on-line]. Yearbook South Africa 2016 [Accessed on 29 December 2016]. Retrieved from <<http://www.housingfinanceafrica.org/>>. Read also the document published by the *United Nations. United Nations Settlements Programme, 2011* [on-line]. Affordable land and housing in Africa, United Nations Settlements Programme, United Nations Habitat, vol. 3, 2011 [Accessed on 29 December 2016]. Retrieved from <[http://www.iut.nu/Literature/UnHabitat/Asia\\_AffordableHousing\\_2011.pdf](http://www.iut.nu/Literature/UnHabitat/Asia_AffordableHousing_2011.pdf)>.

which must be observed with the help of basic interest rates, instead of choosing future gains close to national remuneration of the capital for foreign investments.<sup>83</sup> Housing and real estate bubbles have their origins in a mirage of inflated prices. However, while the national savings are consumed, the level of indebtedness increases exponentially for individuals and families. When that vicious circle consumes the capital saved, more credit is demanded to satisfy the payment of the contracts. The process is interrupted when the consumers of mortgages and capital reach the borderline of not spending more than they earn. As a consequence, real estate firms feel the demand for new products stabilising till the moment it is in fact falling as an effect of the high level of debts. The construction markets starts shrinking since empty housing units are prepared for new consumers, but not sold out in the same velocity of the money as before.

**Table 4 – Pondering the data**

AUM INDEX (Billion US\$)		MARKET CAP INDEX (Billion US\$)	
Zero to 1	1	Zero to 0,5	1'
1 to 10	2	0,5 to 5	2'
10 to 100	3	5 to 25	3'
100 to 1000	4	25 to 125	4'
More than 1000	5	More than 125	5'

Source: MIGLIARI, W. Figures collected from official webpages of the real estate firms listed.

One of the columns in the Table 4 represents the Assets Under Management Index (AUM INDEX) varying from zero to more than 1,000 billion US\$. The other one is a Market Capitalisation Index (MARKET CAP INDEX) showing the equity of each company represented in the list. The number of shares multiplied by the price of each unit available at the stock exchange market stands for market capitalisation or simply market cap. At first, we tried to check the correlation between the two indexes to check if the increase of private funds under management is proportional to the price and quantities of shares in stock exchange markets. Secondly, tried to see if we could establish any correlation between the indexes with pondered numbers to describe the average level of attraction of the two columns, i.e, the relation between assets under

<sup>83</sup> Rajan, R. G. (2005). Has financial development made the world riskier?. *National Bureau of Economic Research*, 1(11728), 1-45. For the author, it is probable a chain of global assets was created through an enormous pyramid of debts without any intermediation of financial institutions in charge of controlling the nominal creation of capital. See the *Iceland v. Kaupthing*, 498 Icelandic Supreme Court 1-224 (2015).

management and equity of the firms visible in stock exchange markets without the chaotic scenario of numerical magnitudes. There are also other correlations with absolute non-pondered figures and the indexes. The Table 5 is the results of the Table 3 correlations having in mind the numbers were pondered as it is shown in Table 4.

**Table 5 – Correlation between data and indexes**

	AUM INDEX	AUM (Billion US\$)	MARKET CAP INDEX	MARKET CAP (Billion US\$)
AUM INDEX	1			
AUM (Billion US\$)	0,726122727	1		
MARKET CAP INDEX	0,707877862	0,555621023	1	
MARKET CAP (Billion US\$)	0,467205305	0,535010738	0,497274237	1

Source: MIGLIARI, W. Figures collected from official webpages of the real estate firms listed.

Along with our case study, we checked how the statistical correlation between the AUM and MARKET CAP behaves. The result is a  $corr(X, Y) = 0,53$  showing that for each digit in the AUM there is half in average for the MARKET CAP of the fifty global firms. For the AUM and MARKET CAP INDEX, the result follows the same pattern of a moderate output with a  $corr(X, Y) = 0,55$ . So, the attraction between pondered and non-pondered numbers confirms the same moderate commonplace as well. For these two correlations, the firms value half of the price they are approximately floating in stock exchange markets compared to the assets they manage. Their degrees of equity vary according to how many regions the funds operate, but the average they usually owe to their clients is approximately the double to what they have in their pockets. For the Market Capitalisation related to the AUM INDEX, there is a  $corr(X, Y) = 0,46$ . The debt of the firms managing the assets, in that case, is slightly below the average. Nevertheless, when we treat the numbers pondering them in the columns of AUM INDEX and MARKET CAP INDEX, there is a significant a  $corr(X, Y) = 0,70$  as seen in Table 6. In other words, when we transform the capital into regions respecting the market capitalisation and assets under management, the correlation is strongy or riskier.<sup>84</sup> At this point, due to the huge volume of investments crossing the national borders, it is almost impenetrable the access to the real estate

<sup>84</sup> Between the Assets Under Management and AUM INDEX there is a  $corr(X, Y) = 0,72$ ; Market Capitalisation and MARKET CAP INDEX,  $corr(X, Y) = 0,49$ . The results are not relevant to show the level of correlation between two different variables, but they only refer to the attraction of non-pondered and pondered numbers of the same variable.

market numbers in order to distinguish the nature of what is private and what is the public from tax-payers. A very significant result evolving the two indexes that confirms the hypothesis of assets growing in opposite direction to the value of the real estate companies.<sup>85</sup> The idea of the correlation of the two indexes is to offer a correction for the numbers varying in the funds of the global firms and also the unpredicted behaviour of them in stock exchange markets. When we translate the mass of absolute numbers into foreign direct investments linked to different regions of the planet, we set a methodology in which the variation of the assets, funds and global capital factors cannot affect the long-term profile of the real estate contracts. The quantity of investments may vary, but the real properties are expected to stay.<sup>86</sup>

**Table 6 - The  $corr(X, Y)$  for the indexes created**

	AUM INDEX	MARKET CAP INDEX
AUM INDEX	1	
MARKET CAP INDEX	0,707877862	1

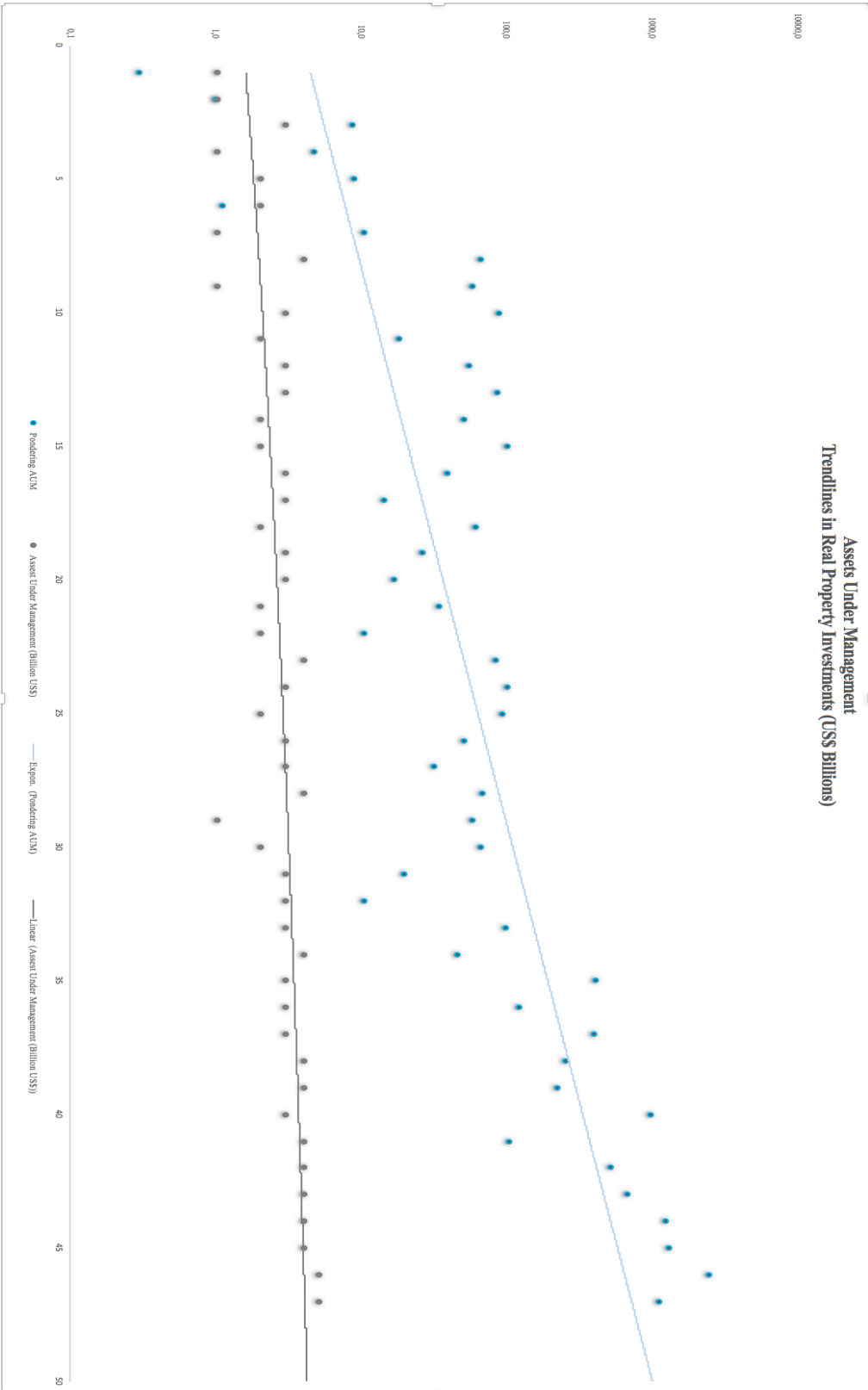
Back to the Table 3 listing the real estate companies, we find an eloquent example of how modern economies in property system are more and more guided by transnational capitals. The assets under management (AUM) these companies have exclusively under their control are usually captured from different origins and welcome in countries poor in capital factor. So, exorbitant quantities of money are stocked by these companies in order to put in practice urban policies of infrastructure, commercial areas and also residential projects where the returns on property investments are profitable. Other aspect to be considered is the market capitalisation variable, that is to say, the value of the company represented by the number of shares multiplied by the price of each unit in stock exchange markets. Along the table we created, we can see if the capital is implemented nationally, in different regions of a single continent or more regions in different continents.

<sup>85</sup> Assets are the same of borrowed money or debts that real estate firms have. The capital comes from families and individuals with the promise of being returned with an interest rate guaranteed by contract.

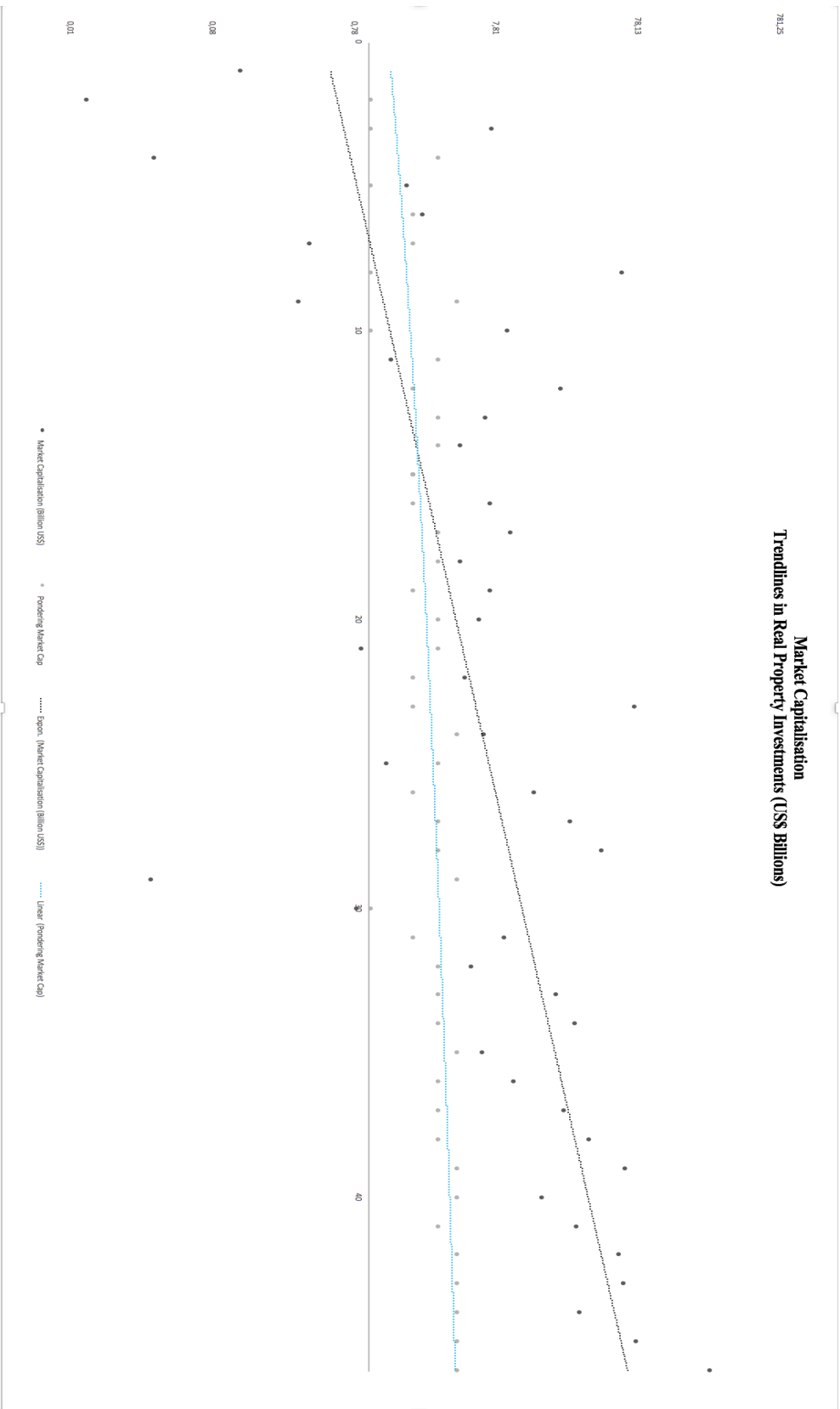
<sup>86</sup> The Asian economic crisis in 1997 affecting foreign investments in the region had its roots in the level of interest rates paid in American dollar or Japanese yen combined with the quality of the contract in which the firms were not obliged to stay in the Asian economies for a long term period. See Eichengreen, B. (2001). Do câmbio flutuante à unificação monetária. In *A globalização do capital: uma história do sistema monetário internacional* (pp. 183-247). São Paulo: Editora 34.



Chart 13



**Chart 14**



The data treatment was thought to avoid the influence of numbers in their absolute dimensions and to proportionate a clear view on whether there were linear correlations in the figures collected in our sample.

For those companies managing capital in different continents, we tried to eliminate mutual funds to avoid counting twice the same data, however, it is difficult to assure the sources from one company will not be re-invested in different firms.<sup>87</sup> With these data, we have shown how the global finances around real estate investments confirm a new *socioeconomic complexity* based upon what we call the *poor demography*. The real property system drains the capital savings as a pre-condition to the access of mortgages and credits for bank housing products creating indebtedness. The *rapporteuse* of United Nations on adequate housing Raquel Rolnik (2008-2014) has denounced that global phenomenon as the financialisation of the right to housing.

Yet the meaning of what would be globalisation may differ among theoretical approaches, there is relative consensus international investments have been more ubiquitous.<sup>88</sup> Although real estate firms have played a central role in urban development, they use the legal apparatus around the property system to benefit their interests. In her book *Guerras dos lugares*, Rolnik avers also that urban lands and the right to have a dignified place to live were both colonised by capital foreign forces of highly speculative real estate firms. Government public debt and mortgage systems through the enormous costs to remunerate the global real estate capital have been constant since the 1990s. For her, private property started being the consumerist paradigm for the poor labourers in capitalist countries and a new model in ex-socialist republics for short-term economic policies evolving banks or other institutions. However, since the 2008 economic crisis, real properties have been concentrated in the hands of few investors. It is in fact a long-term loan in which the borrowers will not honour since the level of employment tend to be depressed by the *socioeconomic complexity* we have exposed. To make matters worse, the Raquel Rolnik calls the

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<sup>87</sup> We will come after making some comments on the notion of tail risks, herding and derivatives in 2008 housing crisis are suggested by Raghuram G. Rajam as one of the causes we translate here as credit interruption. Read *Has financial development made the world riskier?*. For the author, it is probable a chain of global assets was created through an enormous pyramid of debts without any intermediation of financial institutions in charge of controlling the nominal creation of capital.

<sup>88</sup> Rodrik, D. (2011). La gobernanza de la globalización económica. In *Una economía, muchas recetas: la globalización, las instituciones y el crecimiento económico* (pp. 279-304). Ciudad de México: Fondo de Cultura Económica. Read also Keohane, R. O., & Nye, J. S. (1987). Power and interdependence. *International Organization*, 41(4), 725-753.

attention to the reduction or even still not continuous governmental projects devoted to social housing plans of construction as it happens in Spain and Brazil.

Banks, real estate investors and urban constructors have dominated the market of urban land development imposing monetary restrictions to housing access.<sup>89</sup> When we take into consideration such premisses on the financialisation of real estate national investments, we confirm some trends varying together. We elaborated the Charts 13 and 14 based upon the Tables 2 and 3 to test the dispersion of the data for both assets under management and market capitalisation, but observing how the trend lines behave. In the Charts 13 and 14, either presenting exponential or linear trends, including absolute and pondered numbers, it is notable a positive function forming two trend lines that point out the increase of speculation in global real estate markets. As Raghuram G. Rajan tried to make clearer in his paper *Has financial development made the world riskier?*, which was published in 2005, global finances had already become risky institutions. At that time, he was alerting international investors on two issues.<sup>90</sup> The first one is called “tail risks” which can be simply translated from the jargon as “hiding the risks”. Transnational capital is not easy to be tracked.

The other one is known as the “herd behaviour” and it is a massive movement of investors following the steps of wealthy investment firms. Mainly it happens, because “herding provides insurance the manager will not under perform his peers” at the same time that “behavior can move asset prices away from fundamentals”.<sup>91</sup> Therefore, free international capital movement, as it is supposed to be, leaves those countries intensive in capital-factor heading to the ones that are intensive in labour-factor. As an orthodox method to balance the fiscal condition of governments, restrictive monetary policies with higher interest rates supports the ambition of international investors, in our case,

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<sup>89</sup> Rolnik, R. (2016). Financeirização global da moradia. In *Guerra dos lugares: a colonização da terra e a moradia na era das finanças* (pp. 19-140). São Paulo: Boitempo. See also *United Nations. United Nations Human Settlements Programme* [on-line]. Financing Urban Shelter: Global Report on Human Settlements, Nairóbi, UN-Habitat, 2005 [Accessed on 12 January 2017]. Retrieved from <https://unhabitat.org/books/financing-urban-shelter-abridged-edition/>

Some authors have denounced the process of financialisation of the right to property many years before 2008 crisis. See Marcuse, P. (1979). The deceptive consensus on redlining: definitions do matter. *Journal of the American Planning Association*, 45(4), 549-558; Aalbers, M. B. (2008). The financialization of home and the mortgage market crisis. *Competition & Change*, 12(2), 148–166.

<sup>90</sup> Rajan, R. G. (2005a). Has financial development made the world riskier?. *National Bureau of Economic Research*, 1(11728), 1-45.

<sup>91</sup> Rajan, R. G. (2005b). Has financial development made the world riskier?. *National Bureau of Economic Research*, 1(11728), 3.

real estate property speculators, for a certain period. Poorer nations believe the level of satisfaction for investment returns, which was exposed by John Maynard Keynes in the 1930s as the marginal efficiency, can compensate the risk for the “international herds”. However, the need of the *socioeconomic complexity* to attack social rights in order to put in practice its speculative growth seen in the property index price produces the *poor demography* in cities. So, the expansion of interest rates paid by national economies to allure investments set a long-term system of real gains in which property system is part of a sort of income transfer, however, from the poor or taxpayers to the richest.<sup>92</sup> The effects of such logic are perverse once the wealth originated in the production is drained by speculation with high concentration of income among individuals. Such conflict between the general and private interest causes disruption in legal, social and economic bonds.

## **2.2. Global economic crisis and the production of an absolute right to property**

Yet it may look an awkward heterodox study for a traditional liberal orthodox institution, the International Monetary Fund has recently published a paper showing the correlation between taxes on property and the volatility of its prices.<sup>93</sup> As it is well-known the variation of real estate values has been enormously unexplained by the supply-demand theories mainly in those countries with an excess of empty housing units as we pointed out before. The study made public by the institution reveals in United States prices were not stabilised after 2008 crisis. One of the reasons has to do with the public government action in bailing out the banks affected by the housing bubble. Other one is the fact the U.S. Treasury has elevated considerably the interest rates paid for public indebtedness.<sup>94</sup> Although these two actions favoured investments already in the country helping the economic recovery and left a positive message to real

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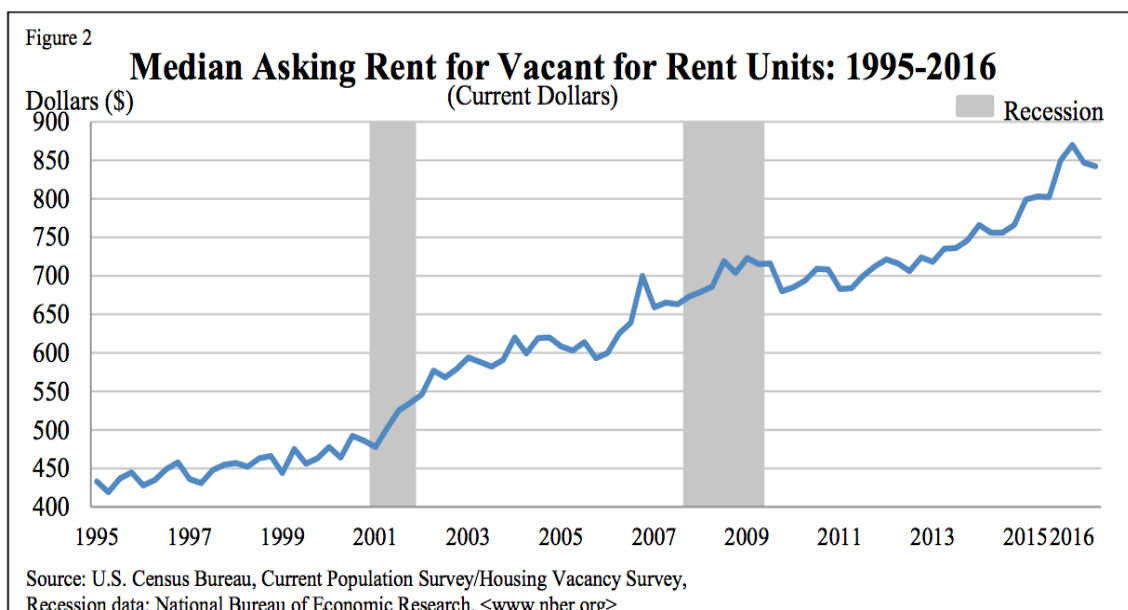
<sup>92</sup> See Chapter Six, *Capital in the Twenty-First Century*, by Thomas Piketty. The section “The Return on Capital in the Early Twenty-First Century” is intimately connected to the notion of high speculative and riskier on real estate investments.

<sup>93</sup> Poghosyan, T. (2016). Can property taxes reduce house price volatility? Evidence from U.S. Regions. *IMF Working Paper*, 16(216), 1-26. About macroprudential policies in European Union, see Hartmann, Philipp (2015). Real estate markets and macroprudential policies in Europe. *European Central Bank, Working Paper Series*, 1(1796), 1-14.

<sup>94</sup> See the document elaborated by the *U.S. Department of the Treasury. Resource Center* [on-line]. Data and charts center [Accessed on 6 January 2016]. Retrieved from <<https://www.treasury.gov/resource-center/data-chart-center/Pages/index.aspx>>.

estate investors, prices did not go down neither for rents nor for sales. Vacancy rates have been reduced since 2010, but not in a proportional fashion with 6.8% of empty houses over the total units available for rent and 1.8% over the total for sale. The Charts 15 and 16 reiterate the *socioeconomic complexity* we have described before related to the false microeconomic correlation stating prices tend to decrease if interest rates increase in a long-term period.<sup>95</sup>

**Chart 15. United States Housing Prices for Rents**



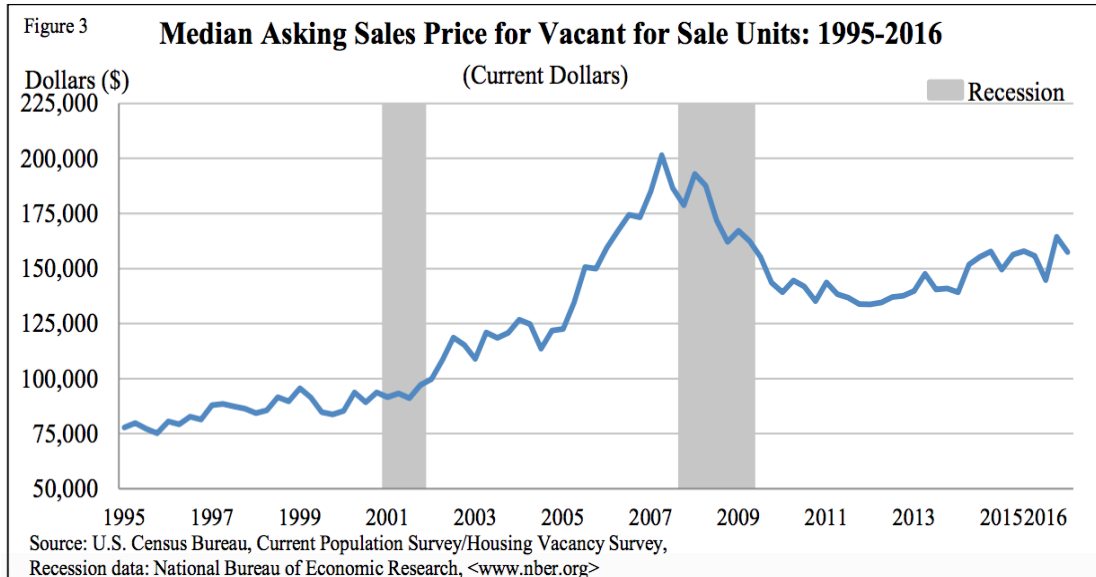
The inflation has been reduced since 2008, but the level of prices in the housing market following the opposite direction. In 2010, the U.S. rate of unemployment was 9.8% and since then it has fallen to 4.6% in 2016 as seen in Chart 17.<sup>96</sup> As a consequence of the more people employed, the elevation of prices responds to the expansion of the aggregate demand. However, it is the level of rents that varies exponentially since the 2008 crisis affecting the *poor demography* not in conditions to buy a property. The housing prices for sale fell till 2011, but constantly migrating from the levels of 2005 to the ones in 2007. With reference to the taxes outside U.S. on real

<sup>95</sup> See *United States Census Bureau. US Department of Commerce, Economics and Administration* [online]. Quarterly residential vacancies and homeownership, fourth quarter 2016 [Accessed on 2 February 2017]. Retrieved from <<https://www.census.gov/housing/hvs/files/currenthvspress.pdf>>.

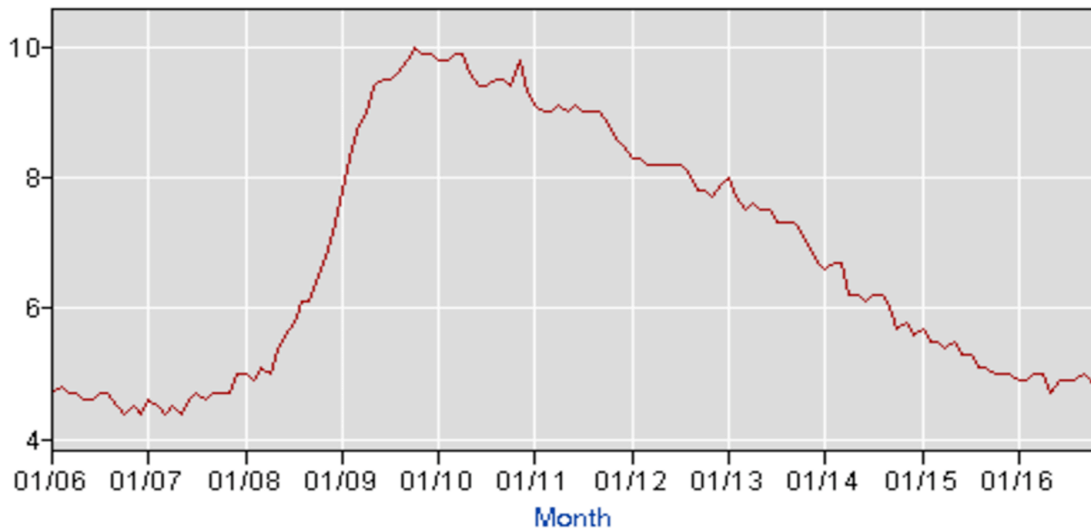
<sup>96</sup> More statistics elaborated by the *United States Department Labour. Bureau of Labor Statistics* [online]. Labor force statistics from the current population survey [Accessed on 2 February 2017]. Retrieved from <<https://data.bls.gov/timeseries/LNS14000000>>.

property, Brazil and Spain still protect the freedom of investments without any burden. In that case, if we consider the foreign direct investment as a “commodity”, the paradox of Metzler does appear.

**Chart 16. United States Housing Prices for Sale**



**Chart 17. United States Unemployment Rates (2006-2016)**



Source: *Bureau of Labor Statistics* [on-line]. Labor Force Statistics from the Current Population Survey [Accessed on 15 March 2017]. Retrieved from <<https://data.bls.gov/timeseries/LNS14000000>>.

The idea of Metzler was that in the model of Heckscher-Ohlin the predictable elevation of taxes on imported goods tend to diminish the internal prices of foreign

goods in a long-term period since the exporter can offer inelastically a certain product, in that case, the increase of the supply in capital factor with minor alterations in the price of the assets. That supposition relies on certain conditions for our experiment. The first one has to do with the quantity of empty housing units since in Brazil and Spain there have been many vacant houses still having their prices going up. The other one is connected to the application of taxes on the condition that individuals and families are looking for residence not paying for any tax except the ones already existent.<sup>97</sup> In other words, if the prices stabilise or even do not follow the ascending trends in rents it is mainly because the demand is represented by impoverished citizens from countries poor in capital factor living in urban areas. When the economies of the countries poor in real estate assets recover, the expansion of the aggregate demand with higher salaries compensate the short-run loss of investors. So, if governments impose taxes on foreign direct investments or neutralise their effects using the devaluation of exchange rates, the assets from richer nations will be offered anyway since the immediate costs are overcome by the remuneration of other markets such as public debt system or level of interests in mortgages. The ownership of real estate firms for non-residential purposes is the criterion to separate the wheat from the chaff to avoid unfair costs for individuals and families buying a property to live.

Along the present chapter, we made an effort to explain why the right to property has an economic aspect and what sort of dimension is directly implicated in that reinvention of a law system along the last decades. The Table 1 shows how the number of vacant houses may vary from country to country, but the increase of non-occupied houses in Brazil and Spain, for example, did not mean a fall in the level of prices in real estate market. The Figures 1 and 2 helped us to make evident the flaws of supply-demand theory explaining how the housing price indexes are still rising in periods when inflation rates are going down. Moreover, the neoliberal ideas advocating in favour of high interest rates to diminish the credit for mortgages is not confirmed in Spain and Brazil. In a long run, both have experienced movements of recession, the Spanish much before than the Brazilian economy, but the real estate firms are still taking advantages of the urban model of development combining the *socioeconomic*

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<sup>97</sup> In Brazil, proprietors usually pay an annual tax called IPTU (Imposto Predial Territorial Urbano) which is collected by the municipality. In Spain, it is called IBI (Impuesto sobre Bienes Inmuebles). The other taxes are related to the purchase of the property in both countries.



*complexity* with the *poor demography*. Therefore, the public debt interests paid by governments posed here as a “capital commodity” and the level of employment influencing the rents through the aggregate demand have more to do with the property system than the general level of prices. The Tables 2 and 3 express the magnitude of the foreign investments in global real estate markets and how they have been more and more ubiquitous.

A series of tables showed how strong have been the correlations in property system between assets under managements and market capitalisation. Such allurements indicate that the more the money from countries where capital-factor is intensive the less the property equity the same firms can guarantee in their real budgets. In other words, the first fifty enterprises in global property market have accumulated relatively few capital in real properties compared to the investments they manage. That gap between capital under management and the market share values is presented as a global trend line yet opaque. Such phenomenon means these firms have much less in their purses when selling their ownership built up in stock exchange markets to shield the risky assets operating in global property markets, but not making clear how that system is trustable. Other notion we tried to bring out is that such scission represents the fissure between the real economy in the use of the right to property and what usually has happened or defined as the speculation of non-resident real estate firms. We may add that such distance evolving residence and investment makes vulnerable other rights like a dignified place to live and the affordability of property possession through rents transforming the compression of the salaries into precarious jobs. Such process we denominated the *socioeconomic complexity*, which is global, combined with the growth of an impoverished working class or the *poor demography*.

We tried to pose along the present chapter how imperfect the real estate market is globally. Distorted supply-demand equations caused by an undersupply of houses for those *strata* who need a dignified house, inflated prices and a national market unable to compete with real estate international funds are some of the characteristics we have seen in the urban developers aforementioned. The following chapter is a historical debate on the evolution of the right to property concept and legal enforcement based upon private contracts without any connection with the social realm. Moreover, we present that the idea of property and profitability is relatively recent in *dominium*. In ancient Rome, the

agreements between citizens were only possible as part of a custom in which individual possession was exercised inside the city limits. The legislative power or the *auctoritas* could not dictate by majority or consensual norms restricting, reducing or banishing private rights. When Tiberius Sempronius Gracchus (B.C. 164-133) evoked the *Licinian Rogations* to distribute lands from its public powers an immense chaos was generated in the Rome. It is important to say that the *ius civile* also meant the limits for the Roman jurisdiction contrasting with the space beyond the frontiers in which violence could be used to conquer territories and result in private rights by force. Such contextualisation serves to make evident the economic element was not over the family or the constitution of power for proprietors. In Iberian tradition, we present how medieval and modern practices of the Civil Law or the right to conquer were mainly important to guide the right of landlords in their *dominia*. The concept of emotional right, which is extracted from the 1603 Philippine Order, is an interesting legal premiss predicted in modern codes as an ample application of the Roman law for civil, penal and administrative matters inside the limits of the property. It is a perfect example of non-limited use of property, but a very well-defined “individual jurisdiction”. Then Marsilius of Padua with his ideas of popular sovereignty through a legislative debate for the *universitas civium* suggesting a legitimate land usufruct in the XIII-XIV centuries as a correct theological interpretation to reconnect men to the nature creation. We also revisit Francisco de Vitoria’s defense on the new territories in America and Pedro Fernández de Navarrete as a modern mentor of law in Iberia Peninsula in order to make clear the expansionist imperial domination overseas for the Spanish property tradition between the XV and the XVII centuries. In addition, the second chapter comprises with the dimension of property tradition and its meanings while the first one indicated the economic aspects as a much more contemporaneous phenomenon devoted to speculation. The third chapter evokes the debate around property and how the right to property is divided into categories in which we find its social function. The possibility of limiting juridically its possession, sub-use, usufruct or even the accumulation of that right has been one of the key demands of social movements. The fourth and fifth chapters, respectively, the legal constitutional interpretation on the conflicts evolving the right to property and the affirmation of right to housing as a compatible juridical prerogative to persecute social

equality. The passage from the former to the latter may perform one of the prerequisites for the construction of the right to the city.



CHAPTER II. FROM CIVIL LAW TRADITIONS TO AN ABSOLUTE EMOTIONAL PROPERTY RIGHT



## 1. The supremacy of private contracts on land as an object of conquest

The concept of property has been immensely described as a constant unstable concept.<sup>98</sup> The limits for private contracts we selected for the thesis are the *dominium*, *possessio*, *concessio*, land occupation and territorial jurisdiction as some of the entries that do not express exactly the sense of ownership we use nowadays.<sup>99</sup> It is through the historical analysis on the tradition of contracts related to the usufruct or use of property that we bring about variations in ownership definition, the applicable law based upon politics and how the absolute dimension of property appeared in the figure of landlords in modern normative frameworks.<sup>100</sup> That sort of notion on the hues of the property juridical abstraction provides for the enlargement of our mental capacity in elaborating adequate judgments on legal definitions with social parameters. The Roman Civil law regulating sedentary forms of life with the help of a sophisticated system of rules between individuals is our starting point. In that social organisation, private ownership would be the result of military conquest and coalesce into a community of citizens. *Dominium*, *possessio* and usufruct were, for example, not exclusively economic, but mainly part of a political and juridical criteria for opulence as a social distinction as

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<sup>98</sup> MacPherson, C. B. (1978). The meaning of property. In *Property: mainstreams and critical positions* (p. 9) Toronto: Blackwell. It is observed by the author: "It [the private property] was attacked by Plato as incompatible with the good life for the ruling class; defended by Aristotle as essential use of resources; denigrated by earliest Christianity; defended by St. Augustine as a punishment and partial remedy for the original sin; attacked by some heretical movements in medieval (and Reformation) Europe; justified by St. Thomas Aquinas as in accordance with natural law, and by later medieval and Reformation writers by doctrine of stewardship".

<sup>99</sup> "In this latter historic sense, *dominium* would be helpful to our understanding of the foundations of eminent domain if ownership of all things rested originally with the state. But that was not how it was viewed by the Romans. *Dominium* existed as a reality of social life. It was in the nature of things — an aspect of the law of nature. Those who controlled land or other resources had dominion over them. The illogic of the distinction between *dominium* and *iura* (rights) was that *dominium* remained with the *domini* (owner) while control passed to others as rights of use were conveyed or otherwise created. As a matter of history it is useful to have a beginning point of ownership, *dominium*, from which other rights in property have arisen, but it is not a beginning from which the concept of eminent domain readily arises". See Huffman, J. L. (2013). Eminent domain. In *Private property and the constitution* (p. 48). New York: Palgrave. It is read that: "Dominium may be roughly translated as ownership. But if we conceive ownership as the *ius utendi, fruendi, abutendi*, it is obvious that it is only a very rough translation. For we have just seen cases in which the *dominus* has hardly any real interest in the property, e.g. where a *dominus* has transferred a *res Mancipi* by *traditio*, creating, a bonitary ownership. He does retain some rights in some forms of property but they are very little, and there may be in some circumstances a possibility of reverter. We can think of it as a dry legal estate'. But it is on the whole more akin to a feudal *seignory*. The bonitary owner in fact 'holds of the *dominus*' and Italian Romanists habitually translate *dominium* by the word *signori*". See Buchand, W. W. & McNair, A. D. (1952). Law of property. In *Roman Law and Common Law* (p. 65). Cambridge: Cambridge University Press.

<sup>100</sup> An anthropological view on these variations related to human nomadism and sedentariness is seen in Childe, V. G. (1950). The urban revolution. *The Town Planning Review*, 21(1), 3-17.

well. The concept of *concessio* in property that is found in both Roman and Anglo-Saxon traditions usually mutual agreement with relevant aspects of subsistence. In Common Law system, the levellers represented the history of possessing and using the lands in which the pecuniary aspect is not a primary issue to cultivate the common areas and the collective occupation was decisive for the making of their concept of jurisdiction.<sup>101</sup> As it happened in a posterior date, the medieval and modern territorial occupation was also established as a concession being ruled by customs of land use in contracts, that is to say, oral and written agreements either for vassalage relationships or emphyteusis. In 1636, a treaty written by P. F. Henrique de Villalobos defined the right to use lands for specified purposes of rents obeying the XVII century belief of *feudum est concessio*. The transmission of the property usufruct grew in sentiments if the land were given to vassals; in services guaranteed either with word or fear if the property were cultivated by peasants. In addition, property was also the limits for the jurisdiction establishment where the power of the landlord invaded the civil and penal competences to administrate his ownership.<sup>102</sup> The emotional right to property was the zenith of the personal relations producing the tradition of an absolute notion without internal limits for ownership that we are used to know nowadays. The following sections will help us understand the actual need for property limitation in its speculative type of usufruct and use as we saw in the previous chapter and, up to a certain extent, how ownership must reconnect to housing.

### 1.1. The concepts of dominium and possessio in the history of property

*On the Republic*, Marcus Tullius Cicero presents a dialogue between Laelius and Africanus about the conveniences and conflicts for the *res publica*.<sup>103</sup> It is important to

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<sup>101</sup> John Lilburne (1614-1657) was an English political leveller during the English Civil War (1642-1651) and wrote about property referring to the complexity of the concept: “Lilburne used the word ‘property’ in an extended sense, far broader than later formal eighteenth-century definitions or twentieth century everyday usage. This meaning can not be reduced to land, capital, or material objects even though it may involve them. Similarly, ‘selfproperty’ – the property one has in oneself – is not defined by labor that is self-employed”. See Levy, M. B. (1983). Freedom, property and the levellers: the Case of John Lilburne. *The Western Political Quarterly*, 36(1), 116-133. See also “The margin between tort [wrongful act with probability of injury resulting in compensation] and property may be very slight”. See Kiralfy, A. K. R. (1984). The division of English law. In *The English legal system* (p.14). London: Sweet & Maxwell.

<sup>102</sup> Villalobos, P. F. H. (1636). Tratado XXI de los alquileres y arrendamientos y del enfiteusis, y feudo. In *Suma teológica, moral y canónica* (pp. 419-420). 5a impresión. Barcelona: Sebastian de Gormellas.

<sup>103</sup> “So then, a republic is a “thing” of a people. A people, however, is not every assemblage of human



notice that the idea of thing can be translated into “concern” or “property” for Cicero, but in both cases it involves an agreement about rights and social classes. We call the attention to notion of contracts for *dominium* and *possessio* as a legal apparatus only among equals. It requires an interpretation of what exactly could be the object of private agreements, for example, farms, slaves and cattle; and the competences of the legislative power in expanding or not the rights of citizens for moveable and immovable things. As aforementioned, the economic realm is reduced to give room to the limits between the Civil Law in private contracts and public issues forging the equilibrium of the Roman politics.<sup>104</sup> In other words, for Cicero, property had nothing to do with those who cannot take part of a community made of citizens. It is land and properties for few in fact. In one of the dialogues *On the Republic*, Scipio asks Laelius if the *res* is more diligently governed by one individual or a collective. The latter agrees with the former saying the ruling command of a thing must be that one in which the union of the public interest to reduce the private influence on the republican issues.<sup>105</sup> So, the properties should be guaranteed among citizens by law since the “a bond of fellowship” and “equality under law” protected the existence of the republican ideal. The political and social cohesion depended dramatically on the level of equity in law and not wealth since

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beings herded together in whatever way, but an assemblage of a multitude united in agreement about right and in the sharing of advantage. The first cause of this assembling, however, is not so much weakness as a certain natural herding together, so to speak, of human beings. For this species is not solitary, nor does it wander alone, but it has been begotten so that not even with an abundance of all things”. About this excerpt, David Fott says in the footnote number 83: “Scipio is saying that a *res publica* is a *res populi*, literally, “[a] thing of [a] people.” Recall from the note on the text and the translation that *res* also means “concern” or “property.” This definition of a people seems to include any group with a unified view of justice and advantage, whether or not that view is praiseworthy. But later (*Rep.* 3.35–36) Scipio will narrow the scope of *res publica* to something honorific by defining a people as a group that pursues what is right (and common advantage)”. See Cicero, M. T. (2014a). Book I. In *On the republic* (p. 47). Translated by David Fott. New York: Cornell University Press.

<sup>104</sup> “But if peoples maintain their right, they deny that anything is superior, freer, happier, since they are masters of laws, courts of law, war, peace, treaties, and one another’s life and property”. Cicero, M. T. (2014a). Book I. In *On the republic* (p. 51). Translated by David Fott. New York: Cornell University Press. See also Merryman, J. H.; Pérez-Perdomo, R. (2007). Legal procedure. In *The Civil Law tradition: an introduction to the legal systems of Europe and Latin America* (p. 119). California: Stanford University Press. According to the author: “To prove a fact, a given number of witnesses was required. The testimony of nobles, clerics, and property owners prevailed over that the commoners, lay people, and those without property”.

<sup>105</sup> “SCIPPIO: Then it seems good to you for all parts of the mind to be under a kingdom, and for them to be ruled by judgment?/ LAELIUS: Yes, that seems good to me./ SCIPPIO: Then why do you doubt what you should feel about the republic? If the thing has been transferred to several persons, one may understand that there will be no ruling command, which cannot exist unless it is united”. Cicero, M. T. (2014a). Book I. In *On the republic* (p. 57). Translated by David Fott. New York: Cornell University Press.

Cicero believed there is a natural predisposition in any fellowship for material, intellectual and social differences: “For what is a city if not a fellowship in justice”.<sup>106</sup>

Although Cicero’s thoughts were seen among privileged citizens as a public defence in favour of private owners’ interests in land – moveable things and political status as well – , a rebellion rose against the Rome during Tiberius Sempronius Gracchus (B.C. 164-133). Gracchus evoked the Licinian Rogations establishing the limits on the interest rates for loans and targeting private ownership distributing the *possessio* in many *dominia*. He used the tribune of the plebeians and passed the law ignoring the Senate’s prerogative as a ruling class. It was clear for Gracchus the use of land was more difficult to legislate on than the ownership from conquest. Years later, Cicero re-inserted the debate of rights and private contracts among citizens based upon the Roman traditions as a legal tool to control the use of violence. *On the Republic*, Laelius says to Scipio what he thinks about redistribution of land or *res* for poor citizens in detriment of the allies and Romans. The preservation of customs through the concept of *dominium* was one of the keys to maintain the political stability of the republican institutions.<sup>107</sup> The rights of the ruling classes in questions of property should be the norm and the legitimate use of force a tool to keep it. Then, the notion of citizenship in Cicero’s writings was the criterion to oppress the rebellions as a phenomenon menacing private proprietors.<sup>108</sup>

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<sup>106</sup> “Therefore, since law is a bond of political fellowship, and justice is equality under law, by what justice can a fellowship of citizens be maintained when the condition of the citizens is not equal? If it is not acceptable for wealth to be equalized, if the natural abilities of all persons cannot be equal, surely rights should be equal among those who are citizens in the same republic”. See Cicero, M. T. (2014a). Book I. In *On the republic* (p. 51). Translated by David Fott. New York: Cornell University Press.

<sup>107</sup> Nowadays, the debate is still present around property rights and the force of law: “The law does not guarantee me the physical or social ability of actually using what it calls mine. By public regulations it may indirectly aid me by removing certain general hindrances to the enjoyment of property. But the law of property helps me directly only to exclude others from using the things [*sic.*] which it assigns to me. If then somebody else wants to use the food, the house, the land, or the plow which the law calls mine, he has to get my consent”. See, Cohen, M. R. (1927). Property and sovereignty. *Cornell Law Review*, 13(1), 12

<sup>108</sup> “Tiberius Gracchus, who persisted resolutely on the side of the citizens, but he neglected the rights and treaties of the allies and the Latins. If that habit and licentiousness should begin to spread more widely and convert our command from right to force, so that those who up to now willingly obey us are controlled by terror, even if we who are of greater age have almost finished our watch, I am still distressed for our descendants and for the immortality of the republic, which could be perpetual if it were kept alive by our paternal institutions and customs”. See Cicero, M. T. (2014c). Book III. In *On the republic* (p. 100). Translated by David Fott. New York: Cornell University Press. M. T. Cicero uses the dialogues among his characters to expose his own positions as a Roman advocate not only of causes, but the Republican system. See Burnand, C. (2004). *Cicero the advocate*. Oxford: Oxford University Press.

As we initially suggested the formal discussion evolving private contracts has also to do with the idea of territorial expansion with an explicit use of force. When the Roman senate sent its troops to ambush the walls of Numantia in Spain (153-133 B.C.), the soldiers of the *imperium* believed they were simply accomplishing a legitimate order from the sovereign.<sup>109</sup> Scipio Aemilianus Africanus stayed for sixteen years in the Spanish territory to defeat the Celtiberian resistance in Numantia. The military strategy used by the Roman soldier was the construction of a wall surrounding the defences of Numantia. The structure did not permit the ones in the city to make any contact with the outside area. The prison in their own lands led the inhabitants to a collective suicide burning the city instead of being changed into slaves. After the event, the remains of Numantia were inside a new *dominium* and the law of conquest extended the legal bases for the Romans in contracts of *possessio*. Cicero recovers the event making clear the notion of treaty and privates with the help of the Roman Senate: “What goes for individuals also goes for peoples: no city is so foolish that it does not prefer unjustly commanding to serving justly [...] When I was consul and you were in my council, I inquired about the Numantine treaty”. The notion of individuals and peoples were commonly used to refer to the Roman citizens. Cicero uses rhetorically Philus’ words to show the transition of public into private contracts in land issues to avoid the misuse of the public competences in personal demands: “Who did not know that Quintus Pompeius had made a treaty [public] and that Mancinus was in the same position? One of them, an excellent man, recommended the bill [public] proposed by me according to the resolution of the senate; the other most vigorously defended himself [public-private]”.<sup>110</sup> The vocation of Scipio in using the force of law to establish the *dominium* represents the public supremacy in forging private contracts as the results of conquest. Physical violence in military expeditions was the division of political relations between public and private lands as seen the Numantine episode. The concept of use derived

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<sup>109</sup> The tragic story of Numantia was revisited by Miguel de Cervantes during the XVII century. It is the literary form of the Spanish Gold Era being critical to the military Spanish expansion inside and outside the Empire: “*Esta difícil y pesada carga, / que el senado romano me ha encargado, / tanto me aprieta, me fatiga y carga, / que ya sale de quicio mi cuidado. / Guerra de curso tan extraño y larga, / y que tantos romanos ha costado, / ¿Quién no estará suspenso al acaballa [acabarla]? / ¡A! ¿Quién no temerá de renovalla [renovarla]?*”. See Cervantes, M. (2013). *El cerco de Numancia* (p. 39). Madrid: Cátedra.

<sup>110</sup> Cicero, M. T. (2014c). Book III. In *On the republic* (p. 95). Translated by David Fott. New York: Cornell University Press.

from a formal relation among individuals, but never force was a prerogative of private owners making exempt the public power.

The object of capture was a legal norm that could only exist under a political concept and the land taken by force was either *dominium* or *imperium*, respectively, private and public areas. For the Numantians, the land was part of land cultivation in which the place was used for survival as we could see in Cervantes' metaphor.<sup>111</sup> Therefore, the property system was completely out of the realm of their understanding on subsistence among equals. In *El cerco de Numancia*, the Celts knew how deplorable would be their lives under the *dominium* of the Romans. They perfectly understood the foreign invasion was there to capture the land and make them slaves by the Roman law. Their collective consciousness conflicted with the idea of a submissive existence. So, the Numantian community was conscious that the loss of their lands would end up in the citizens' hands with privileges in the Ancient Roman Republic. In other words, the *dominium* carried in its formula the *possessio* of human beings as well. Servitude, life under fear and intimidation would be the tools to impose a supposed right to land as a product of conquest. The conception of property as social and political privilege brings also implicitly different forms of compulsory labour and wealth spoliation as a political project. According to Moses Finley, the origins of slavery is affiliated to the property system as complementary legal structure for *dominium*. The British thinker also points out that the Roman domination was more a legislative-political power in expansion than a pure economic formula, but intimately binding contracts for the Roman citizens.<sup>112</sup> In addition, the *dominium* designed for few could not promote equal communal access to the enjoyments of labour, shelter protection and a safe life by definition as Cicero posed

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<sup>111</sup> In this tragedy, Miguel de Cervantes seems to use the concept of property and *dominium* described in *Instituta* and *Digesto*. According to Edmundo Gatti, "Considerados en conjunto los textos de la *Instituta* y el *Digesto*, la conclusión a que arribamos es la siguiente: Hay paridad en cuanto a la frecuencia con que son empleados los términos *dominium* y *proprietates* para designar al derecho de que tratamos. Los mencionados términos son utilizados en el carácter de 'sinónimos'". See Gatti, E. (1996). Terminología. In *Propiedad y dominio* (p. 15). Buenos Aires: Abeledo-Perrot. The implications of this consideration are extremely important to apprehend how the right to property is forged in the historical normative framework of real, private and Civil Law. However, use and property are not universal in Europe.

<sup>112</sup> "A propriedade de terra, contudo, pode oferecer uma primeira aproximação em nossa investigação sobre as origens da sociedade escravista. Fundamental para a *pólis*, grega ou romana, desde quando emergira, em sua forma arcaica, do estágio *pré-pólis*, era a convicção profunda de que pertencer à *pólis* (o que chamaríamos de cidadania) era algo inextricavelmente ligado à posse da terra, ao serviço militar e à religião". See Finley, M. I. (1991). O surgimento de uma sociedade escravista. In *Escravidão antiga e ideologia moderna* (p. 92). Rio de Janeiro: Graal. About the productive relations under juridical sanctions supported by the State in the Ancient period, see Joly, F. D. (2005). *Escravidão romana: modelo e conceitos*. In *A Escravidão na Roma antiga* (p. 21). São Paulo: Palamedia.

in *On the republic*. We do not have any register in Cicero's writings that legal contracts between private individuals would be extended to the well-being of those outside the Roman citizenship.

Taking into account the public-private relations in the Civil Law traditions, the distinction of matters is fundamental for the legal analysis of a case, controversy or even judgments. First, it is urgent to separate the land from the property system in terms of concept. It may coincide for our modern legal culture, but they were not the same for the Roman civil customs. Land and property, for example, may also be understood as one thing depending on another or by simply overlapping common aspects such as rents in a regime of *concessio*, the usufruct of a place by its *dominus* and procedural matters for the exercise of a jurisdiction. In contrast, human access to land for the Numantians, for example, was not a right derived from military conquest once they did not recognise the Roman patterns of land, property and *dominium*. Celtiberians did not see the land as a legal object, but a vital element for the working collectives. Positivists shielded by the dogmatism in law normally defended the idea of *dominium* as a stable system what has been historically incorrect. It is important to say that we know property in its modern meaning. For the Roman society, ownership of lands had a different concept and the State was the body responsible for the expansion of the outlands.

Before entering in the territory of Latin terminologies defining land and property, it is important to say that every counterargument criticising the stability of contracts between individuals would be spurious for the Roman Civil Law tradition, its codes and public order. One of the reasons relies on the protection of customs for private contracts since it used to set the stage for justice, that is to say, relatively peaceful relations among the Roman citizens and war to the outsiders as aforementioned in the Numantia case. Another one is how the usufruct of the property had to be delimited by the wish of the *dominus*. The last one is linked to the evolution of personal relations, land use and the objects of military conquest. The imperfections of the modern Napoleonic Code was pointed out by F. K. von Savigny as a result of a pure application of the Roman Civil Law in modern lands. Therefore, the notion of *dominium*, *possessio* and *concessio* still conflicted with the needs of European society in the beginning of the XIX century.<sup>113</sup>

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<sup>113</sup> Even for a doctrinal point of view based on Roman Civil Law, property is contradictory in the modern

## 1.2. Civil Law traditions: private contracts and the social dimension in the *dominium*

Our effort made until here has tried to unveil the concept of property as an incessant concept in transformation and also an enforceable right favouring only few based on a very specific philosophical history. We pointed out how land is seen by Marcus Tullius Cicero as an object of contracts, conquest and for citizens. However, the details of how *dominium* worked, what it meant for the individuals living in it and who planted the lands are not so evident in the Ciceronian thoughts as it is in Lucius Junius Moderatus Columella.<sup>114</sup> The first explains us the formal separation the ancient Roman law between moveable and immoveable things, property and land. The second about the plantations, but registering indirectly the exercise of sovereignty for land *possessio*. It is a relevant difference to understand property has been a concept under constant changes.

Our primary intention is to show how the owner's relation to things, including slaves and serfs, depended upon the regime of land domination to forge a composite in modern Europe of what was vulgarly translated as the right to property. Such historical accumulation of characteristics conformed also a theoretical debate on sovereignty as a legal power operating in part of the European territory. The property system, which was only used for moveable things, was extended to land as an independent jurisdiction conferring absolute powers on the sovereign. So, the land became as object *dominium*,

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codes. According to F. K. von Savigny, the Napoleonic Code shows its imperfections. He says "Un defecto principal y patente que domina en esta obra [Napoleonic Code] es el siguiente. La teoría de la propiedad es en todo y por todo la de los romanos. Pero todos saben cómo esta se funda en el Derecho romano sobre las dos ideas cardinales de los derechos reales [relation between men and things] y de las obligaciones [mainly the obligations between the State and the citizens], y cuánta precisión consiguieron los romanos con la fuerza y exactitud de esta dos ideas". See Savigny, F. K. von. (2008). *Los tres códigos modernos*. In *De le vocación de nuestro siglo para la legislación y para la ciencia del derecho* (p. 49). Granada: Comares. It is really advisable to think of the institution of slavery as the one that contributed to the Romans as more precise on the definition of relations among human beings. In Roman society, the proprietors used to have a different treatment among themselves, but dispensed varied other manners on their human possessions. This atrocious relation left relatively homogenised the act of Civil Law relations, obligations and capacities.

<sup>114</sup> The notion of *dominium* evolves along history. In the ancient Roman times, land could be possessed through military force by a political regime and private owners. In the European Modernity, the figure of dominus entered the realm of a sovereign under the figure of the State. So, a political entity detached from individual desire was able to set its "public domain", create public contracts through the concession of lands and re-conceptualise the notion of property belonging to public power "dominical lands". For our purposes, *dominium* has to do with a type of proprietor that tends to absolute powers in private hands as we will see in the chapter III.

but it was only confirmed by the exercise of sovereignty. It started being represented by the effective control of objects inside the territorial limits of the place. As part of that historical transformation, landowners could also apply civil, penal and administrative norms to those ones living inside his *dominium*. Not only was property system a matter for substantive law under new patterns, but also threaded with the Roman traditions between the interests of “individuals” and “peoples” as part of a political entity. The custom of interpersonal relations between proprietors and magistrates was also different as we can see in the Philippine Ordinances in 1603. Moreover, the modern property became also a set of new mechanisms operated by subjective criteria in courts to favour the interests of the lords, sharing jurisdiction and political relations to support privileges. The construction of modern sovereignty was not only a legal theme inside the Iberian Peninsula, or at least it had not been an isolated preoccupation for Philip III (1578-1621) in the beginning of the XVII century, when Spain and Portugal had the same territory from 1580 to 1640.<sup>115</sup> However, it is also true the *dominium* could be used by those who wanted to work in it. In case the use of land was permitted by concession, the political condition of the Spanish Kingdom in the interregnum 1580-1640 demanded vassals with absolute powers in their lands. That regime of sovereignty proportionated the use of force as a norm. The word social in private lands did not seem to match to the purposes of dominium. As an example, the *Suma teológica, moral y canónica* published by P. F. Henrique Villalobos is a collection of those legal parameters established by the Philippine Ordinances in 1603 that did not include the construction of sovereignty based upon a social usufruct of land. In that period, the tension evolving serfs and vassals could not be solved through the notion of private contracts or supposed abuses. The Justinian Code (a.d. 530-533), which is also known

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<sup>115</sup> “Although Rabb insists that the mounting difficulties of the age were not confined to politics, he views the location of sovereign authority in the various European states as the dominant issue. Long-standing divisions over the balance between the central and regional authority, between monarchical power and aristocratic privilege, reached an ultimate crisis in the destructive fury of the Thirty Years’ War, and in the rash of revolts and revolutions that broke out in the 1640s and 1650s”. See Mears, J. A. (1988). *The Thirty Years’ War and the Habsburg Monarchy. Central European history*, 21(2), 122-141; “The war’s main impact was not to loosen the bonds between the Empire and its component territories, but to strengthen the authority of the latter over their subjects. The IPO [*Instrumentum Pacis Osnabrugensis*] clearly associated territorial sovereignty with the electors, princes and magistrates of the imperial cities, eliminating all chance of intermediary bodies within the territories claiming such rights themselves. Prior to 1618, provincial Estates like those in Austria and Bohemia maintained militias and sent envoys to foreign powers. Such actions were now clearly illegal under the imperial constitution”. See Wilson, P. H. (2009). *The Westphalian settlement. In The thirty years war: Europe’s tragedy* (p. 777). London: Penguin.

as *Corpus Juris Civilis* or “Body of Civil Law”, had much less influence on common people and lords once the Spanish Kingdom conducted by Philip III in Spain was trying to centralise his power. This is not an easy argumentation, but we put it just to emphasise the idea of force, contract and *dominium* started being opposed in a different fashion at that time.

For Marcus Tullius Cicero common safety is the core of public life and it should be shielded by all means to guarantee the private contracts. Cities are also outranked in comparison to villages and tiny settlements for the Roman advocate. Citizens were entitled to exercise law expecting the use of a limited authority in public sphere, but having their *auctoritas* or right guaranteed in private lives.<sup>116</sup> Cicero also defends in one of the dialogues of his character Scipio the value of freedom for the Roman citizens. Such abstract principle should be limited in the public realm, but ruled differently in the contractual relations. As a respectable rhetor and advocate during the Roman Republic he used to defend the argumentation of liberty in civil traditions as we commonly translate in Iberian modern context without referring to the construction of a vassalage in the *dominium* supported by a sovereign in a chain of violence. Therefore, the private contracts establishing civil rights for a Roman citizen stands for the XVII century when Philippine Ordinances in 1603 used the language of the ancient *dominius* and the Civil Law to guarantee sovereignty and legitimate power inside the feudal lands. City was for Cicero “where the power of people [Roman citizens in the public sphere] is highest” since the core of that expression does not affect those unlimited private prerogatives set by contract. In that sense, the concept of ownership should be part of an assembly of individuals responding to the status of citizens not honour under fear. For the Roman lawyer, a tyranny, an aristocracy and even a republic were political models that should be counter-balanced by equal citizenship. This is why his argumentation on public treaties relies on those individuals of properties and lands once the State was responsible to provide public areas and institutions.<sup>117</sup> Cicero also defended citizens should pursue their private rights in an egotistical fashion up to the

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<sup>116</sup> Cicero, M. T. (2014a). Book I. In *On the republic* (p. 33). Translated by David Fott. New York: Cornell University Press.

<sup>117</sup> The meaning of public is devoted to the Roman citizenship and its exercise. Cicero, M. T. (2014a). Book I. In *On the republic* (p. 51). Translated by David Fott. New York: Cornell University Press. Read also on page 51: “But if peoples maintain their right, they deny that anything is superior, freer, happier, since they are masters of laws, courts of law, war, peace, treaties, and one another’s life and property”.



point their wishes did not collide with certain Roman public values such as their own freedom, peace and happiness. If individuals expand their private wishes menacing the interests of other citizens, they attack the law and, consequently, put their own private lives at risk. For him, the free exercise of liberty should happen in private ownership not in public institutions. Cicero recognises and translates elegantly the human eagerness for violent conquest as the man nature for the freedom, liberty and life in favour of their own but not for the others. The public realm is an important arena to limit the human energy in expanding and ruling the social relations out of private contracts. Such social and political system in the Roman Republic dependent on *dominium* cannot be applied to the modern notion of ownership in the Philippine Ordinances from 1603.

Beyond the notions of private contracts between citizens, the public limits to bar the human nature for constant selfishness, Marcus Tullius Cicero considers also the legal bases for a political fellowship. For him, such concept is intimately linked to law and social bonds. In his own words, “law is a bond of political fellowship”, but justice limited equally by a political community. In the public sphere, citizenry has rights not contracts once citizens are equal in the sense they cannot act excessively in their own wishes: “Therefore, since law is a bond of political fellowship, and justice is equality under law, by what justice can a fellowship of citizens be maintained when the condition of the citizens is not equal?”.<sup>118</sup> Politics was also the terrain where the Roman citizens would not be threatened by any oppressive majority of other eager citizens. Cicero seems to isolate political animosities in public realm to avoid an unstable decision-making body. The Roman advocate trusted in *virtus* as an instrument not based upon wealth, nobility nor status.<sup>119</sup> Suffrage, public powers and magistrates should not be free to pose their opinions disrespecting the private tradition for civil agreements. The equilibrium of the private contracts represented also the balance of the

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<sup>118</sup> Cicero, M. T. (2014a). Book I. In *On the republic* (p. 51). Translated by David Fott. New York: Cornell University Press. Cicero is worried about differentiating the *ius civile* as the realm of formal agreement among privates and the realm of the commons. The public life implies the citizenship not alienated in the sense of responsibility and pluralistic values, although limited by the good of *res* or the well-being of many.

<sup>119</sup> “But they say that this best form [*res publica*] has been overturned by the depraved opinions of men who, because of their ignorance of virtue—which is in few men and is judged and noticed by few—[sometimes] think that the best men are the prosperous and the rich, at other times that the best men are those born of a noble family. When, because of this error of the crowd, the wealth—and not the virtues—of a few has begun to control the republic, those leading men cling to the title of “the best men,” but they lack the substance”. See Cicero, M. T. (2014a). Book I. In *On the republic* (p. 52). Translated by David Fott. New York: Cornell University Press.

republican principles. The Queen Isabella I of Castile and the King Ferdinand II of Aragon had the task not only in unifying the country, but also controlling the vassals in their territories once each of the *domini* had unlimited power in their lands the two most powerful Catholic sovereigns.<sup>120</sup>

So, different from the Spanish Kingdom (1580-1640), in Cicero the making of power should be measured freely by equality: “And so in no other city than where the power of the people [power of the *auctoritas* and institutions] is highest does freedom have any domicile”.<sup>121</sup> In Book II, *On the Republic* initiates with the opposition between two sets of *res*, which means the thing made for all. All models of republic were expected to be conceived by the effort of virtuous men and the citizenship bonds for the permanence of institutions. For Cicero, Roman experience was the one nurtured by an undivided citizenship and rich in private life for their citizens.<sup>122</sup> In the final part of Laelius’ and Scipio’s dialogue, Carthage and Numantia were the places where Cicero did not find the virtuous bonds of private life. When one of this characters called Laelius refers to these two conquered territories, he sees two absent aspects that could teach the Roman Republic. First, these two cities did not permit a government based upon citizenship since the republican spirit was not seen in Scipio’s conquest after the military conquest. Then, they both seemed to be ruled by monarchic and not republican archetypes. Cicero was very critical about kings as rulers, because they used to end up as supreme controllers without noticing the limits of human nature for excesses. The constitution of a supreme power supported by a group of aristocrats commonly lead its use of the State to political violence.<sup>123</sup>

For Cicero, a stable government depended upon how city matters constructed the categories for individual relations in their private realm. The emphasis was not on legislating for public order, but the counter-powers and limits imposed to the political system. The norms in *ius civile* by private contracts create the conditions for a formal legal basis in which people are expected to have their properties free from the

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<sup>120</sup> Read especially the volume 3 of the History of the Catholic Kings. See Prescott, William H. (2004). *Historia de los reyes católicos*. 4 vols. Madrid: Junta de Castilla y León – Consejería de Educación.

<sup>121</sup> Cicero, M. T. (2014d). Book I. *On the republic* (p. 50). Translated by David Fott. New York: Cornell University Press.

<sup>122</sup> Cicero, M. T. (2014b). Book II. In *On the republic* (p. 63). Translated by David Fott. New York: Cornell University Press.

<sup>123</sup> Cicero, M. T. (2014a). Book I. *On the republic* (pp. 60-61). Translated by David Fott. New York: Cornell University Press.

abuses of sovereigns. This is why property is defined by the Ciceronian dialogues different from land, *i.e.*, *pecus* is opposed to *locus*. The former refers to moveable things and the latter to those immovable ones, so property is the realm of things not territories. In addition, the *auctoritas* would not be affected by richness, noble families and affluent individuals since these characteristics did not belong to the public realm. The State was thought to provide military safety to its individuals interfering in their lives in case their actions put at risk the public order. Force of law was necessary only to guarantee the good of legal possessors in property and land politically organised by a socioeconomic status: “property was then in terms of cattle [*pecus*] and possession of places [*locus*], from which come the terms ‘moneyed’ [*pecuniosus*] and ‘opulent’ [*locuples*]”.<sup>124</sup> Moveable things were treated as thing or *res* for Marcus Tullius Cicero *On the republic*. By definition, *pecus* and *locus* were seen as different in essence, because there is not any pecuniary connection to the opulence of land in itself. In order to bridge that gap in legal terms, politics is the way to elevate land to the realm of *res* in Modernity. If *res* were not a public issue, the appropriate care of it would be the making of a private law, contracts and positive norms to update such concept especially during the navigation times to new territories in America. Different from the Roman law, the usufruct was linked to the economy of land, but land was not an object of wealth *per se*.<sup>125</sup> Land market was not recognised by the Romans as a pillar in the architecture of their society. The citizenry used land for status, inheritance and political alliances, but treating land as bond in a community. Even nowadays the category of property that we know is an inaccurate definition for what Roman Civil Law tradition conceptualised.<sup>126</sup> Goods belonging to an acquisitive mentality as any other thing such as land is the result of singular construction recent in history.<sup>127</sup>

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<sup>124</sup> Cicero, M. T. (2014b). Book II. In *On the republic* (p. 67). Translated by David Fott. New York: Cornell University Press. The translator David Fott used the squared brackets and references of Latin words between inverted commas to clarify the text and Cicero’s accuracy in juridical terminologies.

<sup>125</sup> Finley, M. I. (1976). Private farm tenancy in Italy before Diocletian. In Finley, M. I (Ed.) *Studies in Roman property* (p. 117). Cambridge: Cambridge University Press.

<sup>126</sup> Justinian. (1904). On the division of things and their respective natures. In *The Digest of Justinian* (Vol. I, p. 39). Translated by Charles Henry Monro. Cambridge: Cambridge University Press.

<sup>127</sup> “[...] the Roman possessing class thought of land [...] as a commodity like other commodities with a realizable cash value’ and that ‘the disposal of inheritances’ pointed to ‘a brisk movement of land (or dispersal of land, or ‘market in land’) in Roman Society’”. See Crook, J. (1976). Classical Roman law and the sale of land. In Finley, M. I (Ed.) *Studies in Roman property* (p. 83). Cambridge: Cambridge University Press. See also Pleket, H. W. (1978). Review. *Journal of Economic Literature*, 16(1), 110-112

The turning point for Marcus Tullius Cicero is the decision-making process once the votes tend to be a place of dispute for those who have opulent power. It means the affluent families try to induce institutions or use tradition to preserve their *status quo*. Cicero refers to the opulent *strata* the ones with men in possession of land and not the multitude of proprietors in moveable things.<sup>128</sup> After defining land as a far cry from the notion of property, Cicero starts his inquiries about liberty and freedom mainly because the exercise of such concepts implies individuals taking part of the assemblies. Cicero used to see life as unstable out of citizenship either for landowners or proprietors. The Roman advocate mentions the increase of collective wealth, the enlargement of richness and the extension of political limits as an exercise of wisdom: “Wisdom orders [us] to increase resources, to enlarge riches, to extend boundaries — for why was the praise carved on the monuments [...] of the highest generals [military force]”.<sup>129</sup> In other words, *locus* is the point in which converges opulence, prosperity and the logic of land expansion, but not in the territory of the Roman Republic to avoid violent dispute between individuals. A completely different context from what happened in the Iberian Peninsula between 1580-1640 with reference to the conflicts evolving a myriad of sovereigns.

For Cicero, true law is the one that is congruent with wisdom. An act should be passed and applied to all citizens in the same fashion the sun rises and sets for all. It is as nature around us.<sup>130</sup> Although the conflicts in law change, the Roman advocate sees similitudes of law and nature because he understands both with the idea of perennial codes. Norms should be knowable and known by the individuals who are expected to obey or use them. The establishment of civil rules should be decided by assemblies. Cicero believes obligation and liberties as a bodily or mental exertion for the sake of the community respecting the organisation of the entire political body. If there is a rule against any citizen without the recognition of the citizenship in its political bonds, its nature is probably from an unreasonable excess out of *the ius civile*.<sup>131</sup> The image of a

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<sup>128</sup> Cicero, M. T. (2014b). Book II. *On the republic* (p. 75). Translated by David Fott. New York: Cornell University Press.

<sup>129</sup> Read also Book II, p. 82; Book III, p. 97 in Cicero, M. T. (2014). *On the republic*. Translated by David Fott. New York: Cornell University Press.

<sup>130</sup> Cicero, M. T. (2014c). Book III. In *On the republic* (p. 98). Translated by David Fott. New York: Cornell University Press.

<sup>131</sup> Cicero, M. T. (2014c). Book III. In *On the republic* (p. 100). Translated by David Fott. New York: Cornell University Press.

sovereign for Cicero is close to the power of tyrants. The centralised control of a regime is the only one responsible for the land conflicts since the moderation for conquest tends to work on personal preferences and intimidation.<sup>132</sup> Furthermore, it is unreasonable for the Ciceronian writings the survival of a political system in which people are not allowed to question equally what comes in terms of law once the orders, liberties and punishment are dictated and unpredictable. The juridical system is permeated by the use of force imposed by politics.<sup>133</sup> Taking into consideration human beings are bound by equal and private rights, even when the civil traditions permit all kinds of excess in a governor, cities must preserve the unit of individuals in not putting them in the centre of a conquest. So, the emphasis is that contracts for citizens rely on *res* not territory.<sup>134</sup> Law may not presuppose order eliminating physical force to spread or contain excesses, but a true law must obey the values of virtue, wisdom and unity for properties not land. Therefore, the *dominium*, *possessio* and *concessio* is a consequence of *ius civile* not an object of capture by all.<sup>135</sup>

Inquiries on norms for citizens are intensively debated along the dialogues *On the laws*. Marcus Tullius Cicero continues the argumentation he posed in Book V, *On the Republic*, referring to the genesis of the law and rights. For him, the creation of *lex* is connected to natural rules and then the control of excesses. *Lex naturae* is the source of those appropriate rules for the community. Natural human conditions is biologically in favour of life. His brother Quintus Tullius Cicero poses a practical question about the

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<sup>132</sup> Yet the transformation in the concept “force of law” has changed since the bourgeois revolutions, we emphasise the long tradition that undeniably affected the juridical order in Iberian Peninsula: “Behind the syntagma *force of law* stands a long tradition in Roman and medieval law, where (at least beginning with Justinian’s *Digests*, *De legibus*, 1.7: *legis virtus haec est: imperare, vetare, permittere, punire* [The capacity of law is this: to command, to forbid, to allow, to punish]) it has the generic sense of efficacy, the capacity to bind”. Agamben, G. (2005). *Force of law*. In *State of exception* (p. 37). Chicago: The University of Chicago Press.

<sup>133</sup> As it is said about the feudal and modern context with reference to land expansion and political order: “Not only kings but also dukes, counts, and other territorial rulers had strong incentives to encourage settlements in towns on their lands, to which artisans, craftsmen, and merchants would be attracted and from which money rents could be derived. At the same time, however, the territorial ruler was reluctant to give up his political control over the towns. The nature and extent of the liberties that were granted depended on a delicate balance of forces and interests”. See Berman, H. J. (1983). *Urban law*. In *Law and revolution: the formation of the western legal tradition* (p. 369). Cambridge: Harvard University Press.

<sup>134</sup> “That is to say, nothing that happens on Earth is more welcome to the leading god, who rules the whole universe, than the assemblies and assemblages of human beings united in right, which are called cities”. See Cicero, M. T. (2014f). Book VI. *On the republic* (p. 119). Translated by David Fott. New York: Cornell University Press.

<sup>135</sup> Marcus Tullius Cicero sees as indistinguishable what we nowadays call law and Civil Law. For him, the two concepts refer to *ius*. See Cicero, M. T. (2014e). Book V. *On the republic* (p. 117). Translated by David Fott. New York: Cornell University Press.

most appropriate formulas for covenants and judicial decisions.<sup>136</sup> Cicero responds to such curiosity affirming the absolute connection among humans and natural fellowship as a pre-condition for the coexistence. Not satisfied and making ironical comments on Cicero's intellectual position, Titus Pomponius Atticus asks the advocate if he thinks law should be drawn only from a philosophical discussion. For Atticus, *ius* has two paradigms. The first is its connection with the Twelve Tables which meant the law that came from above not from equals. The other is the practice of the *praetor*, who was either a military commander or a magistrate, that could edit the imperatives of force and law. *Ius* for him has to do with *lex*, *i.e.*, normative parameters not thoughts nor people. Cicero defends the use of bonds and citizenship as a source of power in the Civil Law not recognising the robe of judges as political as the togas of the citizens. For Marcus Tullius Cicero, there is a substantial difference in Roman *ius civile*, *ius gentium* and *lex naturae*. Civil and private lives need distinct treatment as it happens for cities and natural laws.<sup>137</sup> It is important to understand that the word *lex* the Latin for *lego*, that is, "choice". It is totally different from the entry law or rule from the Greek *nomos* or *némein* signifying "divide". *Delectus* is another entry used as "choice", but it also refers to the selection of something. So, for Cicero, law is intimately connected to the choice of individuals to face any threat against their particular civil bonds not related to the political power designated by a sovereign.<sup>138</sup> He also says "since all laws should be

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<sup>136</sup> Cicero, M. T. (2014a). Book I. *On the laws* (p. 134). Translated by David Fott. New York: Cornell University Press. See "That I produce pamphlets on the law about rainwater falling from the eaves of houses and [the law] about walls of houses? Or that I compose formulas for covenants and judicial decisions? Those things have been attentively written by many men, and they are lower than what I think is expected of me".

<sup>137</sup> Cicero, M. T. (2014a). Book I. *On the laws* (p. 135). Translated by David Fott. New York: Cornell University Press.

<sup>138</sup> "As they put the effect of fairness into law, we put the effect of choice into it. Nevertheless, each one is appropriate to law. But if it is thus correctly said, as indeed it mostly and usually seems to me, the beginning of right should be drawn from law. For this is a force of nature; this is the mind and reason of the prudent man; this is the rule of right and wrong. But since our entire speech is for the people's business, sometimes it will be necessary to speak popularly and to call that a law which, when written, consecrates what it wants by either ordering [or forbidding], as the crowd calls it. In fact let us take the beginning of establishing right from the highest law, which was born before any law was written for generations in common or before a city was established at all". See Cicero, M. T. (2014a). Book I. *On the laws* (p. 136). Translated by David Fott. New York: Cornell University Press. We may add some comments In English, law refers to the legal system; however, in Latin languages not necessarily. In Portuguese, for example, "direito" may represent constitutional norms or part of the wholeness. It happens in the Italian magna charter too "diritti e doveri dei cittadini"; in French and Spanish Constitutions, respectively, "Droits de l'homme" and "droit civils et politiques" and "los derechos y deberes fundamentales" can be used in plural. The version used in the present work made by Professor David Fott, Political Science Department, University of Nevada, Las Vegas, was one of the key factors for our etymological analyses.

tailored to that type of city, and since customs should be planted and not everything should be consecrated in writing”. He poses that men have common bonds among them because of a natural reason. As human beings, we have a rational capacity that sustains physical laws like life, death and existence. Cicero avers law is also a common aspect among human beings and god. Among those who are sharing in natural law, there is also a community in right. The city is the place where all binding *ius* is present: “his whole universe should [be] thought to be one city in common between gods and human beings”. Human beings are the foundations of a right.<sup>139</sup>

Cicero says rights embrace the purpose of stabilising things, *res*, and they mend people’s disagreement for the social order. The Roman advocate affirms “Right is uniform; human fellowship has been bound by it, and one law has established it; that law is correct reason in commanding and prohibiting”.<sup>140</sup> On the one hand, the Roman lawyer is interested in how *dominium* is treated and criticises those models of law or institutions in which the quality of a fellowship rights is ignored. On the other hand, law cannot encompass *auctoritas*, select social classes and permit advantages for some in detriment of all as it happens between 1580-1640 in the Iberian Peninsula. If there is any kind of discrimination for the use of force, it should respect the physical laws or the *lex naturae* preserving the unity of the citizenship in the Roman Republic. So, justice is a positive effect of fellowship rights for the well-being of the whole community and it is an instrument to avoid the exponential conflict the Romans knew about land expansion, occupation and conquest. For Cicero, the exclusive benefits for one in law means the exclusion of the others.<sup>141</sup> As a consequence, the advantages for one individual leads to his own ruin once the rest of citizens tend to banish selfishness by nature in a true *ius civile*.<sup>142</sup> Even when we scrutinise the significance in acts like force of law for Cicero,

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<sup>139</sup> Cicero, M. T. (2014a). Book I. *On the laws* (p. 136-137). Translated by David Fott. New York: Cornell University Press.

<sup>140</sup> Cicero, M. T. (2014a). Book I. *On the laws* (p. 142-144). Translated by David Fott. New York: Cornell University Press.

<sup>141</sup> Cicero, M. T. (2014c). Book III. *On the laws* (p. 187). Translated by David Fott. New York: Cornell University Press.

<sup>142</sup> “Now if justice is compliance with the written laws and institutions of peoples, and if (as the same men say) everything ought to be measured by advantage, he who thinks that it will be enjoyable for himself will neglect and break through those laws if he can. So it happens that there is no justice at all if not by nature, and what is established for the sake of advantage is undermined by that advantage”. See Cicero, M. T. (2014a). Book I. *On the laws* (p. 144). Translated by David Fott. New York: Cornell University Press.

the element of reason must be present. In other words, the function of law serves to persuade the citizenship to respect rules for the well-being of an institution not to be centralised by sovereigns and compel minds by threat. However, it is also true that physical intimidation may move things in private relations and certain customs not based on law with the excuse of social stability.<sup>143</sup> It seems to be relevant the social relations on land not introduced exclusively by law to avoid a reduced view on private relations from Cicero's writings.

Lucius Junius Moderatus Columella (A.D. 4 – 70) was told by an old friend, who was a consul and wealthy proprietor, that “most fortunate which had as tenants natives of the place, and held them, by reason of long association, even from the cradle, as if born on their own father's property”. Columella replies that “repeated letting of a place is a bad thing, but that a worse thing is the farmer who lives in town and prefers to till the land through his slaves rather than by his own hand”. For him, the intriguing part of consenting the exploration of a private land for foreigners was the suit at law promoted by them after. We may stress the concept of citizens as opposed to foreigners as a legal condition. This is why “we [the landowners] should take pains to keep with us tenants who are country-bred and at the same time diligent farmers”. Otherwise, the result of a permissive act yet lawfully will end up in a “lawsuit instead of revenue”.<sup>144</sup> The dispute pointed out by Columella is the one between ownership and its use by land labourers. Peasants working in the *dominium* tended to create a custom of possession in which the things produced were transformed into properties. That relation materialised a sort of contract in which physical tension between owners and peasants was nurtured by law. In other words, the agreement on using lands could not be unmade simply because the citizen claimed his rights shielding them with the use of force. In the modern Spain in the interregnum 1580-1640, the principle of land use mentioned by Columella was not applied. Different from the Roman Republic, those individuals without a title of land, as the Roman writer says, cannot be left alone in the fields while the owner of the land in towns. The presence of the citizen is necessary to continuity of the contract. The

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<sup>143</sup> Cicero, M. T. (2014b). Book II. *On the laws* (pp. 156-159). Translated by David Fott. New York: Cornell University Press. See also Derrida, J. (1989). Force of law: the mystical foundation of authority. *Cardozo Law Review*, 11(1), 925-927. Jacques Derrida mentioned once that the expression “force of law” in English does not express the same in French. For him, “appliquer la loi” has to do with the idea of movement, action and application of something.

<sup>144</sup> Columella, L. J. M. (1960a). Book I. In *On agriculture* (p. 81). Translated by Harrison Boyd Ash. Massachusetts: Harvard University Press.



enforceability around the right to property seen in the Roman Civil Law must be thought under the terms of tenure or absence of the landowner. For Columella, the overseer and the tenant are those individuals that will act if the owner's greed is proved instead of his presence with reference to the land. In addition, the *dominus* cannot blame his slaves for not feeding or taking proper care of his land, possession and things: "There is no doubt that both these offences [carelessness and greed] are either committed or fostered through the fault of the master, inasmuch as he has the authority to prevent such a person from being placed in charge of his affairs, or to see to it that he is removed if so placed".<sup>145</sup> So, the authority of the landowner is limited to his own obligations and not absolute as we see in the Philippine Ordinances from 1603.

The element that may sound interesting is the relative authority or not absolute use of force the land owner has at his disposal when he decides to claim any right. It is his responsibility to designate who is the best partner to produce in his possessions and there must be a real effort made by him to justify a fair tenure. According to Lucius Junius Moderatus Columella, the landowner is the master of his *dominium* and it means he has title, jurisdiction inside his own territory and the appropriate knowledge to take care of things. An unskilled *dominus* is a sort of unprepared administrator which implies a series of future problems that lead to conflict, unproductiveness and misuse of a land. For the Roman agronomist, it was conferred to the proprietor the right to settle the issues of his ownership. He might be responsible for the use of all his goods including slaves to do whatever he wanted. The owner was also in charge of judging efficiency or inefficiency. He had also the prerogative to punish those he considered his offenders, but always observing whether he was neglecting his own duties or even being omissive: "This he can accomplish if he will choose rather to guard his subordinates from wrongdoing than to bring upon himself, through his own negligence, the necessity of

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<sup>145</sup> Columella, L. J. M. (1960a). Book I. In *On agriculture* (pp. 81-82). Translated by Harrison Boyd Ash. Massachusetts: Harvard University Press. As follow: "On far distant estates, however, which it is not easy for the owner to visit, it is better for every kind of land to be under free farmers than under slave overseers, but this is particularly true of grain land. To such land a tenant farmer can do no great harm, as he can to plantations of vines and trees, while slaves do it tremendous damage: they let out oxen for hire, and keep them and other animals poorly fed; they do not plough the ground carefully, and they charge up the solving of far more seed than they have actually sown; what they have committed to the earth they do not so foster that it will make the proper growth; and when they have brought it to the threshing-floor, every day during the threshing they lessen the amount either by trickery or by carelessness. For they themselves steal it and do not guard against the thieving of others, and even when it is stored away they do not enter it honestly in their accounts. The result is that both manager and hands are offenders, and that the land pretty often gets a bad name". Read also Book I: VII 6-7, p. 83

punishing offenders”.<sup>146</sup> Nevertheless, the relation between the landowner and peasants tend to be tense or even a legal question when the proprietor is absent or he is indirectly administrating his estate. In that situation, the force of law mechanism is undoubtedly the use of violence under the negligence of the *dominus*. Another contrastive aspect with the absolute power of sovereigns in Modern Europe is that enforceability creates in the Roman citizenship a negative moral value for future contracts. Columella calls the attention to the fact lands may have a “bad name” and, in his opinion, “an estate of this sort should be leased if, as I have said, it cannot have the presence of the owner”.<sup>147</sup>

The force of law defends the sovereignty and material value involved in the right to property. The enforceable right, for which land property is one of the aspects that the Roman writer is talking about *On agriculture*, reveals the preoccupation of a Civil Law system in guaranteeing the estate owner interests. As aforementioned, the right to land for Roman citizens worked as a political and social community in which values counted as well. The economic power existed, but it was not the criteria used to judge on a cause evolving lands. If the owner is not prepared or even neglects his functions as a *dominus*, it is better to have the place leased. Lucius Junius Moderatus Columella expresses the Roman opulence in land profits as a stimulating business in vine and cattle as Cicero did *On the republic*. Including it is the use and fruits of the land, not the territory in itself, the source of wealth or moveable property. In one of the passages of his book about the cultivation of vine, he says: “This kind of plantation [vineyard], just like all kinds of other trees, produces a greater abundance of fruit [...] whether it pays the owner of the property to make it is shown by the profit which it returns”.<sup>148</sup> The Roman author also delves into his inquiry about richness and property observing how profitable it is to raise cattle. He uses the wisdom of rich proprietors to give support to his point of view: “This was the opinion of Marcus Cato among others, who, when someone seeking advice asked him what department of agriculture he should practise in order to get rich quickly, replied that he would get rich if he were a competent grazier [the

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<sup>146</sup> See also on the same page “He [the proprietor] should be not only skilled in the tasks of husbandry, but should also be endowed, as far as the servile disposition allows, with such qualities of feeling that he may exercise authority without laxness and without cruelty, and always humour some of the better hands, at the same time being forbearing even with those of lesser worth, so that they may rather fear his sternness than detest his cruelty”. See also Book I: VIII 9-12, p. 89

<sup>147</sup> Columella, L. J. M. (1960). Book I: VII 6-7. In *On agriculture* (p. 83). Translated by Harrison Boyd Ash. Massachusetts: Harvard University Press.

<sup>148</sup> Columella, L. J. M. (1960). Book V: VII 4. In *On agriculture* (p. 71). Translated by Harrison Boyd Ash. Massachusetts: Harvard University Press.

person who puts cattle, sheep etc to feed on pastureland]”. Columella recapitulates Cicero’s ideas of “law as a bond of political fellowship” making more evident the element of *pecunia*, *pecus* or moveable property being part of the use of land.<sup>149</sup> So, for the Roman agronomist, a competent farmer would be the one with those capacities to administrate his land with profitable production and as a skillful proprietor in authority. The money is ulterior the fruits the land can produce under the administration of the owner. Private property is intimately connected to labour, transformation of nature and the enjoyments of *locuples*. The enforceability of a right and the exercise of an authority through violence conform the exception not the general rule in a community made for equals.<sup>150</sup>

## 2. Historical concepts of property: from popular sovereignty to an emotional absolute right

The concept of land and property in Cicero and Columella permits us to make two brief considerations. The first one is linked to the fact *ius civile* is a pure code in which the private interests on land are established by contract. The other one refers to the notion of social contract including limits for the exercise of a *dominium* that was not observed by modern kingdoms in Europe. However, both legal bases in private relations and the impossibility of a social dimension in land ownership were an object of inquiries during medieval times. The interest of them relied on the political challenges of the state rebirth after the fall of the Roman systems of governments. The present section is an attempt to revive the notions such as popular sovereignty and the limits of

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<sup>149</sup> For the Roman law, it is redundant to say “moveable property” once property was considered mainly moveable things. We use it once that accuracy is not consensual and our reader may take advantage to understand better our point. Property comes from what is produced with the land not the place in itself.

<sup>150</sup> It is really important to call the attention of the reader that we are basing our considerations in the system of production under the Roman Civil Law concept of private property not as a model of primitive process of accumulation of money as we see in the capitalist era. The description of Lucius Junius Moderatus Columella is inserted in a context which money and property must obey a relatively coherent lawful arrangement in the Roman society in order to create a community of citizens. The force of law and authority are values defended by the proprietors to serve and make stronger their own interests. The intention is not a competitive logic of business based on accumulation of wealth above any other question. As we can read in one excerpt “For in the history of farming the system of grazing is certainly very ancient and at the same time very profitable, and it is on this account also that the names for money (*pecunia*) and private property (*peculium*) seem to have been derived from the word for cattle (*pecus*), because this was the only possession which the men of old time had, and, even at the present day, amongst some peoples, this is the only kind of wealth in general use, and even among our farmers there is nothing which yields a richer increase”. See Columella, L. J. M. (1960). Book VI: Preface 3-5. In *On agriculture* (p. 121). Translated by Harrison Boyd Ash. Massachusetts: Harvard University Press.

the *dominium* as a theoretical construction that leads us back to the XIII-XIV centuries. First and foremost, we will introduce that long tradition in a more contemporaneous panorama. Secondly, the assumptions Marsilius of Padua (1275-1342) used to refute the medieval theology that transformed *ius civile*, nature of law and private contracts into a theory of state. We introduce the medieval and modern thinkers with the writings of Otto von Gierke. He is one of the intellectuals interested in recovering the studies in political organisation using the concept of government and sovereignty in Germany between XIX and XX centuries. On the one hand, the German thinker identifies two levels in theorising the political body in feudal disputes, *i.e.*, the temporal and spiritual powers. On the other hand, he shows there were also ecclesiastical and temporal studies among philosophers questioning the unlimited power of sovereignty in favour of few and as a burden for many.<sup>151</sup> As a commentator of the legal debate in the context of the Unification of Germany during the second half of the XIX century, he tried to link the thought of medievalists through a theoretical perspective on the access of lands limiting the abuses related to the natural law. The concepts of government and city-State were also important for him once the ancient contracts to formulate land system as property and the application of the *ius civile* in that case had political limitations.

Nevertheless, the establishment of a sovereign government could not count on a simple application of the absolute notions of power once the republican city in Cicero was not the wish of a person, but the citizens with properties, lands and *dominia*. Being aware of such difficulty, there were some uncertainties whether a sovereign state should be based upon law as a political bond reconnecting the human needs with government. The temporal and divine laws should also be conformed with the spiritual power of the Roman Catholic Church once that institution was a huge *dominus* as other landowners. In addition, the evolution of the legal basis to community sharing lands had to refound the meanings of moral use of the nature in order to provide the human needs: “Almost unanimously medieval Publicists agreed that the State is based on no foundation of mere Law, but upon moral and natural necessity”. With reference to the feudal lands, medieval philosophers had also to make free any sovereign from his own servitude in

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<sup>151</sup> “Thus the history of Political Theories of the Middle Age is at one and the same time a history of the theoretical formulation of the System of the Medieval Society and the history of the erection of a new edifice which was built upon a foundation of Natural Law”. See Gierke, O. von (1900). The evolution of political theory. In *Political theories of the Middle Age* (pp. 04-05). Translated by Frederic William Maitland. London: Cambridge University Press.

relation to law. Such characteristics were completely new compared to the *ius civile* tradition: “[...] that it has for its aim the promotion of welfare: that the promotion of Law is but one of the appropriate means to this end: and that the State’s relation to Law is not merely subservient and receptive, but is creative and dominant”.<sup>152</sup> A negative aspect in many medievalists was the condition of such rebellion related to laws, which was evident between temporal and spiritual disputes, for the construction of a political power.

The medieval understanding of private contracts being limited by a sovereign prospered in different legal traditions. In the English modern thought, the concept of property was also applied to *possessio* or *concessio*. The feudal rationale was present in the English concept of *dominium* obeying the same rules established for vassals by a sovereign in the European continent.<sup>153</sup> However, the payment of a *corvée* inside the properties started being questioned not much after the end of the medieval era. The English modern thought reconnected the enjoyments of the labour extracted from lands as part of those who produced in the end of the Medieval Age. So, the state should not take advantages of the land production in private lands if not by law. In a certain way, Thomas Hobbes (1588-1679) re-introduced the notion of *pecus* using the language of the theological medieval tradition in which the power of a sovereign was expected to be in accordance with use and contract.<sup>154</sup> What the English philosopher did not defend was the priority in goods possession for the *dominus* and then the rest of the fruits for those who in fact produced in the land.<sup>155</sup> In the XVII century, John Locke (1632-1704) agreed with the English modern concept of property proposed by Hobbes, however, he elaborated a more sophisticated argumentation changing the condition of *res* in

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<sup>152</sup> Gierke, O. von (1900a). The state and the law. In *Political theories of the Middle Age* (pp. 73-74). Translated by Frederic William Maitland. London: Cambridge University Press.

<sup>153</sup> Gierke, O. von (1900b). The beginnings of modern state. In *Political theories of the Middle Age* (p. 88). Translated by Frederic William Maitland. London: Cambridge University Press.

<sup>154</sup> Read the “Second Part: of Commonwealth”, Section “XXIV, of the Nutrition and Procreation of a Commonwealth”. It says: “Further, seeing it is not enough to the sustentation of a Commonwealth that every man have a propriety in a portion of land, or in some few commodities, or a natural property in some useful art, and there is no art in the world but is necessary either for the being or well-being almost of every particular man; it is necessary that men distribute that which they can spare, and transfer their propriety therein mutually one to another by exchange and mutual contract”. See Hobbes, T. (1996). *Leviathan*. London: Cambridge University Press.

<sup>155</sup> Hobbes, T. (1983). *De Cive: The English Version* [1647], Warrender, H. (Ed.). Oxford: Clarendon Press. See also “[...] enter'd into by all the members of the society to bestow stability on the possession of...external goods, and leave every one in the peaceable enjoyment of what he may acquire by his fortune and industry”. See Hume, D. (1978). *A Treatise of Human Nature* [1739] Selby-Bigge, L.A. & Nidditch, P. H. (Eds.). Oxford: Clarendon Press.

property. Locke says property should be understood as part of the human body of those who had in their hands a *dominium*. He considers that the land has to be common to all men, but only under ownership: “Though the Earth...be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right but to himself”.<sup>156</sup> For the purposes of our thesis, the Spanish Kingdom of the Philip III assumes that notion of property extended to land and the prerogative of the sovereign to capture the fruits of it with the help of absolute powers. In that sense, *lex naturae* was changed into stratified, dominant and selective modern foundations in land ownership.

Again back to the medieval studies of sovereignty, Otto von Gierke reinterprets the origins of property as a concept derived from *ius gentium* in the late of the 1880s, that is to say, the Roman laws applied to foreigners, the right to conquest and slavery. In the exercise of pure law, for example, when men established their own land to protect themselves from nature, he refers to the inexistence of a body to aid proprietors. Gierke seems to re-visit the Ciceronian difference between *pecus* and *locuples* once in the Roman civil tradition things were the object of contracts and territory a matter of the city or later the *imperium*. There was a clear separation between both. Other aspect he extracts from the *ius civile* is the private rights by virtue as Cicero presents in *On the republic*. So, the state could not confiscate the properties or *res* with absolute powers; not even intervene in any relation based upon a private contract.<sup>157</sup> In other words, for him sovereignty did not mean a universal government conceive by only one sovereign. Observing the incongruent medieval model of sovereignty based on individual skills

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<sup>156</sup> Hereon the notion of property is extended to land and it does not refer to what comes from the use of it as in the Ciceronian thought *On the republic*: “Though the Earth...be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it, that excludes the common right of other Men”. See Part II, paragraph 27, Locke, J. (1988). *Two Treatises of government* [1689] Laslett, P. (Ed.). Cambridge: Cambridge University Press.

<sup>157</sup> “First: the institutions of property had its roots in the *Ius Gentium*: in Law therefore which flowed out of the pure Law of Nature without the aid of the State, and in Law which was when as yet the State was not. Thence it followed that particular rights which had been acquired by virtue of this institution in no wise owed their existence exclusively to the State. Secondly: the binding forces of Contracts descended from the Law Natural, so that the Sovereign, he could not bind himself or his successors by Statute, could bind himself or his successors to his subjects by Contract. Thence it followed that every right which the State conferred by way of Contract was unassailable by the State, though here again an exception was made in favour of interferences proceeding *ex just causa*”. See Gierke, O. von (1900). *The state and the law*. In *Political theories of the Middle Age* (pp. 80-81). Translated by Frederic William Maitland. London: Cambridge University Press.

and to revisit a notion of a community, Otto von Gierke introduces the concept *die germanische Genossenschaftsidee* or simply “popular German fellowship”. For Gierke, the idea of sovereignty should rely on a government in which law was a political bond among all whether landowners or not. Critical to Cicero’s beliefs that city was the result of a selected body in which virtue, wisdom and reason had to be pursued in order to promote civil stability, he mentions the medieval treaties among vassals that produced constant conflicts and wars. For Otto von Gierke, the zenith of feudal political theories occurs with the expansion of the community rights as a whole. However, that form of government is seen by him to be much more the exception for the ruling medieval thoughts to justify the exclusive power on lands as a spiritual order. So, the usufruct of the land and its *possessio* resulted in the notion of an absolute *dominium* not as a collective matter guaranteed by contract opposed to a unique sovereign. Another contribution from the German thinker was the idea of a political body exercising social compensation in a community as a tangible aspect for social order.<sup>158</sup> In United States,

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<sup>158</sup> Gierke, O. von (1900). The idea of popular sovereignty. In *Political theories of the Middle Age* (pp. 37-38). Translated by Frederic William Maitland. London: Cambridge University Press. Two decades after Otto von Gierke’s ideas being published, the 1919 Constitution of Weimar introduced the legal basis for the social function of property in its article 153 for the organisation of the economy: “Property is guaranteed by the constitution. Laws determine its content and limitation. Expropriation may only be decreed based on valid laws and for the purpose of public welfare. It has to be executed with appropriate compensation, unless specified otherwise by Reich law. Regarding the amount of the compensation, the course of law at general courts has to be kept open in case of a controversy, unless Reich laws specify otherwise. Expropriations by the Reich at the expense of the states, communities or charitable organizations may only be executed if accompanied by appropriate compensation. Property obliges. Its use shall simultaneously be service for the common best”. All property contracts had to comply with the new external limits on property as the private retribution to collective investments made through taxes payers. “The Roman jurists’ aim is to find – within the specified framework – the rule arising out of the nature of the thing itself, out of conditions as they are. Take, for example, the legal matters not – or scarcely – regulated by statute: Acquisition of possession and ownership (particularly acquisition of ownership by *traditio*, *usucapio*, *coniunctio*, *specificatio*, *occupatio*), the law of *stipulatio* (alternative obligation, impossibility of performance, *mora*), delegation, and also the law relating to sale and hire, capacity to contract, doctrine of degree of liability, and so forth. In all these matters it may be observed that legal writers are not satisfied at the time, but that they are at pains to evolve a law of Nature. This is the determining cause for the peculiar manner in which legal science is presented; it does not actually prove the rules stated, but derives them direct from the contemplation of life, from the *ratio iuris*. This accounts for its dogmatic assurance, but also for its occasional shortsighted orthodoxy”. See Schulz, F. (1936). Isolation. In *Principles of Roman law* (pp. 35-36). Oxford: Clarendon Press. It is also said by Savigny that: “Toda ley debe expresar un pensamiento en forma tal que valga como norma. Quien interprete, pues, una ley, debe analizar el pensamiento contenido en la ley, debe investigar el contenido de la ley. Interpretación es lo primero: reconstrucción del contenido de la ley. El intérprete debe colocarse en el punto de vista del legislador y producir así artificialmente su pensamiento. Esta interpretación no es posible sino por una triple compsiación de la tarea. La interpretación debe tener, por tanto, una constitución triple: lógica, gramática e históric”. See Savigny, F. K. von (1979). Presentación de las normas de elaboración absoluta de la ciencia del derecho. In *Metodología jurídica* (pp. 12-13). Buenos Aires: Depalma.

the social dimension of land ownership appears in the same period: “[...] we must recognize that a property right is a relation not between an owner and a thing, but between the owner and other individuals in reference to things”.<sup>159</sup>

Lucius Junius Moderatus Columella refers to territorial occupation, but land was always a relation between private individuals not an object under an absolute political power. *Possessio* and *concessio* were common contracts between landlords and tenants.<sup>160</sup> The civil contract, which Marcus Tullius Cicero praised in Rome, depended on the concepts of “home”, “fatherland” and “land use” that the Roman laws guaranteed to the citizens.<sup>161</sup> As we have discussed, the modern concept of property as land needs also a constant affirmation, but, different from what is seen in Gierke, that task was headed by the sovereign use of force. The state is considered the supreme actor in territorial and private ownership disputes involving landlords, peasants and new lands “discovered” oversees. So, *locus* or modern property is only possible with the violence of the state and, because of that, sovereignty becomes a political theme for the civil organisation or the Commonwealth in Thomas Hobbes. However, as Otto von Gierke defended, it is known the spiritual argumentation giving to the sovereign an absolute use of power on all lands does not include those ideas from social medievalists. We selected the ideas of the Italian philosopher Marsilius of Padua (1275-1342) to debate the access of land out of the realm of an absolute power. As Otto von Gierke, he called the attention to the need for a spiritual interpretation of the Nature created by God in which men could reach values to live in peace.

## 2.1. Marsilius of Padua: the concept of usufruct limiting the *dominium*

Marsilius of Padua made an effort to explain how the presence of reason was

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<sup>159</sup> Cohen, M. R. (1927). Property and sovereignty. *Cornell Law Review*, 13(1), 12

<sup>160</sup> Columella, L. J. M. (1879). Libro XII. In *Los doce libros de agricultura* (p. 237). Traducción Don Vicente Tinajero. Madrid: Imprenta Miguel de Ginesta. Tomo II. According to the author “[...] porque también los capataces han entrado a ocupar el lugar de sus amos, que en otros tiempos, por una costumbre antigua, no sólo cultivaban los campos, sino también habitaban en ellos”.

<sup>161</sup> Read the dialogue between Laelius and Philus: “Don’t you think it relevant to our homes that we know what is going on and being done at home?—which is not the one that the walls of our houses surround but this whole universe, which the gods gave us as a domicile and a fatherland in common with themselves. Especially since, if we ignore these things, we must ignore many great things. And indeed the investigation and consideration of these very things delight me, as also—by Hercules!—they do you, Laelius, and everyone eager for wisdom”. See Cicero, M. T. (2014a). Book I. In *On the republic* (p. 38). Translated by David Fott. New York: Cornell University Press.



immanent in every community. Up to a certain extent, it is found a confluence between his thoughts and the Ciceronian ideas. However, the medieval philosopher theorised that the temporal social organism was a logical extension and a conscious imitation of the forces of Nature.<sup>162</sup> He critically evaluated the eagerness for the conquest of foreign territories through *imperium* as the Romans and the predominant ecclesiastical order in medieval times.<sup>163</sup> Spiritual representatives are under the power of God to serve him and forgive sins: “It does not, therefore, belong to the office of bishop or priest to judge contentious and carnal acts or temporal things with coercive judgment”.<sup>164</sup> Marsilius of Padua advocated the Church should not have any influence in public, private and city life. Therefore, land or legal substantive matters did not correspond to any spiritual task of God’s men. More precisely, he used to see the ecclesiastical monarchy and bishops as a body for tangible conflicts in spirit. His political theories about the separation of powers, which had an enormous basis from spiritual and temporal rationality from *lex naturae*, were methodologically built on the rejection of coercive jurisdiction on either property or individuals. He affirms “neither the bishop of Rome who is called the pope nor any other priest or bishop or spiritual minister, together or separately, has or should have as such any coercive jurisdiction, either of property or of persons, over any priest or bishop or deacon or college of them”.<sup>165</sup> The entries of *dominium* and *possessio* were the two key concepts to revolutionise how medieval governments should solve their conflicts if land were under scarcity.<sup>166</sup>

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<sup>162</sup> Gierke, O. von. (1900). The idea of organisation. In *Political theories of the Middle Age* (p. 29). Translated by Frederic William Maitland. London: Cambridge University Press.

<sup>163</sup> Padua, M. (2005). On the canonic sayings of the apostles and the expositions of the saints and doctors, by which the same as in the previous chapter is patently confirmed. In *The defender of the peace* (pp. 177-178). Translated by Annabel Brett. Cambridge: Cambridge University Press.

<sup>164</sup> Marsilius of Padua defends the concept of non-ambiguity in carnal or temporal issues. He agrees with Bernard of Clairvaux’s *Five Books on Consideration*, I. 6. The role of the Church should be for spiritual and ecclesiastical matters. Any aspiration for political power or temporal interference would be against the biblical purposes of God representatives on earth. They both refer to Matthew, Chapter 9:6.

<sup>165</sup> Padua, M. (2005a). Discourse II. In *The defender of the peace* (p. 142). Translated by Annabel Brett. Cambridge: Cambridge University Press. Marsilius of Padua was really critical to the contortion of the tythe into an ecclesiastical matter mainly over possessions. The author uses the Ciceronian concept of *pecus*, which was applied to moveable things or the conveyable richness extracted from the land not the land in itself, to make evident the incompetence of the Church on the temporal Civil Law matter about territory. A spiritual tax on land was a pretext to surrogate princes’ role: “Again, they stretch this same term – even more improperly – to the possessions and temporal goods of these men (both moveable and immoveable) and to certain proceeds from temporal goods which they call tithes, so that on the pretext of a word they can be exempted from the norm of Civil Laws and princes”. p. 149

<sup>166</sup> Padua, M. (2005a). Discourse II. In *The defender of the peace* (p. 258). Translated by Annabel Brett. Cambridge: Cambridge University Press.

Moreover, the Italian philosopher refers to poverty as a consequence of the eagerness for wealth in some individuals, but he understands such relation as a sort of unreasonable pauperised illegitimate doctrine on the use of land. For him, natural laws did not permit the pursue of any logic in which a right or *dominium*, even possession, could define paucity and wealth.<sup>167</sup> If there is an individual use of a land, the case of possession that impedes the collectives to enjoy the same, it is illicit by definition based on the divine and natural laws. His thoughts converge the spiritual concept of Nature as something created by God on a very generous and popular use of land in temporal life. Marsilius of Padua includes the variable of time in his analyses on possession. It is important for the medieval philosopher to make evident the notion of perennial usufruct of land for just one sovereign as an artificial predication for God and only possible by the distortions of a men's law.<sup>168</sup> This is why any rule erected against the natural principle that links individuals to the sacred right to everything in Nature, including the natural right to the access to land, should be understood as unnatural and against biblical principles related to God's creation made to endure. For the Italian philosopher, the retention of goods is against the rationality of the *lex naturae* since all kinds of life are susceptible to an end: "Again, 'possession' is predicated, although improperly, of the illicit retention of a thing, present or past: whether one physically handles the thing oneself or another does so".<sup>169</sup> The rationale of such ephemeral condition would be the one devoted to all things in common and that notion was responsible to lead all men to the unity of a spiritual reason. Nature, land and *res* are only licit if used for the good of all.<sup>170</sup>

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<sup>167</sup> "Now everyone calls a man 'rich' if he has licit or rightful power or dominion or possession of temporal things, which are called 'riches', either in common or privately or both, while in contrast they call a man 'poor' if he lacks such goods. Therefore, to avoid the opinion we want to develop turning out ambiguous because of the variety of usage of some of the terms we have just mentioned (and which we shall need to use for our purpose), let us first distinguish between their significations or modes. These terms are: 'right', 'dominion', 'possession', 'proper' and 'common', 'rich' and 'poor'". See Padua, M. (2005a). Discourse II. In *The defender of the peace* (p. 250). Translated by Annabel Brett. Cambridge: Cambridge University Press.

<sup>168</sup> "In another way, and more narrowly, 'possession' is predicated of dominion in the sense just said, together with actual physical handling, present or past, of the thing or of the use or usufruct of it. This is the way the term is mostly used in the science of civil law". Padua, M. (2005a). Discourse II. In *The defender of the peace* (p. 257). Translated by Annabel Brett. Cambridge: Cambridge University Press.

<sup>169</sup> Padua, M. (2005a). Discourse II. In *The defender of the peace* (p. 258). Translated by Annabel Brett. Cambridge: Cambridge University Press.

<sup>170</sup> According to the author: "Further, this term is predicated of the licit physical handling of a thing, either one's own or even another's, as in Acts 4: 'neither said any of them that ought of the things he possessed was his own; but they had all things common'". See Padua, M. (2005a). Discourse II. In *The*

As Marsilius of Padua says the terminology applied to possession is the same that derives from *dominium*: “Following on from this, we must make a distinction with regard to this term ‘possession’. Taken in a broad sense, this term in one way means the same thing as dominion so-called in any of its first three significations”. The element of physical force is implicit in such conception once the perennial land must be an object of constancy: “a temporal thing in relation to one who has it or wills to have it in the way that we said in the first two significations of dominion”. For him, medievalists in general devoted to public issues and territory were interested in defining the limits of meaning in right, power and will for the purposes of a spiritual eternity in temporal life. However, the making of privileges and centralised political powers do not coincide with land possession for all: “Hence Genesis 13: ‘And he was very rich in possessions, in gold and in silver;’ and chapter 17 of the same: ‘And I will give unto thee, and to thy seed after thee, all the land of Canaan, for an everlasting possession’”.<sup>171</sup> Then such divine strength is translated into “act” and “disposition”. Two juridical words in a temporal terminology that medieval legists and canonists diligently chose to re-phrase biblical references of “everlasting possession” in law. A thing acquired is not effective if the only formal reasonable element in Nature is obliterated by the formal exercise of a temporal right in legislation or law. Furthermore, any physical inclination defending the possession against collectives gives support to an act contrary to the God’s laws. If necessary, disposition in using force complements a formal will of an individual in keeping his *dominium* in his hands.<sup>172</sup>

It is important to enter the debate on how the feudal thought operated a long and complex juridical transformation in the concept of land possession, because it has to do with the construction of a concept. The elements of absolute power, temporal laws and

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*defender of the peace* (p. 258). Translated by Annabel Brett. Cambridge: Cambridge University Press.

<sup>171</sup> Padua, M. (2005a). Discourse II. In *The defender of the peace* (p. 257). Translated by Annabel Brett. Cambridge: Cambridge University Press.

<sup>172</sup> “At this point we need to distinguish between the various modes or significations of ‘dominion’. And strictly understood, it means the principal power of claiming for oneself something that has been acquired by right so-called in its first signification; the power, I emphasise, of a knowing and consenting individual, whose will it also is that no one should be allowed to handle that thing without his express consent, sc. as its owner, just as long as he has it in his dominion. But this power is nothing other than the will, in act or in disposition, to have in this way a thing that has been acquired by right, as we said, and indeed it is said to be the individual’s ‘right’, since it is in conformity with right so-called in the first sense; in the same way as we also said that a column is right-hand or left-hand when it is considered in respect of its proximity to an animal’s right or left”. Read Padua, M. (2005a). Discourse II. In *The defender of the peace* (p. 256). Translated by Annabel Brett. Cambridge: Cambridge University Press.

use of force are some of the values Otto von Guericke revisited in Marsilius of Padua to recompose the German social context in the late of the 1880s. In medieval times, land was submitted to a biblical interpretation and an ecclesiastic intellectual movement by Marsilius of Padua to give room to a divergent reading relativising the creation of a human absolute *dominium*.<sup>173</sup> He opposed to those medieval theologians that insisted on reducing all kinds of possession to individuals: “Further, these terms ‘proper’ and ‘property’ are predicated (in a way that is more familiar among theologians) of the individual particularity of a person, or of a thing or aspect of a thing when they belong to one single person alone, not together with another”. It was more meritorious in biblical overview *res* belonging to one individual than sharing it under the idea of a community. Marsilius of Padua also reveals among his contemporaneous thinkers the ideological effort made by them in putting the juridical concept of private against collective or commons: “For those who inquire whether it is more perfect or more meritorious in respect of eternal life to have temporal things as proper to oneself (i.e. individually), than to have such things in common with another or others, are taking ‘proper’ in this way, distinguishing it over and against ‘common’”. The Italian philosopher did not accept any of the juridical apparatuses related to hierarchy and conflict. Imbedded in property definition, most of the medievalists imposed with their thoughts a long political tradition to rule over the commonalities. In other words, such position were against reason and *lex naturae* once it served only feudal possessions to absolute sovereigns. “Over” and “against” were seen by him as an attack to the spiritual notion of land and opposite to his beliefs: “The term ‘common’, however, insofar as is relevant to our purposes, is understood in the opposite sense to the two last significations of ‘proper’”. So, the definition of “common” for the medieval *status quo* was close to adjectives such as “true”, “required” and “exclusive”. For Marsilius of Padua, property was reduced to a subject in law against what we freely understand as social use of land nowadays: “Again, this term ‘proper’ or ‘property’ is predicated of an accident that inheres in a subject of itself; philosophers use the term in this way, although it is more familiar for them to use it as being convertible with the subject”.<sup>174</sup>

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<sup>173</sup> “It follows that we must now make a distinction with regard to the terms ‘proper’ and ‘common’. And in one way, ‘proper’ or ‘property’ is predicated of dominion so-called in its first signification; this is the way in which it is used in the science of civil law”. Read Padua, M. (2005a). Discourse II. In *The defender of the peace* (p. 258). Translated by Annabel Brett. Cambridge: Cambridge University Press.

<sup>174</sup> Padua, M. (2005a). Discourse II. In *The defender of the peace* (pp. 258-259). Translated by Annabel

The definition of rich and poor was under ideological transformation during the Middle Age especially to re-signify the meanings of wealth and poverty linked to property. Marsilius of Padua refers to “superabundance of temporal things” to present a common concept of richness at his time. One could be defined as poor if the person were exposed to the absence of such excessive amount of provisions. Secondly, the “sufficiency of the said things” was another manner to conceptualise wealth. Then, consequently, insufficiency of goods for a rich comfortable life any “particular time, present and future, in a way that is licit” would be understood as poverty.<sup>175</sup> The medieval thinker was interested in that discussion, because there was limited false correlation between poverty and community, richness and individuals, no possession and properties: “Thus, not any and every sense of poverty or of poor is opposed to any sense of rich indifferently similar things; there are others, however, which last and which are of a nature to serve several uses, like a field and a house, an axe and a garment, a horse or a servant”.<sup>176</sup> For the Italian philosopher, it is latent the notion of a reasonable usufruct of all enjoyments nature can provide for a community without the institute of an individual property. A supposed legitimate use of force corresponds to a set of rules imposed by men, against nature and non-spiritual.

Marsilius of Padua was one of the voices referring to property as a temporal thing and not devoted to an economic end. In that sense, he is close to *On the republic* by the Roman advocate Marcus Tullius Cicero. Padua’s main purpose seemed to be the ideological deconstruction of false juridical prerogatives related to property, subject, time, government and, consequently, the Catholic Church’s role. The usufruct of land as part of a spiritual matter is considered by him as an omission the medievalists distorted to favour the eagerness of temporal powers shielded by an spiritual reason. Marsilius of Padua voiced his disagreement with Church’s deviation in temporal laws to make clear a reasonable usufruct of land had in its core the defense of a peaceful coexistence for all creatures on earth. For the Italian political philosopher, such condition was coherent with the Christian principles of no accumulation of goods since the relation men and

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Brett. Cambridge: Cambridge University Press.

<sup>175</sup> Padua, M. (2005a). Discourse II. In *The defender of the peace* (p. 259). Translated by Annabel Brett. Cambridge: Cambridge University Press.

<sup>176</sup> Padua, M. (2005a). Discourse II. In *The defender of the peace* (pp. 260-261). Translated by Annabel Brett. Cambridge: Cambridge University Press.

wealth leads pure hearts to conflict.<sup>177</sup> As a consequence, for him, things conceived by God were not a matter of hierarchy and that includes also the power to judge things.<sup>178</sup> The divine and the human could not obey a hierarchy posed by the humans.<sup>179</sup>

Other renowned medievalists were worried about the same issues that Marsilius of Padua had in mind. The idea of sovereignty, land and political organisation of the

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<sup>177</sup> Justinian. (1904). *The Digest of Justinian*. Translated by Charles Henry Monro. Cambridge: Cambridge University Press. See Book II, Title VIII: "What persons compelled to give a guarantee". It is said: "It must be borne in mind that defendants in possession of immoveable property are not compellable to find sureties. 1. By possessor is to be understood a person who possesses land in the country or a town, whether solely or in respect of a share. We may add that a man is considered possessor just as much when he has an *ager vectigalis*, that is, an emphyteutic estate. Furthermore, a man must be regarded as possessor when he has the bare ownership. But where he has only the usufruct, we have Ulpian's authority that he is not possessor. 2. A creditor who has taken a thing in pledge is not 'possessor', although he should have got possession, whether the thing has been delivered to him or he has allowed it to be held on *precarium* by the debtor. 3. If land is given by way of *dos*, both husband and wife are, in regard of their actual possession of such land, considered possessors. 4. A man who has a right of action in *personam* for the delivery of land is in a different legal position. 5. Guardians are treated like possessors, whether their wards are in possession or they are so themselves; indeed, the construction is the same even where only one of the guardians is in possession. 6. If you bring an action against me to recover land which I possess, and judgment being given in your favour, I thereupon appeal, am I still possessor of the land? The proper view to hold is that I am possessor, as I have still got possession; and it makes no difference that my possession can be taken away from me by course of law. 7. When the question arises whether a man is possessor, the time to be considered [for the present purpose] is that at which the undertaking is given; for just as a man who sells the possession after giving the undertaking is in no worse position, so one who takes possession after giving it is in no better position", 87.

<sup>178</sup> Marsilius of Padua did not accept the idea of subordination between priests and bishops. There is a strong influence from his spiritual analyses in such topics on the matter of Church's power. A priest was a person among common people, so was the archbishop. See "For this reason, too, such individuals who have been elected to direct the other priests in the temple and to instruct the people in matters of faith, called bishops, were called by the ancient legislators (as by Justinian and the Roman people) 'reverend stewards'; and the highest of them, also, is called 'most reverend steward' by the same". Padua, M. (2005a). Discourse II. In *The defender of the peace* (p. 316). Translated by Annabel Brett. Cambridge: Cambridge University Press.

<sup>179</sup> As follows: "The main division of things ranges them under two heads; some things being subjects of divine law, some of human. Subjects of divine law, for instance, are things sacred and religious. Things under a sanction (*res sanctae*), moreover, as for example, walls and gates, are to a certain extent subjects of divine law. A thing which is of divine law is no man's property; but a thing which is of human law is for the most part the property of some one or other; still it is possible that it should be no man's property, we know that things comprised in an inheritance, until some one becomes heir, are no man's property. Such things as are subjects of human law are either public or private. Things that are public are held to be no man's property, they are in fact regarded as belonging to the whole community; things are private that are the property of individuals. 1. Again, some things are corporeal, some incorporeal. Corporeal are such as can be handled, for instance, land, slaves, raiment, gold, silver, and innumerable things besides; incorporeal are those that cannot be handled, of which nature are such as consist of a right, for instance, an inheritance, a usufruct, an obligational claim, however acquired. It is beside the purpose to say that there are corporeal things contained in an inheritance; as it is equally true that produce which is taken from land [in exercise of a usufruct] is corporeal, and anything owing to a man in pursuance of an obligation is for the most part corporeal, such as land, or a slave, or money; still the bare right of succession to an inheritance and the right of usufruct and the right involved in an obligational claim are all incorporeal. To the same class also belong rights attached to urban and rustic tenements, or, as they are also called *servitutes*". See Justinian. (1904). On the division of things and their respective natures. In *The Digest of Justinian* (Vol. I, p. 39) Translated by Charles Henry Monro. Cambridge: Cambridge University Press.

public order was presented also by Engelbert of Volkersdorf (1250-1311). As a political thinker he defended justice as a criterion to sustain or depose a ruler. His thoughts had the seeds of what we call political constitutions nowadays, but extremely dependent on the concept of sovereignty.<sup>180</sup> The debate of a central and powerful body was opposed to Marsilius of Padua's view on temporal philosophical inquiries. John of Salisbury (1120-1180), for instance, elaborated the metaphor of a State comparing it to the parts of the body. Thomas Hobbes (1578-1689) is also well-known for his representation of a creature called Leviathan as literally an image of a political body as "Nicholas of Cusa, who for this purpose brought into play all the medical knowledge of his time". So, the material body in order to justify the temporal power was a spiritual attempt to crystallise what was denominated by them the Cosmic Harmony.<sup>181</sup> The body of power was the creation of a nature with exclusive legitimate use of violence to mediate conflicts: "[...] a well ordered Constitution consists in the proper apportionment of functions to members and in the apt condition, strength and composition of each and every member". Members, head and body as a whole conformed a coherent unity in every single part of a community "that the true *unitas* of the Body of the State rests on the just *coherentia* of the members among themselves and with their head".<sup>182</sup> Marsilius of Padua was forgotten as a philosopher of politics and usufruct of land. The consolidation of Modern states in Europe demanded territorial expansion overseas and the navigation was the instrument for such mission. Therefore, the recognition of the right to enjoy the nature was inappropriate for the construction of sovereignty since it created legal bonds in the usufruct and possession of lands for the natives in the new world. Another controversial topic was the constitution of a political body separated from the spiritual tasks of the Catholic Church, but an entity incumbent on religious purposes. Francisco

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<sup>180</sup> Blythe, J. B. (1992). *Ideal government and the mixed constitution in the Middle Age*. Princeton: Princeton University Press.

<sup>181</sup> Gierke, O. von (1900). Macrocosm and microcosm. In *Political theories of the Middle Age* (p. 24). Translated by Frederic William Maitland. London: Cambridge University Press.

<sup>182</sup> "Thomas Aquinas, Alvarius Pelagius and many others applied the doctrine in its traditional and mystical vestments to the structure and unity of the Church. Ptolomaeus of Lucca pursued the thought that the life of the State is based upon a harmony analogous to that harmony of organic forces (*vires organicae*) which obtains in the Body Natural, and that in the one case as in the other it is the Reason, which, being the ruler of all inferior forces brings them into correlation and perfects their unity". Aegidius Colonna assumes image of the Body Natural as the mechanism that connects and coordinates every individual. William Ockham was another intellectual that treated the State as an organism including also the ambiguous task of State in being ecclesiastical and the Church being temporal, but by separate powers. See Gierke, O. von (1900). Macrocosm and microcosm. In *Political theories of the Middle Age* (pp. 25-27). Translated by Frederic William Maitland. London: Cambridge University Press.

de Vitoria and Pedro Fernández de Navarrete reincorporated the medievalist thought in the definition of sovereignty opening the path to *imperium*, conquest and absolutism.

## 2.2. Francisco de Vitoria and Pedro Fernández de Navarrete: law and *imperium*

Francisco de Vitoria (1492-1546) was a well-known theologian from Salamanca who theorised on the spiritual dimension of the state during the territorial conquests overseas in the XVI century. He presents non-Christian peoples as “barbarians”, subject to the logic of natural laws, civil codes and the notions of sovereignty.<sup>183</sup> As a reader of Aristotle and Thomas Aquinas, he was also devoted to a rationale in favour and against a legitimate seizure of the new territories. Although believing in the use of rationality among the potestas of kings and the Catholic Church, his legal understanding had a natural and divine law bases. All temporal domains are the image of God being, consequently, a task of all Christian should the imitation of a life coherent to the faith preached by the true representatives of the supreme existence: “Aparece, pues, claro que el domino tiene su fundamento en la imagen de Dios” and “Ya dijimos que el fundamento del dominio es ser imagen de Dios”.<sup>184</sup> Moreover, Francisco de Vitoria advocates the natives could not be considered the sovereigns of their territory, because they had their spiritual lives not dedicated to their vital needs ignoring the human laws that were arriving. The Spanish theologian reproduces Aristotle saying it is recommended for some men to be under the condition of servitude if they do not have conditions to govern their minds, but also refuses the right to the Spanish conquerors in

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<sup>183</sup> Read “¿Esos bárbaros [los pueblos conquistados], antes de la llegada de los españoles, eran verdaderos dueños pública y privadamente? Esto es: ¿eran dueños legítimos de sus bienes y propiedades particulares y había entre ellos quienes fueran verdaderos príncipes y señores de los demás?”. See Vitoria, Francisco (1946). Relección primera de los indios últimamente descubiertos. In *Relecciones sobre los indios y el derecho de guerra* (p. 38-40). Madrid: Editorial Espasa-Calpe. The historian Reinhart Koselleck studied the semantic and asymmetric distortions in the meaning and text interpretation imposed by many Popes between the Middle Ages and the Modernity to meet the political intentions of the Catholic Church in questions of sovereignty. He says: “De modo que el ‘superhombre’ aparecía ya en los antiguos cultos de los heroes, y como caracterización del verdadero cristiano, del que ha vuelto a nacer, alcanzó un discutido significado religioso. Esta expresión se uso de buen grado sobre todo en las tradiciones gnósticas, espiritualistas y míticas, pero también desfiguró textos de cara al fortalecimiento de la pretensión papal de soberanía”. See Koselleck, R. (1993). Sobre la semántica histórico-política de los conceptos contrarios asimétricos. In *Futuro pasado* (p. 245). Barcelona: Paidós.

<sup>184</sup> Read the “Introducción” and the chapter “Sobre el pasado y el futuro en la historia reciente”, pages 16-29, Koselleck, R. (1993). *Futuro pasado*. Barcelona: Paidós.



taking possession of the new lands and natives. Outside a Christian *dominium*, they were uncultured, sinlike, unfaithful and ignorant human beings: “[...] los bárbaros no tuvieron dominio, no parece que pueden alegarse otros motivos, sino porque son pecadores, porque son infieles o porque son amentes o idiotas”.<sup>185</sup> In *Relecciones sobre los indios y el derecho a la guerra*, Francisco de Vitoria poses seven unfair and seven lines of argumentation the Spanish conquerors should respect if they wanted to commit with temporal and spiritual laws.

The initial reflection presented by Francisco de Vitoria says all the natives are the true owners and possessors of what is disposed by nature in the new lands. They are the legitimate ones entitled for such usufruct once they access in a pacific way all God’s creation: “Son señores pública y privadamente de las cosas y posesiones privadas, pues las tienen de forma pacífica. Si no se prueba el contrario, no se les puede despojarseles de su posesión sin justa causa”. It is also said that: “[...] el dominio proviene de la autoridad divina [...] y nadie puede tener dominio sino aquel a quien Él se lo dé”.<sup>186</sup> Refuting the allegations of the some theologians and conquerors, who said sinners might have lost any prerogative to claim the *dominium* of lands, he affirms the ones denying the *dominium* for the natives in goods and lands misplace the application of natural ownership with the Civil Law. Francisco de Vitoria explains that rationality pointing out all men are dignified by the *lex naturae* when they possess the natural world for its usufruct and their own existence. It is unconditional the prerogative they are established in the new territory making the use of it for their own. There is not room for different interpretation since it is evident such human need for them.

The first argumentation posed by the Spanish theologian to clarify the right to thigs and lands in the new lands has to do with the *potestas* of all kings. The temporal powers are not universal domina once the dominum only exists in virtue of the natural or divine law. In that sense, any of these systems give power to sovereigns to be the governor of the *orbis terrarum*. The second one critically avoids the highest ecclesiastical authority, the Pope, as a civil or temporal *dominus* to benefit the political bodies interested in the new territories: “El Sumo Pontífice, aunque tuviese potestad secular sobre el mundo, no podría transmitirla a los príncipes seculares [...] Porque tal

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<sup>185</sup> Koselleck, R. (1993). Introducción. In *Futuro pasado* (p. 14). Barcelona: Paidós.

<sup>186</sup> Vitoria, F. (1975a). Primera parte. Relección primera ante los indios últimamente descubiertos. In *Relecciones sobre los indios y el derecho a la guerra* (pp. 38-42). Madrid: Editorial Espasa-Calpe.

Potestad sería aneja al Papado, y no podría el Papa separarla del cargo del Sumo Pontífice, ni podría privar a su sucesor de aquella potestad, porque no puede ser Sumo Pontífice inferior a su predecesor [...] Así, si un Pontífice cediese esta potestad, o tal entrega sería nula o el siguiente Pontífice la podría retirar”.<sup>187</sup> The third argumentation is about the Pope’s *potestas* as a spiritual representative of God on earth to intervene in temporal political conflicts. Francisco de Vitoria does not accept such prerogative since the competence for that is only applied to those who had been converted by the Christian faith: He affirms: “[...] Porque no tiene potestad temporal sino en orden a lo espiritual, y como no tiene potestad espiritual sobre los indios, como resulta de la 1ª Epístola a los Corintios, tampoco puede tenerla temporal”.<sup>188</sup> Understanding the intentions of that rational to have the possessions of the natives, Francisco de Vitoria mentions the *ius gentium* about the *dominium* and *possessio* to question the Spanish position: “Es de derecho de gentes que se concedan al ocupante las cosas que no son de nadie, como se dice expresamente en el referido párrafo *Ferae Bestiae*; pero como aquellos bienes no carecían de dueño, no pueden ser comprendidos por este título. Y aunque este título, combinado con otro, puede tener algún valor, como luego diremos, por sí solo no justifica la posesión de los españoles, del mismo modo que no podría fundar la de los bárbaros en el territorio español, si ellos nos hubieran descubierto a nosotros”.<sup>189</sup> Understanding the intentions of the conquerors in justifying at any cost the occupation and establishment of the new lands, Francisco de Vitoria presents the fourth and the fifth argumentations. In them, he asks, respectively, if the natives were really able to reject the Christian faith and in case of unacceptance if the Spanish Empire could legitimately make the use of force to compel them to do so. For both questions, the theologian states the natives could not be object of punishment for being unaware of the Christianity. Then, a fair war cannot be made because they did not violate any natural law and, consequently, they were not sinners. In order to respond to the issue if the conquerors sent by the Kings of Spain were legally competent to impose

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<sup>187</sup> Vitoria, F. (1975b). Segunda parte. De los títulos no legítimos por los cuales los bárbaros del Nuevo Mundo pudieron venir a depender de los españoles. In *Relecciones sobre los indios y el derecho a la guerra* (pp. 63-65). Madrid: Editorial Espasa-Calpe.

<sup>188</sup> Vitoria, F. (1975c). Segunda parte. De los títulos no legítimos por los cuales los bárbaros del Nuevo Mundo pudieron venir a depender de los españoles. In *Relecciones sobre los indios y el derecho a la guerra* (pp. 66-67). Madrid: Editorial Espasa-Calpe.

<sup>189</sup> Vitoria, F. (1975d). Segunda parte. De los títulos no legítimos por los cuales los bárbaros del Nuevo Mundo pudieron venir a depender de los españoles. In *Relecciones sobre los indios y el derecho a la guerra* (p. 69). Madrid: Editorial Espasa-Calpe.

by force the Christian faith. In the sixth argumentation, Francisco de Vitoria affirms that any conversion should be made under fear or the ignorance of the Christian burden. The last one refers to the Spanish power claiming the right to a special mission to spread the spiritual virtues of the Christianity. In that enterprise, it is necessary a written prophecy in the Bible or visible miracle to give to Spain the power for such task.<sup>190</sup>

Nevertheless, Francisco de Vitoria created other argumentations in order to support the Spanish Empire in conquering new lands. In addition, it is relevant to notice how the theologian presupposes in his seven negatives aforementioned a fair usufruct of the “discovered” territories to protect the Spanish *dominium* from future disputes with other conquerors. His first argumentation to pave the path for the Spanish Empire was that the lands overseas were part of a natural community in which the right to travel and visit, if not used to produce any harm, could not be denied by the barbarians: “los españoles tienen derecho a viajar y permanecer en aquellas provincias, mientras no causen daño, y esto no se les pueden prohibir los bárbaros”.<sup>191</sup> Then, the second argumentation was the spiritual right of spreading and preaching the Christian faith. It says: “Los cristianos tienen derecho de predicar y de anunciar el Evangelio en las provincias de los bárbaros”.<sup>192</sup> The other one was the duty to offer protection to the new Christians if they were forced by their old princes to come back to idolatry or native beliefs. Francisco de Vitoria states that: “Si algunos de los bárbaros se convierten al cristianismo y sus príncipes quieren por la fuerza y el miedo volverlos a la idolatría, los españoles pueden, en tal caso, si no existe otro medio, declarar la guerra y obligar a los bárbaros a que desistan de semejante injuria, y utilizar todos los derechos de la guerra contra los pertinaces y, si lo exigen las circunstancias, destituir a los señores, como en las demás guerras justas”.

The fourth argumentation says if the new believers suffer from any sort of threat by the side of their old lords, the Pope can designate a Christian prince to protect them. The Spanish theologian avers that: “Si una gran parte de los bárbaros se ha convertido a

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<sup>190</sup> Vitoria, F. (1975e). Segunda parte. De los títulos no legítimos por los cuales los bárbaros del Nuevo Mundo pudieron venir a depender de los españoles. In *Relecciones sobre los indios y el derecho a la guerra* (pp. 75-84). Madrid: Editorial Espasa-Calpe.

<sup>191</sup> Vitoria, F. (1975f). Tercera parte. De los títulos legítimos por los cuales pudieron venir los bárbaros al dominio de los españoles. In *Relecciones sobre los indios y el derecho a la guerra* (p. 88). Madrid: Editorial Espasa-Calpe.

<sup>192</sup> Vitoria, F. (1975g). Tercera parte. De los títulos legítimos por los cuales pudieron venir los bárbaros al dominio de los españoles. In *Relecciones sobre los indios y el derecho a la guerra* (pp. 96-100). Madrid: Editorial Espasa-Calpe.

Cristo, ya sea por las buenas, ya por las malas, esto es, por amenazas o terrores, o de cualquier otro modo injusto, el Papa puede, habiendo causa razonable y pídaselo ellos o no, darles un príncipe cristiano, arrancándolos a sus anteriores señores infieles”.<sup>193</sup> The fifth reason authorises the Spanish Empire the legitimate use force to impede any unhuman treatment committed by the barbarians against the innocent natives: “Otro título puede existir, fundado en la tiranía de los señores de los bárbaros o en el carácter inhumano de leyes que entre ellos imperen en daño de los inocentes, como son las que ordenan sacrificios de hombres inocentes o permiten la matanza de hombres exentos de culpa para comer sus carnes. Afirmando que, aun sin necesidad de la autorización del Pontífice, pueden los españoles prohibir a los bárbaros todas estas nefandas costumbres y ritos, pues les está permitido defender a los inocentes de una muerte injusta”.<sup>194</sup> The sixth affirmative argumentation to meet the conqueror’s desire had to do with the true and voluntary acceptance of the Spanish *potestas* by the new Christians. In that point, Francisco de Vitoria recognises the spiritual condition of the natives to recognise the amiable presence of the conqueror saying that: “Otro título puede ser la verdadera y voluntaria elección, que existiría en la hipótesis de que los bárbaros, comprendiendo la humanidad y sabia administración de los españoles, decidieran libremente, tanto los señores como los demás, recibir como príncipe al rey de España. Esto se puede hacer, y sería título legítimo, aun en el mismo derecho”.<sup>195</sup> Finally, Francisco de Vitoria points out the seventh argumentation for the bonds of friendship and alliances between visitors and natives once it is fair the unprotected ask for the Spanish help to preserve their lives against their own enemies: “Otro título podría provenir de razones de amistad y alianza. Pues a veces los bárbaros guerrear entre sí legítimamente, y la parte que ha recibido injuria tiene derecho a declarar la guerra y puede pedir auxilio a los españoles, repartiendo con ellos los frutos de la victoria”.<sup>196</sup>

Not only was Francisco de Vitoria looking for a solid legal basis for the maritime expeditions, but also aware of the authoritarian minds inside the Spanish Empire. The

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<sup>193</sup> Vitoria, F. (1975h). Tercera parte. De los títulos legítimos por los cuales pudieron venir los bárbaros al dominio de los españoles. In *Relecciones sobre los indios y el derecho a la guerra* (p. 100). Madrid: Editorial Espasa-Calpe.

<sup>194</sup> Vitoria, F. (1975i). Tercera parte. Relección primera ante los indios últimamente descubiertos. In *Relecciones sobre los indios y el derecho a la guerra* (p. 101). Madrid: Editorial Espasa-Calpe.

<sup>195</sup> Vitoria, F. (1975j). Tercera parte. Relección primera ante los indios últimamente descubiertos. In *Relecciones sobre los indios y el derecho a la guerra* (p. 102). Madrid: Editorial Espasa-Calpe.

<sup>196</sup> Vitoria, F. (1975l). Tercera parte. Relección primera ante los indios últimamente descubiertos. In *Relecciones sobre los indios y el derecho a la guerra* (pp. 102-103). Madrid: Editorial Espasa-Calpe.

Spanish theologian knew the King Ferdinand and the Queen Isabelle represented an alliance of two institutional bonds that needed to avoid future disputes with other States in Europe. If the conquest of the new lands in America were not legally well-based, the legitimacy of the Spanish imperial expansion sooner or later would end up as an object of conflict with other political powers in the continent. Some of the obstacles for a legal argumentation backing the recent possessions and, consequently, the usufruct of them were in the Spanish Empire notwithstanding. The Kingdom of León was known to be a decisive power for the *Reconquista* of the Iberian Peninsula and loyal military force of Castile. However, the Spanish ally was also famous for the abuses and misuses in the application of the law ignoring most of the argumentations raised by theologians and jurists on substantive matters about *imperium*, *dominium* and *possessio*. Therefore, it was urgent for the interests of the crown the harmonisation of the divine law and the *ius gentium* firstly in Spain. As it is observed as a latent preoccupation in the *Relecciones sobre los indios y el derecho a la guerra* by Francisco de Vitoria, the Spanish Kingdom was incumbered of conving the other Christian *potestas* including the Catholic Church that the enterprises in the new lands were respecting the rules of the *ius gentium*. Jesús Lalinde Abadía presents the tension between the juridical and political powers as a historical body forged by the permanent rivalry of the Spanish crowns before King Ferdinand and Queen Isabelle. After the XV century, the historian calls the attention to the fact that the Kingdom of Castile had to resist vehemently the authoritarian legal tradition from León. For a long time, Castile had ignored the internal legal practices in the Kingdom of León. However, once the conquest of new territories were little by little being seen as a strategy of Catholic kings to consolidate its hegemony the other powers were inevitably exposed to the dominant tradition of León. The authoritarian Visigoth legal system was then internalised by Castile. Such event in its history was central once it carried the seeds of an arbitrary legal framework subject to political inquiries. So, an excessive use of force to expand the *imperium* was concomitantly nurturing juridical facts against the Spanish Empire: “El sistema legal autoritario visigodo es heredado por el reino de León. Castilla lo combate para conseguir su independencia o secesión, y ensaya entonces un sistema judicial; pero, una vez ha conseguido su propósito, es la que lo adopta con mayor intensidad, reforzándolo a través de una fuerte penetración del Derecho común”. Nevertheless, the author calls the attention to the consuetudinary legal

systems in the Mediterranean countries that sounded an alternative to the authoritarian Visigoth system of law. It was the version of law made by political pacts and contracts as it was similarly defended by the Ciceronian thoughts: “Por el contrario, Navarra y los países de la Corona de Aragón practican un Sistema consuetudinario legal pactista, más rigurosamente consuetudinario y popular en Navarra y Aragón, donde, sobre todo en este último reino, se repudia el Derecho común, en tanto priva el carácter erudito en los países mediterráneos, sobre todo en Cataluña, donde el sistema deriva hacia el tipo jurisprudencial doctrinal, con recepción del Derecho común”. The conservative legal system exercised by Castile remained active till the Bourbons’ conquest when it was yet more severe converging the French authoritarian tradition to the jurisprudence of Visigoth customs in Spain juridical history: “Navarra y los países de la Corona de Aragón agudizan sus sistemas pactistas en la España de los Austrias, que adopta el sistema legal autoritario castellano de tradición visigoda, hasta que los Borbones, en los que converge esta tradición con la francesa, todavía más autoritaria, unifican España bajo aquél, salvo algunas concesiones en Navarra”.<sup>197</sup> We insist on the fact that ideological conceptions dominate the juridical system according to the politically social contract. In that sense, rule of law tends to be an intellectual exercise of very few years in democratic regimes. When we revisit the versions of Spanish history in that period we find mostly legal territorial disputes.<sup>198</sup> Kingdoms were re-affirmed with the use of force, military occupation and land. Salamanca, Seville and other parts of what is today Spain have a long lasting tradition on land, *dominium* and sovereignty.<sup>199</sup>

Beyond the position of Spain and its application of the *ius gentium* in the new lands, administrative questions were still pending for the Spanish Empire even one century after Francisco de Vitoria’s ideas. Philip III asked for one of his counselors how the public administration could collect more taxes to enrich his vassals and multiply the number of men with military purposes. Once more the most important reform for the council led by Pedro Fernández de Navarrete was strategically on the usufruct of land,

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<sup>197</sup> Abadía, J. L. (1974). Los sistemas jurídicos. In *Derecho histórico español* (p. 126). Barcelona: Ariel.

<sup>198</sup> García-Gallo, A. (1942-1943). La territorialidad de la legislación visigoda. *Anuario de Historia del Derecho Español* (pp. 593-609). Madrid: Ministerio de la Justicia/Boletín Oficial del Estado – BOE; Reinhart, W. (1945). Sobre la territorialidad de los códigos visigodos. *Anuario de Historia del Derecho Español. Ministerio de la Justicia/Boletín Oficial del Estado, BOE, 1(1)*, 704-711.

<sup>199</sup> Díaz y Díaz, M. C. (1966). Los documentos hispano-visigóticos sobre pizarra. *Studi Medievali*, 3(1), 75-107. About land, sovereignty and political contracts, read Hernández, I. T. (1983). El poder real en el siglo XV: lectura crítica de los documentos de donación de villas y lugares. La formación de los Estados de Osuna. *Revista Internacional de Sociología*, 1(48), 557-591.

sovereignty and military forces. Territory as a source of taxes for Philip III was in the core of an economic plan to support the costs of the empire overseas. So, in order to make the lands in Spain more productive, the counselors of the Philip III suggested as one of the remedies the alleviation of taxes for the peasantry. Yet sounding ironical, the idea was the creation of strong local economies and the increase of the consumption would result in more tax payers. They understood as oppressive the economic logic imposed to the farmers by the king and his vassals since the usufruct of the *domina* had to be evaluated by a fair use of the soil not an extension of an absolute sovereignty. The counselors suggested also the land workers were not arrested in case of any debt during productive seasons. They also added in their advice it was very onerous the tariffs non-privileged landowners used to honour and, if persisted such administrative model of collecting taxes, it was inevitable popular opinion the tributes applied to the poorest were a burdensome system of capital accumulation to serve the ambitions of the crown. Another aspect was the initiatives on commerce liberating the peasants to sell what they produced in the estates of the lord.<sup>200</sup>

Pedro Fernández de Navarrete (1564-1632), who was a Spanish clergy and a political man with a reasonable vision on the kingdom economy, idealises very similar ideas of Marcus Tullius Cicero about the usufruct of the land, *domina* and the peasants working on the production of *pecus* as aforementioned. When he presented the report of the Counselors of the King Philip III about the remedies for the Spanish Empire, he added the peasantry had been an important body for the Roman Republic at the time of Cicero. So, it was as an example to be simulated by Philip III. On the other hand, we cannot deny he was enormously influenced by the liberal and mercantile theories on land, production and labour when he used the classical glosses to elaborate his political speeches written in 1621.<sup>201</sup> The political philosopher Pedro Fernández de Navarrete insisted that the success of sovereign depended firstly on business, secondly values in

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<sup>200</sup> See Gordon, D. M. Estudio preliminar: moralidad y política en la España del siglo XVII. In Navarrete, P. F. (1982). *Conservación de monarquías y discursos políticos* (p. XXV). Madrid: Fábrica Nacional de Moneda y Timbre.

<sup>201</sup> See Navarrete, P. F. (1982c). Discurso XXXIX. De los labradores. In *Conservación de monarquías y discursos políticos* (p. 357). Madrid: Fábrica Nacional de Moneda y Timbre. It says: “[...] considero lo que dixo Cicerón, que entre todas las cosas de que los hombres sacan ganancia, ninguna hay mejor, mas abundante, mas dulce, ni [sic] mas digna de los hombres ingenuos y nobles que la agricultura (a): *omnium rerum, ex quibus aliquid acquiritur, nihil est agricultura melius nihil uberius, nihil dulcius, nihil homine libero dignius*: y quando leo lo que dixo Virgilio: [sic] ó dichosos los labradores si conociesen la felicidad de su estado”.

the war and industrious actions imagining the appropriate solutions for the government.<sup>202</sup> The distribution of what the land can provide was taken into account as the reason the sovereign should use in order to promote the fair usufruct of *res*. Again, the concept of *pecus* is emphatic on moveable things as a source of material prosperity as a political construction of the Spanish State. Pedro Fernández de Navarrete says: “Y es porque no lo medimos con la vara de la razón, sino con la de la envidia, cuya calidad es juzgar mayores los premios de los otros; que es lo que dixo Virgilio: *præluceat alienum pecus*, que aun para no ser agradecidos á Dios, nos parece siempre, que el rebaño de nuestro vecino está mejor parado”. According to him, the pillars for a peaceful and wealthy nation were the sharing not only the labour with an exorbitant system of taxes, but the sharing of the obligation and fruits for those who work and produce in the *domina*. He adds that: “Y para evitar este inconveniente, deben los Príncipes tener mucha atención en la distribución de los premios, y en la de las dádivas y mercedes, poniendo los ojos en lo que dan, [*sic*] á quién lo dan, por qué lo dan, y en qué ocasión lo dan, para que con estas prudenciales circunstancias justifiquen en las dádivas su liberalidad, y en los premios su justicia: y así las puso Séneca, diciendo, que atiendan (*l*): *quid, cui, quando, quare, ubi & sine quibus facti ratio non constabit*”.<sup>203</sup>

The task of the Counsel was accomplished and it was strongly recommended on the topic of land the urgent need of industrious activities considering the escalating level of poverty in the kingdom. For investments, Pedro Fernández de Navarrete understood the solution of the Spanish conflict between *locuples* and *pecus*, that is to say, a system of public debt the crown used to amass a huge sum of money to invest in the maritime expeditions. The counsellor is aware of the importance in consolidating local forms of production and using the commercial treaties to generate a proper usufruct of *locuples*. He says that: “El Rey David, Ezequías y Ozías tuvieron labranza y crianza de ganados, como consta de la Escritura (*k*). Y lo mismo fuera el dia de hoy, si quitados los juros y

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<sup>202</sup> “De suerte, que los Emperadores, Reyes y Príncipes son cabeza de la república, para gobernar los demas miembros: son padres de familias en la vigilancia: son vicarios de Dios en la providencia temporal; son nervios que hacen [*sic*] trabazón á el Rey y reyno: son regla y nivel que ajustan las acciones de los súbditos; y finalmente corazón del reyno, que dándole espíritus vitales, le conserva en paz y justicia. Y para todas estas calidades han de tener tres viriudes, que llamó Cicerón imperiales, trabajo en los negocios, valor en los peligros, industria en las acciones (t): [...] *labor in negotiis, fortitudo in periculis, industria in agendo*”. See Navarrete, P. F. (1792a). Discurso XXII. In *Conservación de monarquias y discursos politicos* (pp. 199-200). Madrid: Oficina Benito Cano.

<sup>203</sup> Navarrete, P. F. (1792b). Discurso XXIV. In *Conservación de monarquias y discursos politicos* (pp. 208-209). Madrid: Oficina Benito Cano.



censos no tuvieran los nobles en que emplear su caudal y sus riquezas. Y no es mala etimología pensar que el vocablo *locupletes* se derivó de *locorum plenos*, juzgando solo por ricos [*sic*] á los que tuviesen muchas heredades; y la palabra pecunia de *pecus*, que propiamente llamamos en lengua Española ganado, por ser en lo que consiste la mayor ganancia de los frutos naturales”.<sup>204</sup> For the counselors, the economy was an essential tool to restore the political vigour of the nation and promote a fair distribution of the wealth. The proposition was more and more linked to a material conclusion on land capacity of generating positive balance of international payments and not repeating the historical facts to which Spain had been submitted before: “Y por esta razón, como lo refiere Ambrosio de Morales (*o*), alzaron los Romanos la tasa [*sic*] á los labradores de España, habiendo examinado el senado las razones referidas. Y si es opinión común, que en todas las mercaderías que vienen por mar es lícita la ganancia de doce y trece por ciento por los riesgos de la navegación, [*sic*] ¿quántos [*sic*] mas y [*sic*] mas continuos son los de la labranza, donde se fia el caudal por un año [*sic*] á la tierra, sin otras fianzas mas que la de las lluvias, sin cuyo socorro no se retorna el principal, que demás de las inclemencias [*sic*] á que está expuesto antes de llegar [*sic*] á los graneros, tiene otras muchas en las vexaciones de soldados, amigos y calumnias de cobradores”.<sup>205</sup>

For Pedro Fernández de Navarrete, the reorganisation of the economic activities in the countryside was essential to provide food for people, positive results in national savings and positive administrative balance for the entire Spanish Empire. Nevertheless, the counselor was bitterly criticised by the aristocracy and attacked when he defended a more equal condition in legal questions for the peasantry.<sup>206</sup> Considered as progressive as it could be for an empire with strong traditions in aristocratic modes of production, the Spanish King Philip III did not implement the advisory report made by him. The motive was the Thirty Year War (1618-48) and the complexities of the culture of imperial expansion as an advantageous practice in the economic field as well. The

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<sup>204</sup> Navarrete, P. F. (1792b). Discurso XXIV. In *Conservación de monarquias y discursos politicos* (p. 209). Madrid: Oficina Benito Cano.

<sup>205</sup> Navarrete, P. F. (1792c). Discurso XXXIX. In *Conservación de monarquias y discursos politicos* (pp. 364-365). Madrid: Oficina Benito Cano.

<sup>206</sup> See Gordon, D. M. Estudio preliminar: moralidad y política en la España del siglo XVII. In Navarrete, P. F. (1982). *Conservación de monarquias y discursos politicos* (p. XXVI). Madrid: Fábrica Nacional de Moneda y Timbre. As D. M. Gordon says: “En su rescisión de la pesada carga de impuestos, en la exagerada dotación de mercedes, en el crecimiento y lujo de la Corte, en la condición del campesinato y en la multiplicación de vocaciones improductivas, ya sea a través de instituciones religiosas o a través de la venta de oficios, el Concejo estaba realizando un informe coherente con proposiciones constructivas”.

king's ambition halted his administrative reforming plans on the usufruct of the lands and put the liberal conceptions of production aside. Ironically, the emotions of the king brought very negative externalities to the kingdom and culminated in the beginning of its decadence. The usufruct of ownership in the Iberian Peninsula was then suppressed by an authoritarian view defeding the interests of the Spanish sovereigns. A legal and political design in State backed the eagerness for territorial expansion, but it also proportionated absolute forms of *dominus* since the aristocracy imposed that as a condition to finance the maritime expeditions. So, the deviation of a pecuniary model based upon *pecus* served the nobility in their interests of capital speculation, put aside the social dimension of the crown and sustained a system of property without limits.

### **2.3. The concept of an absolute emotional right to property in the Iberian tradition**

The Philippine Ordinances from 1603, which was a compiled legal text from other laws called Ordenações Manuelinas, increased the notion of absolute powers for proprietors in the limits of their lands. Private owner could expand their public figures beyond the exercise of property usufruct and traditional political bonds of concession from the *dominus* to the vassal. The emotional right is the practice of deciding on administrative, penal and civil conflicts inside the *dominium* by the landlord. As we read in the Philippine Ordinances, the application of norms, the selection of facts and judgments comprised a complex system of personal bonds. The inheritance of land titles resulted also in patriarchal relations and a vast territorial jurisdiction on individuals or the “padroados”: “A qual declarou, confôrme a tenção del-Rey seu pai, ao qual vira por muitas vezes assi usar e julgar em seu tempo, quando tais casos de feito aconteciam, que quando em tal doação especialmente fosse declarado, que El-Rey dava os ditos Padroados; em tal caso passassem ao Donatário, e dai em diante a seu filho, varão legítimo, que herdasse a dita terra, segundo fôrma da dita Lei, e de outra maneira, não passassem os Padroados ao Donatário per tal doação sem embargo de a terra, Villa ou Castello, lhe ser dado com toda sua jurisdição, mero e mixto império, e todo o outro Direito Real, que El-Rey ahi tinha, ou pudesse ter, ou quaesquer outras palavras geraes, que por qualquer maneira possam ser ditas, ainda que algumas parecesse, que per bem

de sua generalidade pudessem compreender os ditos Padroados”.<sup>207</sup> The idea of jurisdiction included the status of *imperium*, which meant the right to war, creating a constant tension with the highest political authority: “Se pelos Reys, que ante elle foram, foi feita doação a qualquer pessoa de alguma Terra, Villa, ou Castello, geralmente com toda sua jurisdição, mero e mixto império, com todo outro qualquer Direito Real, que a el Rey hi pertencesse haver, se por taes palavras assi geraes passaria aos taes Donatarios os Padroados das Igrejas, que el Rey ahi tivesse?”. The serfs themselves constituted another right of the absolute *dominus* once the landlord was the spiritual owner of those living in his lands: “E se os Padroados fossem dados a alguém, apartados, per graça special, de juro e de herdade, sem terra, Villa, ou Castello, em tal caso passassem por morte do Donatario ao seu filho maior, varão legítimo, pelo modo que he ordenado que passem as terras da Corôa, confôrme dita Lei. E isto mandou, que houvesse lugar geralmente em quaisquer doações, feitas pelos Reys, que antes dele foram, ou per elle, ou pelos que adiante fossem”.<sup>208</sup>

In order to make more evident the absolute concept of property and its influence in the Iberian Peninsula, we go further in the analysis of the Philippine Ordinances from 1603. The implications of these emotional aspects in establishing social norms for the ownership contributed also to a peculiar construction enforcement. In case the lord had a doubtful feeling on some matter, the virtue and triumph of the individuals would support the ruler in condemning or absolving the accused. The figure of *praetor*, who was in the Ancient Rome a magistrate with a certain knowledge on people’s private and public life, was revived in Spain with the King Ferdinand and the Queen Isabelle in the person of *corregidor*.<sup>209</sup> However, the representative of law could not intervene in the *dominium* of the proprietor. So, all the functions in law or use of force transferred to the

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<sup>207</sup> Read the excerpt aforementioned in *Ordenações Filipinas*, Livro II, Part XIV, Title XXXV. Retrieved from <http://www1.ci.uc.pt/ihiti/proj/filipinas/l2p461.htm>

<sup>208</sup> Read the excerpt aforementioned in *Ordenações Filipinas*, Livro II, Part XIV, Title XXXV. Retrieved from <http://www1.ci.uc.pt/ihiti/proj/filipinas/l2p461.htm>

<sup>209</sup> “In 1477, Ferdinand and Isabella added the kingdom of Arragon to them; and from that period, Spain became a single sovereignty, divided into separate provinces. Madrid is governed, as to its civil concerns, by two corregidores, forty regidores, and as many alcaldes as there are districts. There is a military governor besides, and the captain general of Castile resides in the city. The functions of a corregidor are of Roman origin. The Emperor Augustus named a magistrate, who was especially charged with the care of the police, and civil government of cities; he gave him the name of Praetor. The kings who gave laws to Spain, followed the example of Augustus; and established Praetors in the principal cities of the kingdom; with this difference only, that the Praetor of the Romans is the Corregidor of the Spaniards”. See Taylor, C. (1809). Views of Spain. In *The literary panorama* (Vol. V, p.102). London: Cox, Son, and Baylis.

*dominius*.<sup>210</sup> In other words, the modern tradition of property opted for the Christian rationality in the sense the lord was a spiritual power to rule the moral values of the others. Concomitantly, the landlord was also a representative of a temporal power and he could claim his right to the legitimate use of the force to make war. We must also pay heed to the historical complexity and tensions still persisting between the temporal and ecclesiastical powers during the interregnum 1580-1640, however, the Spanish Empire finally agreed in conceiving the right to jurisdiction to the *domina*.<sup>211</sup> As we notice in the Book II, Title XLV, “De que maneira os Senhores de terras usarão da jurisdição, que per El-Rey lhes fôr dada”. The Spanish sovereignty had also to give to some landlord the concession of civil and penal jurisdiction as a covenant involving the imperial and ecclesiastical Iberian tradition.<sup>212</sup>

In the core of the emotional right concept, we can also find that the predominant role of the sovereign was a judge in his own jurisdiction mediating tensions not by legal procedures, but by politics. His feelings had to dominate the oratorical techniques to convince the public opinion on what he was deciding. That aspect of the emotional right

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<sup>210</sup> “In the composition of the edict, a learned praetor gave a sanction and preference to his private sentiments; the opinion of a censor, or a counsel, was entertained with respect; and a doubtful interpretation of the laws might be supported by the virtues or triumphs of the civilian”. See Gibbon, E. (1907). The idea of Roman jurisprudence. In *The history of the decline and fall of the Roman Empire* (Vol. VII, p. 323). New York: Fred de Fau & Company. Read also on page 332 in the same volume “But the ministers of Justinian were instructed to labour, not for the curiosity of antiquarians, but for the immediate benefit of his subjects. It was their duty to select the useful and practical parts of the Roman law; and the writings of the old republicans, however curious or excellent, were no longer suited to the new system of manners, religion, and government”.

<sup>211</sup> “Jurisdictional complexity was an inherent part of the legal order of Iberian society on the eve of conquest. The legal order contained overlapping authorities and forums, and the scope and precise nature of claims to legal control were continually in dispute. One set of tensions focused on the boundary between secular and religious legal authority. Another contested boundary was that between local and centralized law. These jurisdictional debates sometimes intersected, and the dynamics and language of one arena of conflict tended to influence the other.” See Benton, L. (2002). Law in Diaspora. In *Law and colonial cultures: legal regimes in world history, 1400-1900* (p. 90). New York: Cambridge University Press.

<sup>212</sup> “Como entre as pessoas de grande estado e dignidade, e as outras, he razão que se faça diferença, assim nas doações e privilegios, concedidos às taes pessoas, consumaram os Reys pôr mais exuberantes clausulas, e de maiores prerogativas para se mostrar a maior *affeição e amor* [our italics], que lhes tinham. Polo que nas doações feitas às Rainhas e aos Infantes, e alguns Senhores de terras foram postas clausulas que lhes conheciam algumas terras, Villas, e lugares, com toda sua jurisdição civil e crime, mero e mito Imperio, não reservando para si parte alguma da dita jurisdição, e em outras reservaram alguma parte della. E posto que as ditas doações passassem assim largamente, sempre se entenderam, que fique reservada ao Rey a mais alta superioridade e Real Senhorio, que elle tem em todos os seus súbditos e naturais e estantes em seus Reinos”. Retrieved from <http://www1.ci.uc.pt/ihti/proj/filipinas/l2p467.htm>. About civil, penal and administrative jurisdiction exercised by proprietors, including the use of violence in land conflicts, read Franco, M. S. C. (1997). *Homens livres na ordem escravocrata*. São Paulo: Editora Unesp. See also Nadal, A. (1993). La violencia en la España republicana. *Anales Universidad de Alicante*, 1(10-11), 111-129.

was essential to consolidate an absolute power, because in such system the law did not have any limitation.<sup>213</sup> If present these two aspects, personal jurisdiction and supreme judge, injustice was everything against the desire of the *dominus*. We call the attention to the existence of such practice in the Ancient Rome, but the figure of the *praetor* had to meet certain procedural matters. In cases of disputes evolving *pecus* or *locuples*, moveable property and lands, the formal aspect of time in possession was an important criterion: “Yet, according to the Twelve Tables, a prescription of one year for moveables [*sic*], and of two years for immoveables [*sic*], abolished the claim of the ancient master, if the actual possessor had acquired them by a fair transaction from the person whom he believed to be the lawful proprietor”. In addition, it is also known that: “Such conscientious injustice, without any mixture of fraud or force, could seldom injure the members of a small republic; but the various periods of three, of ten, or of twenty years, determined by Justinian, are more suitable to the latitude of a great empire”. According to Edward Gibbon, different from the concept of property in Spain, dominium and its usufruct in Rome is described as: “[...] in the term of prescription that the distinction of real and personal fortune has been remarked by the civilians, and their general idea of property is that of simple, uniform, and absolute dominion. The subordinate exceptions of *use*, of *usufruct*, of *servitudes*, imposed for the benefit of a neighbour on lands and houses, are abundantly explained by the professors of jurisprudence”.<sup>214</sup>

The emotional right is also found in the Philippine Ordinances on private goods and land succession: “El Rey Dom Duarte, por dar certa fôrma e maneira, como os bens e terras da Coroa do Reino entre seus vassallos e naturaes se houvessem de regular e succeder, fez huma Lei”. In that law, the king “mandou pôr em sua chancellaria, a qual se chama Mental (1), por ser primeiro feita segundo a vontade e tenção del Rey Dom João o Primeiro, seu pai”. Moreover, the emotional right was not written, but an abstract code belonging only to the mind of the landlord. Nevertheless, observing the 1603 Philippine Ordinances, it is very notable that the XVII century legislation relied on non-

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<sup>213</sup> Read about the emotional procedures in suits at law when Caio Gracchus “[...] sought to use a new kind of forceful and emotional oratory to appeal to the broader Roman public [...]”. See Burnand, C. (2004). *The advocate as a professional: the role of the Patronus in Cicero’s pro cluentio*. In *Cicero the advocate* (p. 282). Oxford: Oxford University Press.

<sup>214</sup> Gibbon, E. (1907). *The idea of Roman jurisprudence*. In *The history of the decline and fall of the Roman Empire* (Vol. VII, p. 358). New York: Fred de Fau & Company.

positive legal acts as we showed with Francisco de Vitoria's redefinitions of *ius gentium* for a fair right to war to support the new Christians. In hundred year's time, the existence of the doctrine was sufficient to back the *dominus'* judgments once he was responsible for the defense of the Christian faith in his own territory: "A qual [the emotional right] em seu tempo se praticou, ainda que não fosse scripta".<sup>215</sup> As part of the emotional right, the inheritor should be a capable son in Civil Law and from a legitimate marriage. The death of the father would be the criterion to give the descendent the real right to assume the land possession. So, "fôro, rendas, e Direitos Reaes" were concentrated on the primogenitor. The land should not be object of division among the sons of the family. Based on the point four of the emotional right, the women were not able to inherit the possessions of the estate except the king passed an act favouring the legitimate daughter. If the primogenitor were a clerical member, he would not be able to inherit the land. If the first son were a knight, he would not be permitted to receive any title of possession. In that case, only if he got married and had a son. Beyond the explicit hierarchy based on the legitimate use of force, the agreement between real sovereign and the vassal maintained the tradition of personal contracts as well.<sup>216</sup> Implicit in that personal relation of distribution of titles, there was a series of rules to maintain the regime of *concessio* the Spanish Empire used to retake lands in Portugal and redistribute them from distant to closer allies.

With reference to those judges not acting inside the *dominium*, the emotional right was also present once magistrates to act in king's land were selected by abstract feelings. They had to be considered "good men" to be eligible for juridical, political and administrative functions in the Spanish Empire: "Os Juizes ordinarios, Vereadores e Procurador do Concelho, e os outros Officiaes, se farão per eleição dos homens bons, segundo fôrma de Ordenação". The judges took office after a confirmation letter. Although the landowners could not interfere in the process, the Philippine Ordinances affirmed the sovereign could solicit their consent. In that case, the political and personal relations between central power and landlords were decisive to the constitution of

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<sup>215</sup> Retrieved from <http://www1.ci.uc.pt/ihti/proj/filipinas/l2p454.htm>

<sup>216</sup> "E quanto às cousas e bens aforados ou emprazados, mandou que se guardasse a fôrma dos contractos sobre taes bens e cousas feitos [in relation to land use and possession], de maneira que as ditas cousas e bens aforados, ou emprazados, andassem nas pessoas conteúdas nos ditos contractos, e se regulassem em todo, como contractos de pessoas privadas". Read about land use and private contracts in the Book II, Title XXXV, Da maneira, que se terá na sucessão das terras e bens, da Coroa do Reino. Retrieved from <http://www1.ci.uc.pt/ihti/proj/filipinas/l2p456.htm>

powers. So, the influence of the *dominus* was extended to the making of sovereignty, but the opposite was not true. As aforesaid, the emotional right conquered a broad exercise of legal matters, inheritance and judicial doctrine use.<sup>217</sup> The fact of being compelled to obey strictly the real prerogatives of non-interference, the magistrates designated to act in king's land strengthened the authority of the *dominus* in his ownership. It is also true that there were some cases in which the "corregidores" visited landlords once a year, but such custom was the exception and only for those titles given by the King Fernando I.<sup>218</sup> However, after the 1603 Philippine Ordinances, the State representatives were authorised to make use of a modern compilation of laws to revoke the doubtful concessions. It seems to be important for the Spanish Empire the political bonds with strong landlords through an absolute system of property. The local magistrates, who were known as "ouvidores" and responsible for derogatory acts to question the sovereign confiscation of lands, would be subject to sanctions. Since the Philippine Ordinances from 1603, the emotional right had to be necessarily an alliance between powerful landlords and sovereignty through ownership.<sup>219</sup>

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<sup>217</sup> "E os Juizes haverão Carta de confirmação, para usarem de seus Officios, dos Corregedores [magistrates designated to exercise jurisdiction in the king's land] as Comarcas, [the division of the territory in areas] em que as tais terras ativerem, ou dos nossos Desembargadores do Paço [magistrates of the supreme court in Portugal from XVI to XIX responsible for those questions related to privileges and benefits]. E os ditos Senhores de terras e seus Ouvidores [magistrates that supervised the lands of the lords] não se intrometiam nas eleições, nem em as apurações delas, nem confirmarão os Juizes, salvo, se expressamente lhes fôr per Nós outorgado, ou pelos Reys que ante Nós foram, e per Nós confirmado". Retrieved from <http://www1.ci.uc.pt/ihiti/proj/filipinas/12p468.htm>.

<sup>218</sup> "E todo o sobredito neste titulo, mandamos, que se cumpra e guarde sem embargo de qualquer posse nova ou antiga, em que o Senhores das tais terras stêm, ou ao diante estiverem, ou uso e costume de que usassem, por qualquer tempo que delle tenham usado, ou ao diante usarem ainda que seja immemorial; por quanto havemos por danado [censored] tal costume, e posse posto que seja immemorial. E que sem embargo de quaesquer doações, que lhes fossem feitas pelos Reys destes Reinos até o fallecimento de El-Rey Dom Fernando, que foi a vinte dois dias de Outubro do anno de Nascimento do Nosso Senhor Jesu Christo de mil trezentos e oitenta e trez". In the Book II, Title XLV, clause X, it is said that: "Em que maneira os Senhores de terras usarão da jurisdição, que pelo Rei lhes for dada". Retrieved from <http://www1.ci.uc.pt/ihiti/proj/filipinas/12p469.htm>.

<sup>219</sup> "Porque quanto a isto de usarem da Correição, e de os Corregedores não entrarem em suas terras, foram as tais doações pelo dito Rey revogadas. E quanto às doações feitas depois do fallecimento de El-Rey Dom Fernando, em que expressamente fôr declarado, que possam seus Ouvidores usar de Correição, ou de alguns autos della, com clausula derogatória das Ordenações e Capítulos de Côrtes, ou que os Corregedores não entrem em suas terras, e por lhes ser feito nisto special mercê, assi foram confirmadas, queremos, que usem disso, como nellas fôr conteúdo. Porém, não he nossa tenção que por algumas clausulas, ou palavras, quanto quer que sejam largas e geraes, se entenda, serem concedidos os ditos dos casos, salvo quando delles for feita particular, e expressa menção. E os que usarem de algum auto de Correição contra esta Ordenação, serão suspensos de sua jurisdição até nossa mercê. E o Ouvidor haverá a pena, que em tal caso per Direito merecer". See also the reference of the derogatory acts, Book II, Title XLV. Retrieved from <http://www1.ci.uc.pt/ihiti/proj/filipinas/12p469.htm>.

The emotional right was also in the hands of the Catholic Church. As a *dominus*, the institution exchanged the use of land by the peasants with the tenure of it. The occupation had a tradition based upon the same personal relations we pointed out for landlords. The fruits of the property were produced in the regime of *concessio* and worked as a payment for the ecclesiastical power, or the *praelatus*, months of labour during a certain period of the year.<sup>220</sup> The use of the land counted also on the tools and animals belonging to the church. So, a sort of private contract was generated and the time of the agreement lasted years. When the Spanish Empire broadened its power and centralised the functions of the “ouvidors”, specially in the lands of Portugal, increasing the tension we have mentioned before between the spiritual and temporal power. It was also important for the sovereignty that the property and the legal demands linked to it remained outside the ecclesiastical power since the Catholic Church had accumulated for many centuries an enormous quantity of land in Europe.

In order to subdue peasant’s conflicts and diminish the force of law supporting the system of *praelatus*, the State recompiled and re-edited procedural matters for property litigation in the Philippine Ordinances from 1603 incorporating the power of different personae and reinforcing a kind of emotional discretionality. First, demands should be addressed to masters, then temporal landlords or “ouvidores”. If the litigation persisted, the claimants of any right had to meet the “desembargador”. Therefore, the judicial procedures had to be part of the political power of the sovereign: “Todas as appellações, que saírem dante os Juizes das terras das Ordens de nosso Senhor JESU CHRISTO [*sic.*], Sant-Iago, e S. Bento de Aviz, e da Ordem de S. João de Jerusalem, e bem assi das terras de quaesquer Prelados, ou Fidalgos, e o de outras quaesquer pessoas, assi ecclesiasticas, como seculares, que de Nós jurisdição tiverem, irão aos Mestres das ditas Ordens em suas terras, e aos outros Senhores em as suas, ou aos seus Ouvidores, e delles irão as appellações aos nossos Desembargadores, a que o conhecimento segundo a qualidade dos feitos, pertencer; salvo, se as nossas Casas da Supplicação, ou do Porto estiverem no lugar, onde a sentença, de que se appella, fôr dada, ou cinco legoas ao

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<sup>220</sup> It is important to observe that the existence of “prelaturas” shows an intimate connection and power relation between the 1603 Philippine Ordinances and the Canonical Law. The Iberian kingdoms received the written codes from the Western Catholic Church. See the Canon Law, clauses 368-370, Book II, Second Part. In the XVII, the church had already codified the land tenures and the distribution of competences in ecclesiastical estates. Jurisdiction and atemporal power constituted what we may later call substantive law.



redor; porque em tal caso, sem mais irem aos Ouvidores dos Mestres, ou dos Senhores das terras, irão diretamente aos Desembargadores [central judicial power] das ditas Casas a que pertencer. Porém, se os seus Ouvidores estiverem dentro das ditas cinco legoas, irão primeiro a elles”.<sup>221</sup> According to the Book III, Title LXXI, 1603 Philippine Ordinances, all the case suits and appeals should be directed to the local courts within a limited distance only after the realisation of the interpersonal procedures aforesaid.

The juridical procedures relying on the emotional law of the administrative body of the royal family caused more conflicts in land disputes. The text of the Philippine Ordinance from 1603 affirms that it is not fair to expell human settlements dependent on land usufruct or its use disrespecting certain norms. So, the Book IV, Title XLII, says that: “Por quanto somos informados, que em algumas partes de nossos Reinos eram constringidas muitas pessoas, assim homens, como mulheres, descendentes, ou transversais daquelles, que tomaram alguns casais, ou terras, posto que seus herdeiros não fossem, que per força fossem morar e povoar essas terras e casas pessoalmente, e se não queriam ir, faziam que os prendessem, e sobrello davam muita fadiga e oppressão, e os traziam em demandas”.<sup>222</sup> In case force of law compelled the tenants to leave the properties, the observance of contracts was essential for the materiality and procedures in the controversy. Landlords and peasants, who had titles of *concessio* or simply used a parcel of land by *usucapio*, were generally menaced by the sovereign. Another similar effect of that situation was the non-interference of the Catholic Church. The same logic used by the theologian Francisco de Vitoria to concentrate the power in the hands of the crown, although the temporal potestas was also a representative of the Christianity.

Even after the interregnum 1580-1640, when Spain and Portugal consolidated the unification of their crowns, the Spanish Empire succeeded in making the use of the Philippine Ordinances in the Portuguese territory. In fact, the legal diploma predicted an oppressive judicial practice, which was clearly conveyed by a pure emotional right of powerful landowners, but refounded the importance of civil contracts. However, *concessio* and property titles were reconnected to production in territories overseas, but the ownership in Europe kept following the traditional patterns of unproductive lands

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<sup>221</sup> Retrieved from <http://www1.ci.uc.pt/ihti/proj/filipinas/13p680.htm>

<sup>222</sup> Retrieved from <http://www1.ci.uc.pt/ihti/proj/filipinas/14p821.htm>

that Pedro Fernández de Navarrete had bitterly criticised. It is why the economic issue was a problem for the “discovered” tenures in the XVI century in the Spanish Empire, but clearly seen as question for those who could pay for the enterprise in America. The extensive parcels of land, which are called “sesmarías”, meant a huge investment by the crown and future debts for the landlords established in the new territories. If the real properties were not productive, there were sanctions and financial penalties applied to the non-cultivation of the sovereign ownership. In the Book IV, Title 43, “Sesmarías”, the concession would be confiscated by the State if the land were not worked. As part of a private contract between the Spanish Empire and the designated possessors, the person should be one with the material conditions and reputation to employ tools, personnel and plans of production. So, *pecus* and *locuples* merged in the concept of “sesmaría” and referred to “individual”. In that sense, the evolution of the emotional law in the lands overseas was based upon private obligations in which could end up in “enjoyment” or *personae, non portioni* – a parcel much smaller from the total area in concession after the confiscation of the “sesmaría”. The real properties sharing their parts between co-owners, but only one of them cultivating the *concessio*, resulted in separate sanctions and penalties. In other words, the individual capacity was determining to spread the idea of usufructuaries are compensated, idle proprietors punished with the reduction of their part in the *dominium*.<sup>223</sup>

In the present chapter, we called the attention to the notion of property and its usufruct in the Roman Civil Law. Moreover, the concept of ownership was constantly redefined to fit the needs of *imperium* in ancient times of a new reality of contracts once the territories from the military conquest had to be occupied, the land produced and the civil codes extended. During the Middle Ages, the power of sovereignty and *imperium* had to be revised by some theologians, because the Catholic Church broadened its view on temporal power for the ecclesiastical body of the institution. As a theologian for the use of lands, Marsilius of Padua defended the principles of *lex nature* for the human survival as a spiritual gift. He also added the Church did not have any right to vindicate any temporal power on material goods including the position of a landlord. The Italian

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<sup>223</sup> “[land] It was a *ius* attaching to an individual person and, in early classical law, it was regarded as having no existence for any purpose until it was capable of enjoyment. Moreover, though it normally was for life it might have a premature determination, e.g. it might be lost by non-enjoyment for a certain time”. See Buckand, W. W.; McNair, A. D. (1952). Common ownership. In *Roman Law and Common Law* (p. 109). Cambridge: Cambridge University Press.

philosopher was considered heretic when he criticised the Pope John XXII for the strong centralisation by the Catholic Church in its administration and by the Franciscans' chase by the spiritual representative. So, Marsilius of Padua defended the unity of the political sovereignty and his intention was a period of peace he had predicted under menace. As his ideas never came into practice, almost two centuries later, the Spanish Empire had to solve the same tension between the temporal and spiritual power. The alliance for a new enterprise was momentarily pacified by Francisco de Vitoria's argumentation on how the crown could combine the Christian faith and the sovereign power to conquer lands overseas. In a hundred-year's time, the desintegration of that agreement culminated in the recompilation and re-edition of the Philippine Ordinances in 1603. The concepts of property, *concessio* and usufruct had to be reformed for a more absolute *dominium* in which landlords started sharing some political, administrative and legal powers. Since the Spanish Empire wanted the Catholic Church out of the land occupation of the new territories "discovered" in America, Philip III reintroduced the "mental law" or what we defined as the emotional right to give to some nobles the right to rule under absolute powers inside their dominia retributing with the support of their sovereigns. However, in the American lands as the result of the use of force, the concept of *concessio* and property conformed the idea of productive *dominium* in a historical perspective since in the beginning of the European settlements the occupation by military expeditions were the priority. The economic elites with titles of property were invited to be part of it and the spirit of politics affected by pecuniary enterprises during the rise of the modern *potestas*. It was a time for strong centralisation of the judicial, administrative and political functions of the Spanish Empire in the sense the sovereignty was a body of landlords in a long process of enrichment, privileges and absolute rights.



CHAPTER III. CONSTITUTIONAL INTERNAL LIMITS FOR THE ABSOLUTE RIGHT TO PROPERTY



## 1. Brazil & Spain: property, social function and their historical limits

For some lawyers and judges trained in Civil Law traditions, the social function of property has not yet achieved the status of force of law or a juridical figure with more subjective dimensions. In some constitutional histories with strong positive Roman-Germanic traditions, the concept has been politically adopted by their constituencies yet not taken into consideration as a subjective right nor a matter of enforceability.<sup>224</sup> On the one hand, the boundaries of a fundamental right such as the property are in constant changes since the matter is also a democratic issue. On the other hand, a long tradition of central control demands the legal prerogative to affirm what is ownership, its use and its obligations the owners shall comply with. In Spain and Brazil, the interpretation of what means “social”, for instance, as an internal limit for property is expected to be in the hands of constitutional or supreme courts.<sup>225</sup> However, the hermeneutic battle to bar the absolute notion of property use is a recent dispute in democratic legislatures. It was not common in the past the access to land through a social perspective of wealth distribution not even a local decision on the use of it being exempt from review.<sup>226</sup> The

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<sup>224</sup> The notion of the social function of property in Spain has caused dissents with reference to its application. There are some juridical contributions that have defended it as a strict non-subjective right in which enforceability should not be exercised by the public administration. See Tornos Mas, J. (2017). *Las viviendas desocupadas y la función social de la propiedad*. In Montó Darner, J. M.; Ponce Solé, J. (Eds). *Derecho a la vivienda y función social de la propiedad: nuevas políticas públicas en el marco del servicio público del alojamiento* (pp. 147-164). Navarra: Thomson Reuters Aranzandi. Read Jaume Saura Estapà says “Este planteamiento coincide con la configuración de los derechos sociales en la Constitución española donde, como es sabido, no aparecen dentro del catálogo de derechos ‘fundamentales’, sino entre los ‘principios rectores de la política social y económica’ (arts. 39-52 CE), distinción que lleva acarreada, entre otras cosas, su inexistencia mientras no sean objeto de ‘desarrollo legislativo’ (art. 53.3 CE) y la consiguiente incapacidad de recurrir directamente su vulneración en amparo ante el Tribunal Constitucional”. See Estapà, J. S. (2013). *La exigibilidad jurídica de los derechos humanos: especial referencia a los derechos económicos, sociales y culturales (DESC)*. In Pérez, J. B. & Estapà, J. S. (Eds). *El derecho internacional de los derechos humanos en períodos de crisis* (pp. 54-66). Barcelona: Marcial Pons.

<sup>225</sup> On the internal limits of the right to property in Spain and their conclusive interpretation, see Vazquez, J. B. (1988). *La función social de la propiedad*. In *La propiedad constitucional: el estatuto jurídico del suelo agrario* (pp. 44-45). Madrid: Editorial Civitas. In the Brazilian case, the Constitutional Amendment 29/2000 ratifies the central power of the Supreme Court in delimiting the interpretative exercise of what means social function, for example, in progressive or extra taxes applied by cities.

<sup>226</sup> For the Iberian tradition and the exercise of the absolute concept of the Civil Codes, see García, A. G. (1976). *Estudios sobre la canonística portuguesa medieval*. Madrid: Fundación Universitaria Española. The supremacy of canonic interpretation has been unquestionable in a historical perspective when confronted with civil issues in local levels, although not a relevant question for legal studies nowadays. However, we call the attention to the effects of that literature and practice in law influencing the right to property. Read also García, A. G. (1991). *Derecho canónico e historiografía española*. In *Derecho común en España: los juristas y sus obras* (pp. 13-20). Murcia: Secretariado de Publicaciones de la Universidad de Murcia.

influence of the civil codes in Brazil and Spain is still consistent with socioeconomic issues what can be perfectly translated into historical bonds of privilege.

The absoluteness of the property concept was confronted between the 19<sup>th</sup> and 20<sup>th</sup> century by theories and constitutional charters in which the meaning of ownership started being part of a social and intellectual debate. One of the first reflections on the social function of property was presented in thesis by Léon Duguit as a mandatory aspect to make flourish the internal limits of property. It was an attempt to decode the 19<sup>th</sup> polemics on the retribution of real estate proprietors to society having from the State all the support to keep legally their ownerships. Moreover, proprietors were supposed to be served by public administrations and protected by the State power of police, but what exactly they would give in return was never part of property definition.<sup>227</sup> Among other aspects suggested by the French jurist in 1911, equities or values of land titles were understood as a direct result of the social transformations.<sup>228</sup> In 1919, the Constitution of Weimar introduced that laws would determine the concept and limits of the right as a legislative task. In other words, the contemporaneous concept of property in Germany magna charter takes possession of ownership definition and gives it back to a political representative body. The exercise of the German political decision-making process changed with the notion of popular sovereignty and, consequently, limited the property right in itself. That structure was decisive for updating the economic dimension that affected the idea of State and its social organisation. There was also a clear separation between properties for residence and ownership for production in the constitutional project as a progressive view on the economic contribution ownership was supposed to give back to the general interest. In Spain, some conjectures affirm the administrator cannot use the social function in order to justify an extensive exercise of the general interest.<sup>229</sup> The Brazilian case is not different since the Civil Code has much influence on the internal limits of the property.<sup>230</sup>

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<sup>227</sup> Pasquale, M. F. (2015). La función social de la propiedad en la obra de Léon Duguit: una re-lectura desde la perspectiva historiográfica. *História Constitucional*, 1(15), 93-111.

<sup>228</sup> The concept of social function in the right to property was initially formulated by the French jurist Léon Duguit. He was immensely interested in the events of 1789 French Revolution and Napoleon's Code. Life, liberty and property were in the centre of his thoughts in a series of conferences to debate European and American sociopolitical transformations in the beginning of the XX. See Duguit, L. (1920). *Las transformaciones generales del derecho privado desde el Código de Napoleón*. 2ed. Madrid: Francisco Beltrán, Librería española y extranjera.

<sup>229</sup> "Más en concreto, si el *dominus* no se ha convertido – en virtud de la función social – en un mero agente público (sería inútil el reconocimiento de la propiedad privada), no puede aceptarse que el fin de la



Duncan Kennedy says the legal thought when barely structured on the necessary distinctions for the social experience it ends up in a decline of indispensable contrasts for the meaning of liberal. For the author, between the 19<sup>th</sup> and 20<sup>th</sup> centuries, the core of liberalism was not solely construed by formal aspects despising social contents that were used to set their own references. “The history of legal thought since the turn of the century is the history of the decline of a particular set of distinctions – those that, taken together, constitute the liberal way of thinking about the social world”.<sup>231</sup> So, the legal figure property represents in our study is close to the notion of absoluteness, but it is with the birth of liberal magna charters in urban contexts that the internal limits of the right started being redefined. A fair economic compensation for those properties object of expropriation appeared in the 19<sup>th</sup> century as an evolution of the material privileges owners used to have from State in the past. However, such practice was coherent to a legal external limit consonant with the understanding that ownership value has nothing to do with a social construction, but a material datum recognised by the State power. On the one hand, equities for any kind of improvement promoted by the private proprietor, for example, were considered the fruits of the individual effort. On the other hand, any development made by public powers in the area surrounding the ownership or favouring the property was not object of compensation by the owners. The urban land use made more evident that private owners tend to have enormous advantages in a private market with a historical support of taxpayers’ money. The debate on the social interest is an interesting topic that helps us clarify the disputes between public and private about the

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propiedad privada radique, de modo inmediato, en las diversas manifestaciones del interés general: consecución de relaciones sociales más iguales, o de niveles de renta más equitativos, etc. La función social, al menos inmediata y directamente, no pretende la consecución de tales objetivos. Por el contrario, tal es el papel que ha asumido el poder público de modo indeclinable y discurre, en el ejercicio de sus competencias, a través de multitud de medios y de técnicas a su alcance: sistema tributario basado en los principios de capacidad y progresividad, Seguridad Social, subsidio de desempleo, etc”. See Vazquez, J. B. (1988). La función social de la propiedad. In *La propiedad constitucional: el estatuto jurídico del suelo agrario* (p. 70). Madrid: Editorial Civitas.

<sup>230</sup> On the social function and its effects in the Brazilian legislation for the internal limits of the property, see Fernandes, E. (2003). Del Código Civil al Estatuto de la Ciudad: algunas notas sobre la trayectoria del derecho urbanístico en Brasil. *Revista Eure*, 29(87), 63-78.

<sup>231</sup> The notion of property is part of a complex legal arrangement: “Those distinctions are state/society, public/private, individual/group, right/power, property/sovereignty, contract/tort, law/policy, legislature/judiciary, objective/subjective, reason/fiat, freedom/coercion, and maybe some more I’m not thinking of. Although these distinctions are not synonymous, they are all in a sense ‘the same’. By this I mean that it is hard to define any one of them without reference to all, or at least many of the others, and that if one understands the common usage of one of them, one understands, pretty much ipso facto (what a fudge!), all the others”. See Kennedy, D. (1982). The stages of the decline of the public/private distinction. *University of Pennsylvania Law Review*, 130(1), 1349-1357.

limits imposed to owners, for instance, through expropriation. Nevertheless, it is the social function that offers a conceptual construct in which the other dimensions have to be explicit as part of intrinsic aspects of the right to property. In the following sections, we show the liberal notion of property and its idea of compensation creates obstacles for a more democratic understanding of ownership in Spain and Brazil. Then, the internal limits for non-resident owners in order to balance the interchange of wealth between society and individuals. The absolute use of the right to property and, consequently, the effects of that irresponsibility may end up in anti-democratic regimes since ownership is the backbone of many types of civil organization.<sup>232</sup>

### **1.1. The liberal and the economic thought for the right to property in Spain**

In the 1812 first Spanish Constitution, article 4, it is written that “La Nación está obligada a conservar y proteger por leyes sabias y justas la libertad civil, la propiedad y los demás derechos legítimos de todos los individuos que la componen”. Based on much more arbitrariness of an emotional right than discretionary power, at that time the King of Spain could dispose of the private ownership, but he could not do it without compensation and “se le dé el buen cambio a bien vista de hombres Buenos”. In the article 173, the monarch is expected not to take any property without respecting the political liberty of each individual in the nation. In the Spanish Constitutions of 1837 and 1845, both texts in the article 10, it is said that the act of expropriation is foreseen under the idea of indemnity for the owner and if the property is destined for the common utility. Privilege and benefit are consequently defined in the sphere of private rights. If we observe the history of property in Spain from the constitutional angle, it is reasonable the argumentation that the liberal and land use built a sort of property right galvanising the absolute use of it into the traditional wealthy social classes. Until the end of the 1850s, property system was regulated by a foreign Civil Code brought from Portugal and there was not any consensus resulting in the elaboration of a private law statute on the matter.<sup>233</sup>

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<sup>232</sup> Crawford, C. (2017). *A função social da propriedade e o direito à cidade: teoria e prática atual* (Case Study No 2282). Rio de Janeiro: Instituto de Pesquisa Econômica Aplicada.

<sup>233</sup> “Although the Brazilian Constitution of 1824, which created the new Brazilian Empire, stipulated that a Civil Code would be written, a lack of consensus prevented the drafting of a definite version. And while

We may add that once the concept of property was progressively out of the *imperium* of the State during the XIX, property started being situated in the consensus of *dominium* class. The naturalized domination of some groups, which was supported by a long civil code tradition, has captured the democratic parameter of access to a dignified dwelling in constitutions.<sup>234</sup> During the period between the two constitutions (1837-45), it was the first time in Spanish history that it seemed to exist a legal norm between the use of property and the concept of collectivity. However, it continued being a conversation among proprietors and private-public contracts not necessarily involving housing questions. It persisted in relations involving what we have already named an emotional right with too much abstract and personal elements. The history of the country has been in charge of demystifying if the force of law towards the common good is really efficient for general interest in housing questions. In articles 74 and 77, respectively in the Constitutions of 1837 and 1845, the properties of the State could only be pawned regarding the approbation of the courts. Once more, the traditional action of magistrates and public goods with the theme of land.<sup>235</sup> Here the idea of property does not suggest the apparent relation between person and thing, once the entry State disguises people behind it. Nevertheless, we know it involves *persona* and its *dominium* among proprietors.<sup>236</sup> We recapitulate Morris R. Cohen's ideas making the

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nineteenth-century efforts to codify a Private Law statute did result in the creation of some important documents". See Cunha, A. S. (2011). The Social Function of Property in Brazilian Law. *Fordham Law Review*, 80(1), 1171-1181. About the similarities among civil codes, see Zweigert, K., Kötz, H. & Weir, T. (1998). *An introduction to comparative law*. Oxford: Clarendon Press.

<sup>234</sup> Hespanha, A. M. (1990). La revolución y los mecanismos del poder (1820-1851). In *Derecho privado y revolución burguesa* (pp. 15-51). Madrid: Marcial Pons. For others, "La propiedad se concibe en este periodo [till the end of the 1850s], por tal razón, como un instituto de Derecho Privado, disciplinado no por la noción constitucional de 'inviolabilidad' (incapaz de regir las relaciones entre particulares), sino por el más complejo, articulado y refinado orden regulado por el Código Civil. El derecho de propiedad se define compactamente como situación subjetiva por normas que pertenecen topográficamente al Derecho Privado; de ahí que su reconocimiento constitucional comportarse (necesariamente) la norma civil substantiva que definiese su contenido esencial". See also Martínez, F. R. (1994). La propiedad privada en la Constitución española. In *La propiedad privada en la Constitución española* (pp. 239-244). Madrid: Boletín Oficial del Estado.

<sup>235</sup> The same disposition regarding property and the public fund rising was also receptioned by the Spanish Constitutions of 1869, Title XI, *Of contributions*, article 86; and 1931, Title VIII, *Government treasury*, article 117.

<sup>236</sup> The Spanish Law of 1<sup>st</sup> May of 1855 habilitated the State to convey public lands and buildings out of mortmain. In its article 1, it was for sale every rustic and urban *fora* belonging to State, church, military orders etc. See also Montoya, R. M. (2006). Propiedad desde el punto de vista del derecho civil: limitaciones del derecho de propiedad. In *Propiedad y derecho civil* (pp. 231-261). Madrid: Fundación Registral. The Brazilian case used the criterion of productive land to avoid the general practice of massive expropriation. Nevertheless, the real effects from the Land Statute of 1850 affected those possessors established in large areas gave by the colonial powers. Once more, thing turned into its own image, *i.e.*,

comment that the interaction among owners is a permanent and conflictive dispute with the general interest. In case of State intervention, proprietors understand their goods are possessed by the public interests, so they claim their rights in order to make the State compensate, protect and serve them. As Stefano Rodotà affirms on the property nature restrictions or as we would say the intrinsic or internal social aspects of the right to property: “unas veces se utiliza para negar a la propiedad la naturaleza de derecho subjetivo [...] y otras veces para expresar la subordinación del momento individual [...] al momento social”.<sup>237</sup>

In this tension, sometimes the State itself may play the quality of a subject while using the property to legally sign contracts without being specifically motivated by the general interest. The 1869 Spanish Constitution, article 103, permitted the government to dispose properties of the State to coin credits for the nation, but not directly regarding the common good. What is observed in the 19<sup>th</sup> century constitutional disposition is much more a liberal notion of property since ownership can generate economic liquidity for the State by analogy with any real property for individuals. The article 10 of the 1876 Spanish Constitution, section about the nationals and their rights, expressed the same guarantee for owners when: “No se impondrá jamás la pena de confiscación de bienes, y nadie podrá ser privado de su propiedad sino por autoridad competente”. It is a liberal and broad notion of what liberalism means for proprietors, because the good in itself could not be used by the public power to demand non-paid debts to the State or even being a matter of dispute in case of possible material damages by the action of private proprietors against the public *res*. Up to a certain extent, that debate on public utility prospered under the argument of socialization as an economic general interest we would say. In the Magna Charter of 1931, the Spanish State invests in a centralized power using the political pact to pave the path for a juridical window of opportunity. In the article 15, the legislation of that time gave to the autonomous regions the competence for acts of limited expropriation, the socialization of natural resources and

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only citizens economically invested could remain in their domains allegation conditions to make the property financially profitable to the public administration. So, public and private proprietors established a *dominium* agreement. See Lima, R. C. (2002). As posses. A situação jurídica dos posseiros. Aquisição do domínio pela posse e cultivo como costume jurídico. In *Pequena história territorial do Brasil: sesmarias e terras devolutas* (pp. 49-59). Goiânia: UFG.

<sup>237</sup> Rodotà, S. (1986). *El terrible derecho. Estudios sobre propiedad privada* (p. 191). Madrid: Editorial Civitas.

entrepreneurship. In the same document, article 26, the Roman Catholic Church was not allowed to accumulate more properties than the one it used to live or for other private ends. In the article 44, the social utility appears as an innovation compared to the previous constitutions. It says that “La propiedad de toda clase de bienes podrá ser objeto de expropiación forzosa por causa de utilidad social mediante adecuada indemnización, a menos que disponga otra cosa una ley aprobada por los votos de la mayoría absoluta de las Cortes”. Nevertheless, the social utility must be paid and presupposes buyers and proprietors, *i.e.*, the State and owners. Other mechanisms were possible if there was a law approved by the absolute majority in the Courts. The land belongs to political-economic Government not to its possessors. Any similarity with the post-Second War democratic systems in Roman-Germanic Law family has not been a coincidence. So, the covenant involving property system seems to evoke force of law, dispute among dominant classes under the veil of common good and the adjudicative right mechanisms of contract. The right to property was still vulnerable to the assaults of *dominium* since the State comprehension about its use was question in which the administrative power represented an extension of what the central power understood as common good. Stefano Rodotà argues that the English and French revolution in redistributing the lands from the nobility to small proprietors meant in the course of history a visible de-concentration of ownership favouring social productive terms yet such ideological *laissez-faire* movement was pregnant of many contradictions like the low profile of the legislatures on regulating the use of lands as a historical aspect. Since the XVIII and XIX centuries, the absolute right to property gained new faces that paved the path to new economic relations even under the statute of the welfare state of our era.

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In the article 6.2, from the 1955 Reglamento de Servicios de las Corporaciones Locales, Spain, under the authoritarian government of Francisco Franco (1939-1975), it is said that the public administration interventions in the private realm and individual liberties should be the least restrictive ones. It consolidates a liberal orientation from an economic perspective in favour of proprietors’ right since they would be a fundamental key for the political support Francisco Franco needed during his dictatorship. It is also true tenants had their rights strongly defended by the public power through the massive

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<sup>238</sup> Rodotà, S. (1986). Dos clases de absolutividad. In *El terrible derecho. Estudios sobre propiedad privada* (pp. 113-118). Madrid: Editorial Civitas.

housing policies for the working class and a stabilising price standard enacted by law. However, it was the moment proprietors saw both the external and internal limits of ownership being put apart as well, because the economic structure for ownership created a balanced sensation of protection for tenants and owners. So, the government triumphed over the legal debate about the social function of property using economic strategies harmonising the public policies with the private interest. The Spanish national plans for housing during Francisco Franco's regime launched the meaning of "social" with strong influence of capital, market and entrepreneurship.<sup>239</sup> The defense of the social function of property or even the public utility had been formally validated, but its content profoundly determined by crony economic principles.<sup>240</sup>

In Spain, the 1954 Act for Expropriation was passed by Francisco Franco dictatorship (1939-1975) predicting fair compensation with prices in real values observing the purchase power to tackle with inflation.<sup>241</sup> Years later, the "Ley Fundamental" of 1958, which was approved on May 17, recognized the private property in many aspects including its social function of property as well. However, this "referencia a la función social de la propiedad en las 'Leyes Fundamentales' del régimen franquista se entendió por la doctrina dominante como mero principio orientador sin eficacia jurídica directa o como criterio de interpretación de la normativa vigente".<sup>242</sup> So, the normative juridical system was not capable to produce an anti-liberal efficacy in order to benefit the social use of ownership. The consequences of such

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<sup>239</sup> Blanco, M. A. (2012). La transformación del mercado de alquiler de fincas urbanas en España (1920-1960). *Revista Bibliográfica de Geografía y Ciencias Sociales*, 17(988), 1-17.

<sup>240</sup> Collado, P. E. (1979). Los principios informadores de la propiedad privada. In *La Propiedad Privada Urbana* (pp. 123-128). Madrid: Montecorvo.

<sup>241</sup> Ley de Expropiación Forzosa de 1954 says in its jurisdictional guarantees section that "En la medida en que la Ley ha apreciado la necesidad de configurar la expropiación, considerando todo el campo a que hay se extiende la acción de la Administración, se ha hecho cargo de la necesidad de compensar jurídicamente tan amplio desarrollo con un sistema eficaz de garantías, que fueran la proyección técnica del solemne principio consagrado por el artículo treinta y dos del Fuero de los Españoles. La expropiación irregular, cuyo concepto se construye en el artículo ciento veinticinco dentro de los límites de las garantías del artículo citado del Fuero, ha sido tratada, conforme al criterio tradicional de nuestra legislación, como un caso en el que la normal excepción que defiende a la Administración, frente a los interdictos, es a su vez objeto de excepción. Y dentro del supuesto de expropiación no regular se ha incluido como caso concreto el de vicio en el procedimiento expropiatorio declarado por sentencia firme, siendo aquél de tal entidad que impidiera a la Administración la legal ocupación del bien". Retrieved from <https://www.boe.es/buscar/doc.php?id=BOE-A-1954-15431>. The preamble of the legislation stresses in the section Public Utility Declaration and Social Interest, letter "a", the prerogative of State administration and juridical power to evaluate the argumentation of those petitions of expropriation with reference to public building work.

<sup>242</sup> Collado, P. E. (1979). Los principios informadores de la propiedad privada. In *La Propiedad Privada Urbana* (p. 22). Madrid: Montecorvo.

prerogatives and traditional inheritance are valid for rural and urban areas once the legislative, juridical and social orders have maintained their *status* for years. The elites oriented by conservative paradigms for land use did not understand property could be an object of public restriction except in case of expropriation led by the State. The idea of an elected power able to legislate on property internal limits is strange to that sort of selective liberal conception that tends to favour non-residential owners.<sup>243</sup> We have a very similar situation in Brazil as we will see in the following section.

## 1.2. The liberal and the economic thought for the right to property in Brazil

It was in the 1934 Constitutional Project that a more specified idea of the social function of property and possession was presented. However, it was finally eliminated in the approved version of the 1934 Constitution. In the Title XII, Economic and Social Order, the original article 114 said that the right to property had to be guaranteed and would be ruled by the limits determined by the law. In addition, the first paragraph of the first text affirmed the property had to meet its social function and this right should not be exercised against the collective interest. Then, the second paragraph mentioned that the property had only to be expropriated under the public utility and social interest respecting fair payment in cash or other form established by the national assembly. Furthermore, in the Title XII, Economic and Social Order, the article 116 established five years of uninterrupted possession with no opposition or the recognition of the dispossessed owner to transfer the right to property to the legitimate occupier. Beyond this, the land area should respect a certain limit and be necessarily productive. If so, the continuous possession could be claimed as a property by *usucapião*. Finally, a competent judge shall be responsible to declare through a sentence the title of the

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<sup>243</sup> In 2007, as an effect of the 18/2007 Catalan Housing Act, a series of academic opinions started being produced in order to clarify the meaning of social function in property system and, consequently, the idea of it as a State intervention in a fundamental right or more oppressive external limits for owners. Some authors are also guided by the linguistic surface uttered by the law on “expropriation for housing purposes” not reflecting or analysing what seems to be an external limit as a complete reassertion of property as in the 1978 Spanish Constitution, that is to say, the real property serves society in its immanent value for housing, intimacy, private life etc avoiding purely speculative motivations. Read Marín, I. & Milà, R. (2007). El alquiler forzoso de la vivienda desocupada. *Revista para el Análisis del Derecho*, 1(2), 1-33. However, it is important to say that the meaning of social function in the act passed by the Catalanian Parliament seems to be an attempt to requalify the concept of property in democratic regimes reconnecting the right to its purpose of residence yet the legal language does not give us a clear reference of that view.

property. Moreover, in the first paragraph of the non-approved constitutional text, the article 116 affirmed that the national possessors would be recognised as proprietors in unproductive, unoccupied and abandoned lands where betterments had been effectively implemented. The liberal idea of the individual efforts, physical and economic ones, would be recognised by the State. The processes of foreclosures or real bankruptcy could not generate the condition of misery to the debtor as it was in the first paragraph of the article 118 mentioning the house, where the function of dwelling for the debtor and his family was observed, could not be object of legal attachments. Under the same logic, its second paragraph said the rural property could not be given as a guarantee as well if the property was used to provide the subsistence of the debtor and his family.

The 1850 Brazilian Land Act was the attempt of regulating those territories that belonged to the State. According to it, the right to property would be legally recognised if the parcel had been bought by private possessors as it is seen in its article 1. The concept of “*terras devolutas*”, that is to say, the lands that the public *dominium* got back for not being conceived by a regime of public concession or titles of ownership, was defined by the article 3, § 2, of the same provision. However, it was the liberal economic criterion that reintroduced by law the external limit for expropriation and the absolute intrinsic value for ownership stating. For those that had the pacific possession cultivated or used the land to raise cattle the Brazilian State would guarantee the land title under the article 5, § 1. The restrictions on those concessions and occupation of the public *dominia* leading to expropriation with fair compensation for the facilities constructed in the property had to be oriented by documents or sentences that could make evident the privilege of possessor in being inside State’s territories as it is seen in the article 5, § 2. The article 6 made clear rustic houses were not the object of concession if the land was not cultivated or even used as housing. The article 11 affirmed the possessors had to get copies of property titles in order to have access to right to put land in the market through mortgages or alienate the ownership. That provision was a sort of trap for the majority of possessors once most of them could not prove the legal right to their settlements.<sup>244</sup> The article 14 established the government could sell lands and register the actions with titles of property, but the possessors that had cultivated the lands and raised cattles had the preference in buying the properties according to the article 15. The contribution of

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<sup>244</sup> Retrieved from [http://www.planalto.gov.br/ccivil\\_03/Leis/L0601-1850.htm](http://www.planalto.gov.br/ccivil_03/Leis/L0601-1850.htm)



the new proprietors would be formalised by the right of the State in crossing the private ownership with roads between human settlements or a port of public interest as it is affirmed in the article 16, § 1. If there were any facility, the State would proceed with a fair compensation. The liberal economic traces in the Brazilian right to property are in a certain perpetuated by the 20<sup>th</sup> century constitutions. The external limits seem to be the most common practice for the public interest not necessarily meaning social for those people belonging to the lower socioeconomic *strata*.

The liberal and the economic thought for the right to property is reaffirmed again during the Brazilian “Estado Novo” authoritarian regime (1937-1945). In the late thirties, the chief of the executive power Getúlio Vargas designed a centralised constitution excluding the social function of property as a principle, but forging the notion of “social” with the economic power of the State to support the owners’ interest in expropriated lands. The 1937 Brazilian Constitution affirmed in its article 122, XIV, that the legal prerogative for expropriation was an object of the State’ scrutiny taking into consideration the general interest. In case of emergence, the State could also expropriate ownership to keep the peace and order according to the article 166 of the same Magna Charter. After the fall of Getúlio Vargas in 1945, a new constituency passed the 1946 Brazilian Constitution. The limits of the property were based upon not only expropriation, but the social interest as it the article 141, paragraph 16, affirms. The article 147 goes further saying that the use of property should be extended to the promotion of the welfare state and the law could also incentivise the fair distribution of land with equal opportunities for all. It was a moment of revising the tradition in which the central power legislated through dictatorial bases yet oriented by liberal ideas on ownership to give back the power of land distribution to the legislative exercise.

Nevertheless, the restrictive liberal paradigm comes back with the 1964 Land Act. In its article 2, the access to property is conditioned by its social function, but we scrutinise the criteria for the meaning of “social” it is found the economic dimension based upon production, the well-being of the producers and their relations with the ones who work in the lands. In the letter “c” of the same article, it is necessary to cope with satisfactory levels of production and the maintenance of the natural resources. Here we find the external limit, which is a legal disposition involving proprietors and State, is close to the traditional framework of land use that was in the 1850 Land Act. As in the

19<sup>th</sup> century, property concession was again concentrated by the executive power under the excuse of public interest, but curiously favouring wealthy illegal possessors in the inlands of Brazil. The implementation of the 1964 Land Act was sent to the national legislature, but it worked more as a formal procedure since the executive power served the Military Regime (1964-1985) with a biased legal structure relying on the absolute concept of ownership.

Revisiting the 1967 Brazilian Constitution text, we have some relevant facts to comment on its history with reference to the limits of ownership while there seems to be a legal tradition in not recognizing it as an instrument of labour to combat inequality but a tool to serve the economic status quo.<sup>245</sup> The social function of property, for instance, was mainly linked to the topic of expropriation. Then, the State using force of law under the excuse of general interest is another clear example. We also find the concept of public to forge the bonds between the State institutions such as law courts, decrees and Civil Law codes and wealthy private sectors, although the Brazilian State assumed the task of tackling economic abuse of power in property issues.<sup>246</sup> In the 1967 Brazilian Constitution, Chapter IV, Section Rights and Individual Rights, article 150, the inviolability property for all Brazilian citizens and foreign residents is defended as a fundamental right. In the § 22, the same article, the right to property is guaranteed except in cases considered necessary for public utility or social interest with previous compensation in cash. In the article 157, III, Title III, Economic and Social Order, the idea of social justice should be based on the following principles: social function of property, third point; all economic abuse of power must be restrained, the sixth point. The domain of the property markets should be oriented by harmonised competition and economic development. The first paragraph yet in the article 157 predicts the expropriation of rural properties under the argumentation of public utility. Although a very authoritarian government, the political military regime made positive the notion of social interest in the property system. In 1969, there was a constitutional amendment revising the 1967 Brazilian Constitution, but it reaffirmed the principles establishing limits for ownership. However, the social function of property was clearly submitted to socioeconomic organisation of the State, Title III, article 160, as a declared objective for

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<sup>245</sup> Carter, M. (Ed.) (2014). *Combatendo a desigualdade social: o MST e a reforma agrária no Brasil*. São Paulo: Unesp.

<sup>246</sup> Bonizzato, L. & Coutinho, R. (Eds.) (2011). *Direito da cidade*. Rio de Janeiro: Lumen Juris.

the national development under the stigma of social justice, but definitely not inclusive. In other words, the liberal pecuniary aspect underlay the formation of the right not the social use of ownership neither on representative nor democratic grounds.

### **1.3. Other liberal and economic legal systems limiting the right to property**

From a comparative perspective, the right to property has not been conceived as absolute by the Court of Justice of the European Union even when it has to do with its intellectual dimension. The case C-347/03, *Regione Autonoma Friuli-Venezia Giulia and Agenzia regionale per lo sviluppo rurale (ERSA) v. Ministero delle Politiche Agricole e Forestali*, was a dispute with reference to the competence of the Italian ministry to restrict the commercial use of the brand “Tocai friulano” or “Tocai italico” in 2005. In order to prevent the proprietors from creating an aggregate value for the wine that could misbalance the competition inside European Union and, in the case, affecting the Hungarian producers, the court decided the Italian State through its competences was entitled to implement the previous agreement signed between European Union and the Republic of Hungary. In the sixth rule of the CJEU, it is said: “The right to property does not preclude the prohibition on use by the operators concerned in the autonomous region of Friuli-Venezia Giulia (Italy) of the word ‘Tocai’ in the term ‘Tocai friulano’ or ‘Tocai italico’ for the description and presentation of certain Italian quality wines produced in specified regions at the end of a transitional period expiring on 31 March 2007, resulting from the exchange of letters concerning Article 4 of the Agreement between the European Community and the Republic of Hungary on the reciprocal protection and control of wine names annexed to that agreement but not referred to in the latter”. Previously, the court had mentioned that: “[...] the right to property is one of the general principles of Community law. However, it is not absolute but must be viewed in relation to its social function. Consequently, the exercise of the right to property may be restricted, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute in relation to the aim pursued a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed [...]”.<sup>247</sup> Even under a liberal and

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<sup>247</sup> Retrieved from <http://curia.europa.eu>

commercial analysis, it is possible to restrict the exercise of a fundamental right concerning the issue of intellectual property. It seems to be a very interesting case for revising the traditional concept of ownership motivated by the absolute dimension in the field of economic relations. In 1994, the CJEU had already decided on the similar Case C-306/93 also known as *SMW Winzersekt GmbH ('Winzersekt') v. the Land Rheinland-Pfalz*. The dispute is related to the right to commercialise champagne with a specific brand related to its method to distinguish the product as if it were unique from other ones in the common European market “[...] the use after 31 August 1994 of the term ‘Flaschengärung im Champagnerverfahren’ (‘bottle-fermented by the champagne method’) to describe certain quality sparkling wines produced in a specified region (‘quality sparkling wines psr’)”. One of the reasons for the substance of the decision mentioned the importance of market organisation as a result of the social function of property in a fundamental right pursued by individuals or companies: “Account must also be taken of the Court’s case-law to the effect that the right to property and the freedom to pursue a trade or business are not absolute but must be viewed in relation to their social function. Consequently, the exercise of the right to property and the freedom to pursue a trade or profession may be restricted, particularly in the context of the common organization of a market”.<sup>248</sup> In addition, the logic of promoting internal limits for the conceptual usufruct of the right to property establishes a connecting factor to the principle of general interest: “[...] provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed [...]”.<sup>249</sup>

Another conflict involving the internal limits of the right to property can be intimately linked to the concept of “social” for housing projects and access to social housing in the Flemish Decree. According to the norm for the Region of Flanders, some municipalities could impose restrictions for the rent and property acquisition saying potential tenants or buyers should respect at least one of the following criteria. The first one was the proof of residence of at least six years in the municipal perimeter prior to

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<sup>248</sup> Trstenjak, V. (2017). Private law and fundamental rights. In Schauer, M. & Verschraegen, B. (Eds.). *General Reports of the XIXth Congress of the International Academy of Comparative Law* (pp. 73-98). Dordrecht: Springer.

<sup>249</sup> Retrieved from [https://curia.europa.eu/jcms/jcms/j\\_6/en/](https://curia.europa.eu/jcms/jcms/j_6/en/)

the transfer of the property; then the second one proving a job contract in the place; thirdly the social and economic relations. So, the Constitutional Court of Belgium: “before which several applications for annulment of that decree have been brought, raises the question whether the decree is compatible with EU law, specifically the fundamental freedoms and the rules on State aid and public contracts. That question has been referred to the Court of Justice for a preliminary ruling”. The Case C-203/11 was understood by the Court of Justice of the European Union as emblematic since the criteria posed by the Region of Flanders could not meet necessarily the “social” aspect with those immovable properties destined to less affluent individuals: “Whilst accepting that such an objective may constitute an overriding reason in the public interest capable of justifying restrictions such as those provided for by the Flemish Decree, the Court finds however that none of those conditions directly reflects the socio-economic aspects relating to the objective of protecting exclusively the less affluent local population on the property market. Such conditions may be met not only by the less affluent local population but also by other persons with sufficient resources who, consequently, have no specific need for social protection on the property market”. Moreover, the CJEU affirms the provisions in the decree should be committed to other measures such as subsidy mechanisms and tax incentives to assist less affluent persons. For the purposes of the present chapter, it is relevant the idea of social function as an internal limit if there is actually a connecting factor with the right to property and social rights. The CJUE also concluded the “Article 63 TFEU must be interpreted as not precluding legislation such as Book 4 of the Decree of the Flemish Region, according to which a ‘social obligation’ is imposed on some economic operators when a building or land subdivision authorisation is granted, in so far as the referring court finds that legislation is necessary and appropriate to attain the objective of guaranteeing sufficient housing for the low-income or otherwise disadvantaged sections of the local population”.<sup>250</sup> The argument of the social function established a connection to other fundamental rights beyond the right to property with the intention of generating equal opportunities in labour issues as well. The Case C-43/75, *Defrenne v. Sabena* from 1976, is a dispute involving a female flight attendant obliged to retire at the age of forty while the male employees in the same function did not have to. In addition, she had a lower pension

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<sup>250</sup> Retrieved from [https://curia.europa.eu/jcms/jcms/j\\_6/en/](https://curia.europa.eu/jcms/jcms/j_6/en/)

compared to her counterparts. Defrenne's defense alleged the company had violated the principle of equal treatment on the grounds of gender under the article 119 and other principles in the article 141 of the Treaty of the European Community.<sup>251</sup> The court decided that equal payment formed "part of the social objectives of the [European Community], which is not merely an economic union, but is at the time intended [...] to ensure social progress and seek the constant improvement of the living and working conditions".<sup>252</sup> All these cases from the European context are interesting to pave the path for a redefinition of the internal limits of the right to property, but mainly the social function as an immanent concept for a broad range of fundamental rights in democratic societies without denying the economic order.<sup>253</sup>

Sometimes the legal category of social function reveals more abstract or even intangible conflicts regarding the limits of property, but intimately connected to some restrictions for absolute anti-democratic notions on fundamental rights. The case *Penn Central Transportation Co. v. New York City* nurtured a polemic when the historical value of a building was defended by the city administrative power by not giving permit of construction for the owners. The company presented a project of fifty apartments about to be erected on the original structure and, with the restriction of its plans for the building, went to court alleging the possession of its property without fair previous compensation: "After the Commission had rejected appellants' plans for the building as destructive of the Terminal's historic and aesthetic features, with no judicial review thereafter being sought, appellants brought suit in state court claiming that the

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<sup>251</sup> See the article 157 of the Treaty on the Functioning of the European Union as a substitute for the Treaty of the European Union valid at the time the case was led to court.

<sup>252</sup> Retrieved from [https://curia.europa.eu/jcms/jcms/j\\_6/en/](https://curia.europa.eu/jcms/jcms/j_6/en/)

<sup>253</sup> Muir, E. (2015). Pursuing equality in the EU. In Amull, A. & Chalmers, D. (Eds.) *The Oxford Handbook of European Union Law* (pp. 919-942). Oxford: Oxford University Press. With reference to the limits of fundamental principles in economic or tax disputes inside the European Union market, the TJEU has objected the argument or legal rationale of unlimited power of the States disguising their historical absolute formulas of sovereignty. As two examples, we mention the Case 26/62 *van Gend & Loos v. Netherlands Inland Revenue Administration* in which the tribunal of the European Union affirmed in paragraph 11, letter B, "On the sustance of the Case": "The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit with limited fields, and the subjects of which comprise not only Member States but also their nationals"; and the Case 6/64 *Costa v. ENEL*, the tribunal says in its section "On the submission that the court was obliged to apply the national law", paragraph 9, that: "By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves". See Emmert, F. (2000). Fundamental principles of European Union law. In *European Union law: cases* (pp. 14-23). Hague: Kluwer Law International.

application of the Landmarks Law had ‘taken’ their property without just compensation in violation of the Fifth and Fourteenth Amendments, and arbitrarily deprived them of their property without due process of law in violation of the Fourteenth Amendment. The trial court’s grant of relief was reversed on appeal”. Regarding a possible act of expropriation: “the New York Court of Appeals ultimately concluding that there was no ‘taking,’ since the Landmarks Law had not transferred control of the property to the city, but only restricted appellants’ exploitation of it; and that there was no denial of due process because (1) the same use of the Terminal was permitted as before; (2) the appellants had not shown that they could not earn a reasonable return on their investment”. In 1978, the dispute ended up in the United States Supreme Court reaffirming the historical value of the building and the act of the city was legally binding observing the New York’s Landmarks Preservation Law.<sup>254</sup>

#### **1.4. The making of the internal limits of the right to property in the Brazilian and Spanish democratic regimes**

The social function of property was reintroduced as an internal limit in the 1988 Constitution of the Federative Republic of Brazil. However, it is an intrinsic value that is completely different from the previous period since it was not exclusively an object of a centralised executive power. It is affirmed in the Title II, Rights and Fundamental Guarantees, Chapter I, observing the individual right to property but including also obligations. According to the article 5 of the Magna Charter, everyone is equal before the law with no distinction of nature, guaranteeing all Brazilian citizens and resident foreigners in the country the inviolability of the right to life, equality, security and property. So, the right to property appears in the article 5, XXII. It is followed by the social function of the property, article 5, XXIII, in the same provision. The clause XXVI, still part of the article 5, the small rural property must be under the productive use of the family and cannot be pawned. Its production will neither be used to guarantee the payment of its own debt production. In the Title VII of the same 1988 Constitution of the Federative Republic of Brazil, Economic and Financial Order, Chapter I, General Principles of the Economic Activity, it is said in the article 170 that the economic order

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<sup>254</sup> Retrieved from <https://supreme.justia.com/cases/federal/us/438/104/case.html>

must be based on the value of human work and free enterprise. It has also the objective of assuring a dignified life based on social justice. As a means to achieve certain goal, in its second clause, the private property is one of the tools to promote material equality. After that, in its third clause, yet in the article 170, the social function of property is understood as the concrete measurement in the magna charter to put in practice a democratic use of property with no incentives to abuses as well. It is important to analyse the same conflict between the property system and the housing issues with reference to *usucapio*. This selection is really meaningful to the Brazilian colonial history and tradition in use of land.

In the article 183 of the 1988 Brazilian Constitution, it is mentioned that the person who has under his own possession an urban area with the limit of two hundred squared meters for five years without interruption for dwelling purposes. As long as the person does not have any other urban or rural property neither owner's opposition, there is no legal impediment in emitting the title of private property to the possessor. The first paragraph points out the title of property will be conferred to men or women, or both, regardless of their marital status. The second paragraph says this right will not be conceived more than one time. The third paragraph makes explicit public buildings is not susceptible to *usucapio* – possession and title of property if there is no juridical opposition. It is a very advanced model of land and property right in a country where the State recognises the property has a social function for residence. However, we can resume the idea of *usucapio* saying it is an enforceable right for those individuals with a land not being an object of a dispute. The social function is also close to the notion of public interest. If a possessor claims for the land title under a peaceful tenure, the State can dispose of legal procedures of alienability, prescriptibility and confiscable on the good justifying it to make the property functional in society. A possession occupied under the regime of property is object of taxes that can be distributed in municipal, regional and federal levels.<sup>255</sup>

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<sup>255</sup> The right to property is defended by the Brazilian Civil Code, revised in 2002, in the article 1.228. In the Spanish reality, the articles 348 and 349 of its Civil Code express the guarantee of the right to property. See also the 1988 Constitution of the Federative Republic of Brazil, article 191, related to *usucapião* for rural areas. The text says “the possessor who has a rural property for uninterruptedly five years without opposition, being not an owner of any rural or urban property, living and producing in the place for him and his family, will be declared the proprietor of the land where is established. Public lands will not be susceptible to the content of this article”. In the article 190, leasehold and acquisition of rural areas will be regulated by specific law, juridical or individual *persona*, national or foreigners, the



With reference to expropriation, article 185, it is present in its clause I that small and middle-sized properties are insusceptible of this legal external limit with the objective of agrarian reform as long as the proprietor is not the proprietor of another land; and the clause II, in the same provision, says only specific law will be able to establish special measures to the accomplishment of the social function of property in productive lands. Once more, the 1988 Constitution of the Federative Republic of Brazil seems to focus on those large unproductive properties for expropriation to correct a historical deficit inherited from the colonial times in possession disputes. Moreover, what we consider very progressive, that the federal legislature is able to enact any law with that purpose. Finally, the article 186 mentions that the social function of property is accomplished when, according to law criterion, a) the rational and adequate improvement of the soil is seen; b) the adequate of the natural resources are available and the preservation of the environment observed; c) fair regulation of the working relations realized and d) the exploration of the property favoring the welfare of the proprietors and workers. This last part is coherent to the traditional liberal notion inherited from the 19<sup>th</sup> century as we showed in the 1850 Land Act, but it must coalesce into a democratic perspective. In the *Acts of the Transitional Dispositions*, published later, article 68, the remainders of the *quilombolas* communities, which are those areas isolated with self-subsistent economic life and occupied by the African descendants possessing the lands, are recognised the definitive property title. The State must emit the respective documents.

In the 1978 Spanish Constitution, Chapter II, Rights and Liberties, Section II, From the Rights and Obligations of the Citizens, in its articles 33.2 and 33.3, respectively, it is evoked the social function of property and the social interest in case of expropriation. So, the acts passed under the assertion “de acuerdo con las leyes” have been a practical example of the legislative power on the definition of the social function of the property and its external or internal limits. Other element is the social function of wealth in the 1978 Spanish Constitution, article 128, present in its clauses I and II. The text says that a) all richness of the country in its various forms regardless its matter is

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National Congress will establish the cases in which authorization will be demanded. The concept of “usucapión” is also predicted in the Spanish Civil Code since 1889, articles 1940 and the following ones, Book IV. The origins of principle are established by the Roman right as the *usucapio* and it is distinct from the *occupatio*. The former has to do with a long human settlement and the later the physical presence.

subordinated to the general interest; b) public initiative is recognised in the economic field and, based on normative frameworks, essential sectors and specially in cases of monopoly or even intervention in those entrepreneurships of general interest.<sup>256</sup> Along the decades since the 1978 Spanish Magna Charter was promulgated, the Constitutional Court of Spain has recognised the insufficiency of the Civil Code in establishing the limits and the discipline for the right to property.<sup>257</sup> It is a clear effect of a democratic political structure influencing the making of interpretation of ownership in the country. However, that battle involving the external and internal limits of the right to property has not been so close to a democratic approach among justices, public defenders and lawyers. It has been an object of traditional and modern conflicts in order to set basic parameter for property definition between economic liberal minds and a socioeconomic complexity derived from a democratic regime.<sup>258</sup>

The historical experience of the Brazilian and Spanish constitutions may be intriguing when we observe that the social function of property along the history of their

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<sup>256</sup> “En contraposición a los sistemas medievales de propiedad basados en el *dominium* de las cosas, el derecho de propiedad burgués surgiría del interior del sujeto y sería una emanación de sus potencialidades. Su punto de partida sería una nueva concepción antropológica en la que el individuo se describe como esencialmente propietario por llamada de Dios y de la naturaleza. Esta propiedad espiritualizada, es decir concebida más allá de las cosas, se convertirá en la piedra filosofal de la civilización capitalista y como connatural e imprescindible para la plena realización del *homo economicus*. Introducir estos elementos en el análisis del proceso de cambio institucional, en mi opinión, ha de servir para examinarlo desde una nueva perspectiva ya que nos pone directamente en relación con el individuo posesivo convertido en protagonista del mundo contemporáneo”. See Garrabou, R. (1998). Derechos de propiedad y crecimiento agrario en la España contemporánea, In De Dios, S., Infante, J., Robledo, R. & Torijano (Eds.) *Historia de la propiedad en España: siglos XV-XX* (pp. 349-370). Salamanca: Centro de Estudios Registrales.

<sup>257</sup> Rodríguez, A. P. (1959). La propiedad y los demás derechos reales. In *La propiedad: una crítica del dominocentrismo* (p. 97). Madrid: Instituto Balmas. According to the author: “El Tribunal Constitucional se ha limitado a declarar la insuficiente disciplina de la propiedad privada en el Código Civil, lo que es evidente a todas luces, pero ha dejado incólumes sus preceptos desde la perspectiva de su hipotética inconstitucionalidad. Si pensamos que los Códigos civiles nacieron a lo largo del siglo XIX para regular la sociedad burguesa, que descansaba sobre todo en la sacralización de la propiedad, ‘derecho fundamental en el que reposan todas las instituciones sociales’, observaremos el contraste total con la pluralidad de estatutos jurídicos que actualmente rigen la variedad de formas dominicales, todos ellos sometidos a la Constitución, y, por ello, valorados a la luz del Estado social de Derecho (arts. 1, 33.2 y 128 CE, entre otros)”. See Perez, M. A. (1998). La propiedad en el código civil. In Hernández, R. R. et al. (Eds.) *Historia de la propiedad en España: siglos XV-XX* (p. 474). Salamanca: Centro de Estudios Registrales.

<sup>258</sup> “La tarea de juristas y legisladores no solo se centró en la defensa abstracta del derecho de propiedad sino también en la homologación de las antiguas formas posesorias en el nuevo modelo burgués y esta operación conllevó no pocos problemas. Basta recordar las dificultades para encontrar la fórmula adecuada para solucionar el tema de la abolición del régimen señorial, mediante la división artificial entre señorío jurisdiccional o solariego o las indemnizaciones a los antiguos perceptores de diezmos, sin olvidar claro está el tema de los bienes comunales”. See Garrabou, R. (1998). Derechos de propiedad y crecimiento agrario en la España contemporánea. De Dios, S., Infante, J., Robledo, R. & Torijano (Eds.) *Historia de la propiedad en España: siglos XV-XX* (p. 355). Salamanca: Centro de Estudios Registrales.

magna charters is not necessarily a fruit of a social legal order in which the legislative power had the prerogative on the matter except in their democratic constitutions. In other words, it is quite astonishing that such mechanism based on the property system has not been an apparatus of a participative democracy thought specifically to face the juridical inequality of its subjects in the both nations. In their histories, the social function of property descends from a corporative state relation with privileged classes. Either in Brazil or Spain, the internal limits are not necessarily part of the property system, but a legal matter transforming the tradition of absoluteness of ownership. The root of the problem lies in the observation of the fact that even the social function of property was maintained as a constitutional norm during the Military Regimes in Brazil (1964-1985) and in Spain (1939-1975). An intrinsic contradiction also appears in Spain, for example, since the popular demands had to resist the liberal progressive alliances in order to face the exclusivist bourgeois legal order that favoured proprietors concentrating title of properties. In the Catalonia countryside, there was a dilemma in supporting the plans of a non-traditional project on property system from the economic elites or suspecting of the elitist productive bourgeoisie renovating the links with aristocratic-religious class interests.<sup>259</sup>

For that inquiry, we point out to a very argumentative proposition that the two centralizing States had their constitutional texts under a limited juridical order based on a Civil Law tradition. This is why it sounds reasonable for us the subsistence of abstract meanings of emotional rights, arbitrariness from a very hierarchical logic of law order and the supremacy of contracts between possessors. The owner of political and military power may negotiate with others, but mainly with economic powers. The public good and general interest, as we can see in the case of State expropriation in both countries,

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<sup>259</sup> “En el caso de Cataluña los juristas y legisladores liberales tuvieron que enfrentarse al tema de la enfiteusis y de la rabassa [useful ownership of the land]. A diferencia de o que sucedió en otros territorios del estado, la amplia reacción social de mediados del siglo XIX a la propuestas [sic.] de redención forzosa de la enfiteusis, obligó a aplazar indefinidamente estas medidas hasta después de la guerra civil de 1936-39. En relación con la rabassa, otra herencia de dominio compartido característico del sistema de propiedad de antiguo régimen, recordemos que constituyó uno de los factores generadores de tensión y conflicto en el campo catalán hasta la II República. Dificultades parecidas encontraron los legisladores liberales para la transformación inmediata de las instituciones forales en formas de propiedad burguesa en Galicia y Asturias, lo que originó tensiones y conflictos, hasta la publicación de las medidas redencionistas en los años veinte de nuestro siglo”. See Garrabou, R. (1998). Derechos de propiedad y crecimiento agrario en la España contemporánea, In De Dios, S., Infante, J., Robledo, R. & Torijano (Eds.) *Historia de la propiedad en España: siglos XV-XX* (p. 356). Salamanca: Centro de Estudios Registrales. Read also Prado, C. (2004). A república burguesa. In *História econômica do Brasil* (pp. 211-212). São Paulo: Brasiliense.

are interpreted most of the time as a relation of lords or as we prefer the realm of *domini*. The privileged men of powers forged a concept of what would be social interest not only with a widespread culture of authoritarian governments, but also with a legal regime of detachment between land norm based on force of law and the real need for habitat. The perversion of such practice was the legacy in doctrine, jurisprudence and law reading practice in the subsequent years of the 1931 Spanish Constitution and 1967 Brazilian Constitution.<sup>260</sup>

## **2. Brazil & Spain: a three-dimensional rationality and the absolute use of property**

### **2.1. The Brazilian inequality and the social function of property**

In our first example, the Brazilian City Statute, the Federal Act 10.257, which was approved in the federal sphere in 2002, for example, guarantees to under public powers the planning models, the social function of the property and the social function of the city. However, the right to housing was obliterated in the section that predicted a possible solution to the debate of space concessions for housing purposes. The impoverishment of geographical areas and the exclusion generated by historical limited access to land were negatively formalized. From the articles 15 to 20, these dispositions were vetoed by the President Fernando Henrique Cardoso specifically restricting the special uses of land for social housing purposes. It was understood by the executive power that public areas such as parks, squares and under-bridge rooms could be framed in these five articles. In fact, they are, but the point is not a formal norm regularising a practice considered offensive for the common good, but the exclusion of five dispositions to support urban social movements in those public areas abandoned and subject to the arbitrary selection of the State about what would be social interest. The emotional right in the State legislative, executive and juridical powers select what is social use for housing issues. The Brazilian history tells us not the invasion of the public space, but an extreme unequal society that urges the roofless to occupy vacant urban

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<sup>260</sup> Bravo-Ferrer, M. R.P (2007). La problemática de la propiedad desde la perspectiva del derecho social. In *Propiedad y derecho social* (pp. 19-36). Madrid: Fundación Registral.

territories. With reference to the article 18, in the *caput*, a horizontal effort was made in the original text to put in equilibrium administrative *potestas* and juridical power. If the former was considered omissive, so the later could be claimed. This mechanism could be procedurally reinforced by the figure of a judge who would be a competence able to declare the concession of a property for special housing motives.

Art. 18. O título de concessão de uso especial para fins de moradia será obtido pela via administrativa perante o órgão competente da Administração Pública ou, em caso de recusa ou omissão deste, pela via judicial.

§ 1o Em caso de ação judicial, a concessão de uso especial para fins de moradia será declarada pelo juiz, mediante sentença.

§ 2o O título conferido por via administrativa ou a sentença judicial servirão para efeito de registro no cartório de registro de imóveis.

§ 3o Aplicam-se à concessão de uso especial para fins de moradia, no que couber, as disposições estabelecidas nos arts. 11,12 e 13 desta Lei.

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Although the executive power recognized the immense number of passive cases in irregular occupations, it understood the adjudicative mechanism seen in the article 18 as a congestive instrument for the judiciary power. This was the justification for the veto specifically for the article 18. We prefer emphasizing the executive impediment was absurdly cynical. Once the public administration recognizes massively the demands for housing, inefficiency of State bureaucracy cannot limit the right to a better place to live. Besides, we can deduce the fallacy of the administrative police in the veto counting the number of property possession reintegration solved in record periods for the Brazilian justice. In other words, the proprietors' claims for their rights to possession of their properties are the same of the non-proprietors in quantity that has been occurring. They represent the same process in numbers that have been satisfactorily favoring the title owners in the history of land legal possession in Brazil. However, the individuals

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<sup>261</sup> Read the comments on the vetoes applied to the article 18, especially on page 38. Retrieved from <http://www2.senado.leg.br/bdsf/bitstream/handle/id/70317/Estatudo%20das%20cidades.pdf?sequence=6>

are not seen the same in quality if there is a combination of social rights and enforceable law.

Since the 1850 Land Statute, during the imperial times, property was not accessible to immigrants and former slaves. Curiously, Brazil is massively populated by Africans and other nationalities than the Portuguese royal family descendants or employees.<sup>262</sup> To make matters worse, the discussion related to housing questions was negatively solved under the auspices of the Labour Party government. It sanctioned the idea that “favelas” should have their juridical normalization through titles of property as it says the Federal Act 12.288/2010, the Racial Equality Statute. In this text, from the articles 35 to 37, inadequate places and housing must be bettered and annexed to the urban life. Although the law seems to be progressive, it deceivably recovers history. In the article 35, the public *potestas* shall guarantee the public policies to assure an adequate dwelling for the black population established in slums, beehives, underused urban areas, derelict places or clearly in derelict process. The article predicts also the re-integration of these peripheral geographies to the urban dynamics of the city promoting environmental betterment and quality life elevation. Nevertheless, these supposed areas had never been integrated and they are the result of exclusion in urban plans that had historically been developed by the private-public segregationist capital.<sup>263</sup> As we observe also in the article 35, juridical and administrative public power will be technically based on social assistance to facilitate actions of self-construction that have been deeply rooted in the Brazilian culture of housing building. Finally, the article 37 that reassures the possibility of financial private-public agents to promote the access to dwelling mortgages for the black population.<sup>264</sup> For a further reflection on the use of a different rationale invoked to restrict the abuses in property system, we suggest two models, i.e., the single and the three-dimensional rationality.

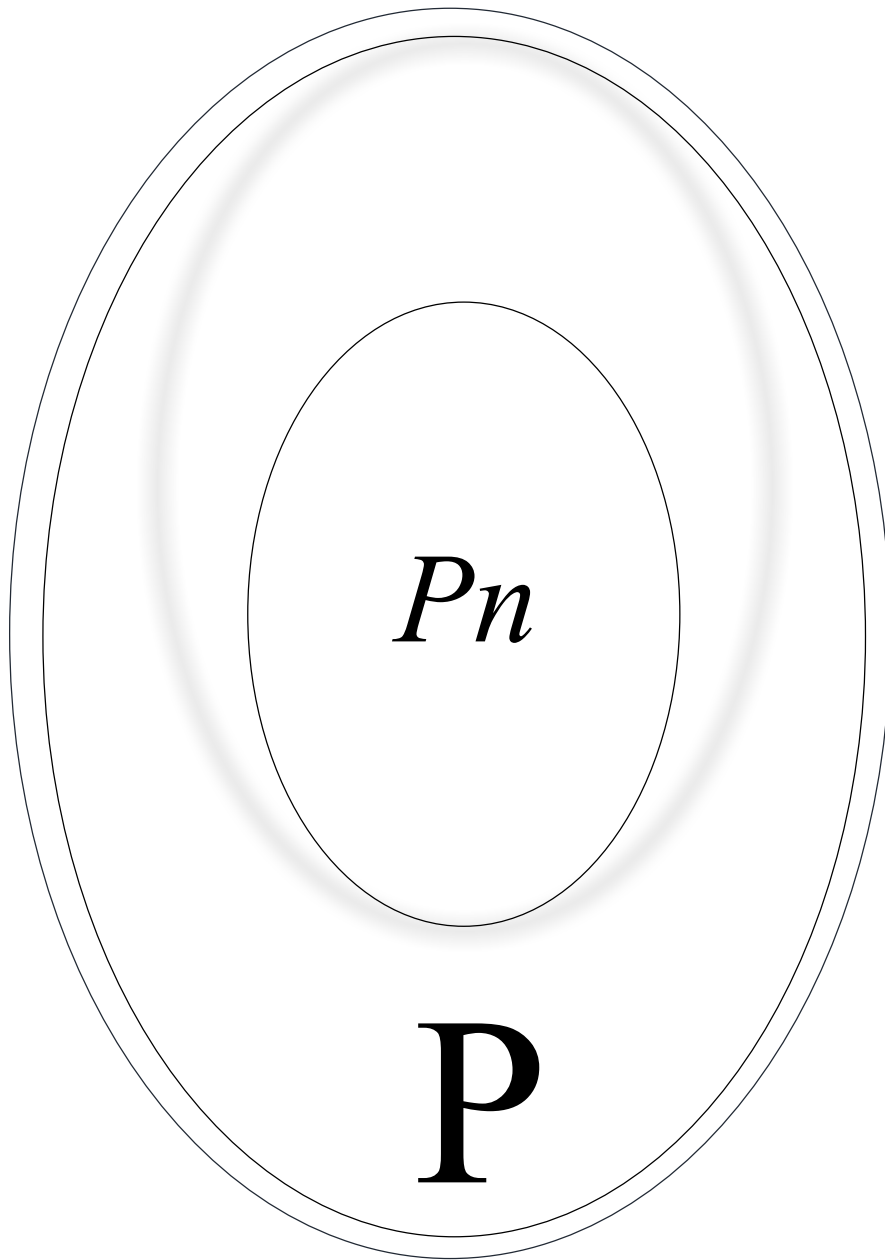
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<sup>262</sup> “The Land Statute had no social concerns. Its main aim, successfully achieved, was preventing immigrants and former slaves from becoming landowners”. See Cunha, A. C. (2011). The social function of property in Brazilian law. *Fordham Law Review*, 80(1), 1173.

<sup>263</sup> We have a different opinion from Ngai Pindell’s argumentation about “favelas”. For us, they are not created by the action of individuals in dispute among proprietors. They are a political and socioeconomic result and reaction of a historical culture of segregation in Brazil. They do not deliberately elect to live under deplorable levels of sanitary conditions, irregular architectural building standards, criminally oppressed and exposed to lack of minimum social services. They are expelled from the formal city and arrange themselves as they can. See Pindell, N. (2006). Finding a right to the city: exploring property and community in Brazil and in the United States. *Vanderbilt Journal, Transnational Law*, 39(1), 435-479.

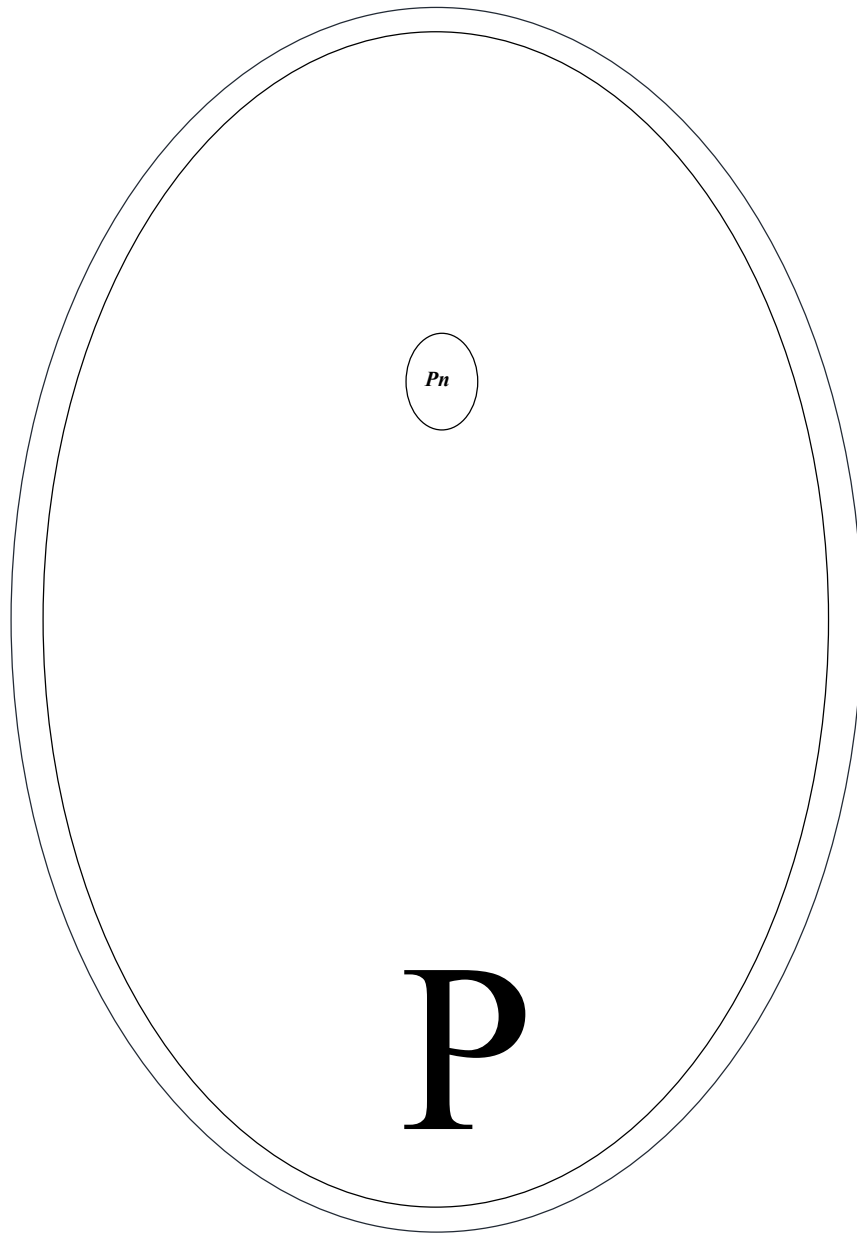
<sup>264</sup> Retrieved from [http://www.planalto.gov.br/ccivil\\_03/\\_Ato2007-2010/2010/Lei/L12288.htm](http://www.planalto.gov.br/ccivil_03/_Ato2007-2010/2010/Lei/L12288.htm)

## Single Rationality



The bigger ellipse represents all properties in society. The second biggest ellipse stands for residential properties,  $P$ . The smallest one  $Pn$  in expansion with a grey outer ellipse illustrates the global speculative real estate businesses. The social function is not effective to impede the accumulation of non-residential empty dwellings by firms; progressive taxes on marginal returns provoke legal conflicts between proprietors and administrative competences; nations with poor national policies for housing programmes and there is a huge instability for public funds financing cheaper mortgages for the working class.

## Three-Dimensional Rationality



The bigger ellipse represents all properties in society. The smaller one stands for non-residents, *Pn*; and the second biggest one for residents **P**. This is the model for those societies where vacant houses tend to be appropriately occupied. The social function of property limits speculation in *Pn* and in the outer space between the biggest and the second-biggest ellipses. Non-residents proprietors such as banks, real estate investors and speculative property market tend to find restrictions for the accumulation of an infinite number of dwellings, because of the progressive taxes on urban marginal returns, national policies for housing as a connecting factor of other rights in urban context and public funds financing cheaper mortgages for the working class.



In one of his speeches given during the 1917 Mexican Constituency, the parliamentary representative Pastor Rouaix said the right to property was not supposed to be absolute and it had to be conceived as a connecting factor to other legal matters: “Claro está que el ejercicio del derecho de propiedad no es absoluto, y que así como en el pasado ha sufrido modalidades, es susceptible de admitir otras en el porvenir, basadas en el deber que tiene el Estado de conservar la libertad igual de todos los asociados; deber que no podría cumplir sin el derecho correlativo”.<sup>265</sup> The article 27 of the Mexican Magna Charter, clause V, says financial institutions are allowed to have properties, but only if they are intimately connected to the purpose of their activities: “Los bancos debidamente autorizados, conforme a las leyes de instituciones de crédito, podrán tener capitales impuestos, sobre propiedades urbanas y rústicas de acuerdo con las prescripciones de dichas leyes, pero no podrán tener en propiedad o en administración más bienes raíces que los enteramente necesarios para su objeto directo”. During the 2008 global crisis, when banks and assets management firms were the main beneficiaries of the unpaid mortgages debts with many housing units in their hands, few constitutional legal systems were prepared to apply the law for the abuses of ownership as the 1917 Mexican Constitution had been for practically a century. Moreover, the same article in its part VII avers that locals and communities shall have their legal personality and the possession of the land guaranteed either for human settlements or productive activities. The constitutional norm also provides indigenous groups with the protection of their lands: “Se reconoce la personalidad jurídica de los núcleos de población ejidales y comunales y se protege su propiedad sobre la tierra, tanto para el asentamiento humano como para actividades productivas. La ley protegerá la integridad de las tierras de los grupos indígenas”. Following the paragraph XV of the same article, it is forbidden in Mexico the existence of large and extensive ownerships as the Querétaro Charter categorically states in order to defend the productive small proprietors: “En los Estados Unidos Mexicanos quedan prohibidos los latifundios [...] Se considerará [...] pequeña propiedad, la superficie que no exceda por individuo de ciento cincuenta hectáreas cuando las tierras se dediquen al cultivo de algodón, si

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<sup>265</sup> Rouaix, P. (1917). Discusión del artículo 27 constitucional (agrario). In *Estados Unidos Mexicanos. Diario de los Debates del Congreso Constituyente*. Querétaro: Memoria política de México. Retrieved from <http://www.memoriapoliticademexico.org/Textos/6Revolucion/1917DAV.html>

reciben riego”. The same provision further defines the familiar property as a human criterion for a vital and economic subsistence: “[...] y de trescientas, cuando se destinen al cultivo del plátano, caña de azúcar, café, henequén, hule, palma, vid, olivo, quina, vainilla, cacao, agave, nopal o árboles frutales [...]”. In order to protect the familiar cattle production: “Se considerará pequeña propiedad ganadera la que no exceda por individuo la superficie necesaria para mantener hasta quinientas cabezas de ganado mayor o su equivalente en ganado menor, en los términos que fije la ley, de acuerdo con la capacidad forrajera de los terrenos”. The affirmation of these rights brought into being the understanding property should have in its internal limits a social dimension.

As it is seen in the Constitution of Mexico, there is a bond of economic, civil and constitutional matters forging what we have been defending as a three-dimensional rationality. Therefore, property is intimately linked to the actual claim to socioeconomic rights and propagating a universalist discourse in international forums complying with human rights. In other words, the understanding on property must be studied out of the umbrella of a single rationality, that is to say, non-residential and speculative ownership must not be evaluated only under the auspices of contract law in its many forms of business. Other aspect present in a three-dimensional rationality is the political force behind the legislative power to manipulate, change and seduce the public opinion. In that sort of understanding we introduce the clear view of production and distribution of wealth through property system. The defence of the social function of property is not an economic comprehension or prize of the democratic regimes necessarily designed for the needy. The Third Reich (1933-1945), for instance, kept the social contribution of private ownership from the 1919 Constitution of the Weimar Republic in its article 153 in order to collect taxes for the making of war. State institutions, property and society were used as an instrument for capital accumulation in belligerent ends and, as justified by the conservative intellectuality of the III Reich, an indispensable tool for the State of exception.<sup>266</sup> Like other European countries, Germany had to deal with the economic and speculative abuses in the property system with the end of World War I calling the attention to the need of social contribution, but that prerogative served as an excuse for

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<sup>266</sup> Schmitt, C. (2005c). The problem of sovereignty as the problem of the legal form and of the decision. In *Political theology* (pp. 16-20). Chicago: Chicago University Press.

the abuses of expropriation against Jewish people from 1939 to 1945.<sup>267</sup> In the post-World War II reconstruction period, the acts of expropriation by the National Socialist German Workers' Party and fascist institutions created an enormous social cost for Germany, Poland and Italy since illegal dispossessions under the auspices of a supposed social function ended up taking from Jewish individuals their properties without compensation.<sup>268</sup> A three-dimensional rationality does not support any authoritarian notion of expropriation disrespecting a due process, but a clear social contribution regarding the surplus value ownership through public investments in urban planning or profits made after the State concession for natural resources exploitation in rural lands.

In 1939, Walter Benjamin wrote about the reconstruction of Paris making some comments about Georges-Eugène Haussmann's project: "Haussmann's activity is incorporated into Napoleonic imperialism, which favors investment in capital. In Paris, speculation is at height".<sup>269</sup> So, it made sense for the working class the claim to fundamental rights in accordance with social and labor demands. People's expectations for the construction of political alternatives and human settlements relied on the instruments formal democracy offered at that time and effectiveness seemed to be an urgent need after the 1871 Paris Commune. In 1920, the Constitution of Austria, in its article 11.3, avers the right to social housing affairs meaning the State should promote the social interest in the property market to serve the human dignity of the citizens. An understanding that was born pregnant of reformism on the internal limits of property system and an instrument to pacify the public eye energized by the anger of an oppressing speculative system that used to make the rents a system of wealth accumulation. In Vienna, the housing units had many sanitary problems such as the bad odour caused by non-ventilated areas and clogged toilets. More than one family had to share intimate spaces, but still struggling to pay the monthly costs of housing units without, for example, running water, electricity and heating. Yet the investments were

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<sup>267</sup> Wolf, N. (2010). Europe's great depression: coordination failure after the First World War. *Oxford Review of Economic Policy*, 26(3), 339–369.

<sup>268</sup> Weizman, Y. (2017). Unsettled possession: the question of ownership of Jewish sites in Poland after the Holocaust from a local perspective. *Jewish Culture and History*, 18(1), 34-53.

<sup>269</sup> Benjamin, W. (1989). Paris, Capital of the Twentieth Century. In Tiedemann, R. (Ed.). *The Arcades Project* (pp. 14-26). Cambridge: Harvard University Press.

considerably higher for social housing constructions during the 1910s in the country, private urban capital had an immense control of the city finances.<sup>270</sup>

The Italian Charter of 1947 affirms the social function of property in its article 42. It is the most explicit assertion of the internal limits of the property with a dimension of responsibility the owner has with the Italian society. Moreover, the Italian Magna Charter, article 44 says: “For the purpose of ensuring the rational use of land and equitable social relationships, the law imposes obligations and constraints on private ownership of land”. Two provisions that make the legal connections and covering the three-dimensional rationality. The idea was similar to the 1917 Mexican Constitution since the Italian Constituency decided to set: “[...] limitations to the size of property according to the region and the agricultural area; [Italian Constitution] encourages and imposes land reclamation, the conversion of latifundia and the reorganisation of farm units; and assists small and medium-sized properties. The law makes provisions for mountain areas”. Two years later, the Constitution of the Democratic Republic of Germany of 1949, Article 22, at this time, without explicitly explaining the social function of property, also imposes restrictions on property rights to create social harmony and de-constitute the absolute use of ownership. One of the characteristics of that limitation during post-World War II period in Germany had to do with the notion that financial property system generates costs for the society. Such expense is more explicit in cases of expropriation, but also when the State has the obligation to protect and administer the ownership of those properties in debt with public powers.<sup>271</sup> The social function is a very powerful legal category if it is used to promote other fundamental rights as dignified life, privacy and housing subsidies. The 1949 Constitution of Germany states, article 26, for instance, that every citizen or family, mainly victims of fascism or armed conflicts, may have the right to a decent housing making the suffering of the war a connecting factor for housing rights.

The political impact of the 1910 Mexican Revolution on the 1917 Magna Charter was progressively interpreted as a legal instrument for social justice regarding the economic, civil and constitutional criteria we translate into a three-dimensional

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<sup>270</sup> Banik-Scheweitzer, R. (2016). Vienna. In: Dauton, M. (Ed.). *Housing the workers 1850-1914. A comparative perspective* (pp. 107-149). London: Bloomsbury Academic.

<sup>271</sup> Huffman, J. L. (2013). Unconstitutional takings of the private property. In *Private property and the constitution: state powers, public rights and economic liberties* (pp. 139-184). New York: Palgrave.

rationality. The social convulsion questioning the way wealth distribution was made, demanding more political participation and imposing the general interest on properties, paved the path for an international systemic rationality that supported other different constitutional experiences.<sup>272</sup> In French constitutionalism, for instance, the Magna Charter of 1958, article 34, transfers the responsibility of legislating in property matters to the legislator, but safeguarding the provision with many connecting factors since property is a bond of relations. The three-dimensional rationality is expressed if the parliament ignores its own responsibility of regulating property. In case legislators are negligent in regulating property abuses, there is a direct delegation of the powers from the legislator to the executive discretionary power. This explains the 1991 *Loi d'Orientation pour la Ville* (LOV), which imposed 20% of social housing on each city contributing to less spatial segregation. A juridical and legal mechanism of an effective power to impede the preponderance of the market in dictating policies that end up affecting the social realm in urban planning. Financial penalties for infringing municipal legislation are part of the 2000 *Loi Relative à la Solidarité et au Renouvellement Urbains* transferring also a grant of competences for building permits.

Constitutional texts usually define the right to property observing its economic aspects for the enjoyment of private life and the individual protection. However, some legal thinkers alerted property system carried the seeds of absoluteness if it were solely analysed as a covenant from a civil law perspective. In that sense, proprietors tend to be the tyrant of their own consent in case their fundamental right is only theorized as a contract of usufruct.<sup>273</sup> In response to that new form of absolute economic model of property, some countries matured in their constitutional systems the notion of general interest. The Portuguese Constitution of 1974, article 65.1, says everyone has the right to an adequate housing with comfort, sanitary and appropriate protection for the familiar intimacy. Nevertheless, the article 65.2, letter “c”, affirms the State shall stimulate

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<sup>272</sup> Read Carpizo, J. (1982). *La Constitución Mexicana de 1917*. México: Universidad Autónoma de México. See also Galeana, P. (Ed.) (2011). *México y sus constituciones*. México: Fondo de Cultura Económica. For a historical and international view, read Garcíadiego, J. (2011). Vigencia de la Constitución de 1917. Marco histórico. México a través de este siglo: su evolución política. In Galeana, P. (Ed.). *México y sus constituciones* (pp. 279-310). México: Fondo de Cultura Económica.

<sup>273</sup> “The law does not guarantee me the physical or social ability of actually using what it calls mine. By public regulations it may indirectly aid me by removing certain general hindrances to the enjoyment of property. But the law of property helps me directly only to exclude others from using the things [*sic.*] which it assigns to me. If then somebody else wants to use the food, the house, the land, or the plow which the law calls mine, he has to get my consent”. Read Cohen, M. R. (1927). Property and sovereignty. *Cornell Law Review*, 13(8), 08-30.

private enterprise, including zone planning and residential projects, but investments will remain under the principle of general interest. A three-dimensional rationality is more explicit if we pay attention to the economic, civil and constitutional matters to invoke the use of general interest for property access and housing issues. Following the 1919 Weimar tradition, the Italian Charter of 1947, the German Basic Law of 1949 and the Portuguese Magna Charter were influenced in its social dimension and fundamental rights by a constitutional system that had been operating in the European context in two fields. On the one hand, the socio-democratic paradigm: “São as Constituições italiana e alemã, ambas do pós-guerra e do pós-fascismo, que mais se aproximam da nossa na enumeração dos direitos, liberdades e garantias”. On the other hand, the social demands for human dignity of the 1910s as aforementioned: “Contudo, nos direitos económicos, sociais e culturais torna-se palpável alguma parecença com Constituições de influência marxista [Mexican and Russian Constitutions]”.<sup>274</sup> Regardless of the ideologies and the singularities of political regimes, property was a central topic for the production and distribution of wealth.

The 1917 Mexican Magna Charter ignited a legal message for the international order with a progressive discernment on the property system: “Indeed, the Mexican Constitution, being the first to set out social rights, served as a model for the Weimar Constitution (1919) and the Russian Constitution (1918) for social rights”.<sup>275</sup> Furthermore, the post-authoritarian regimes period like the ones in Argentina, Brazil, Portugal, Spain and Poland had also been inspired by the Mexican and Weimar legal constitutional systems.<sup>276</sup> The 1949 Constitution of Argentina, article 38, limited the absolute use of property through its social function: “La propiedad privada tiene una función social y, en consecuencia, estará sometida a las obligaciones que establezca la ley con fines de bien común. Incumbe al Estado fiscalizar la distribución y la utilización del campo e intervenir con el objeto de desarrollar e incrementar su rendimiento en interés de la comunidad, y procurar a cada labriego o familia labriega la posibilidad de convertirse en propietario de la tierra que cultiva”. With the 1994 Constitution of

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<sup>274</sup> Miranda, J.(1997). O conteúdo e as fontes da constituição. In *Manual de direito constitucional* (p. 260). Coimbra: Coimbra Editora.

<sup>275</sup> Oropeza, M. G. (2006). United Mexican States. In Majeed, A.; Watts, R. L.; Brown, D. M. (Eds.). *A global dialogue on federalism* (pp. 181-206). Québec: McGill-Queen’s University Press.

<sup>276</sup> For the connecting factors between property and natural resources, or the commons, read Zillman, D.N.; McHarg, A.; Bradbrook, A.; Barrera-Hernandez, L. (2014). *The law of energy underground*. Oxford: Oxford University Press.

Argentina, the property limits came back to the pure concept of a fundamental right without any reference to the social function or social interest. However, the National Congress of Argentina passed the 23.054 Act making part of its legal system the American Convention of Human Rights and, then, the article 21 of the international document on property limits affirming: “1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society” and “2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law”. So, a three-dimensional rationality keeps also its connections to the international order. In the 1967 Constitution of the Republic of Uruguay, article 32, property must also have in the subsequent laws and derived norms the general interest for the socioeconomic development. The article 6 guarantees the solution of conflicts always based on social and economic integration. The 2008 Political Constitution of the Plurinational State of Bolivia, article 56, I, recognizes the social function of property and establishes it as an internal legal category. The Bolivian constitutional legal system also advances, for example, in the agro-environmental jurisdiction, article 186; water resources, article 373, II; and agrarian property, article 397, I and II. The article 13, IV, says the interpretation of rights and duties shall rely on international covenants and treaties that eventually are ratified by the State of Bolivia. Although the existence of socioeconomic contrasts and the growing concentration of income in Latin American countries are still part of their complex realities, their constitutional texts defend a more balanced use of the property system open to a transversal rationality.

The 1978 Constitution of Spain includes the right to housing in its article 47 and imposes limits the right to property in the article 33.2, therefore, recognizing the social function of property through human rights introduced by international agreements with the use of the article 10.2 of the Magna Charter. The Brazilian Federal Constitution of 1988, article 5, XXIII, affirms the property has its social function and the article 6 associates decent housing with other rights such as potable water, the right to a non-degrading social environment and integrated with urban infrastructure. The paragraph III, article 5 of the Brazilian Federal Constitution defines the international covenants as constitutional amendments if they are passed with the support of the three-fifths of the

Congress and Senate voted in a two-round system. The definition of market, which is mainly represented by private ownership working for society, flourishes in the context of the Polish Constituency during the 1990s to construct: “a ‘social market economy’ as a characteristic feature of the state economic system”.<sup>277</sup> Therefore, in the Polish Constitution of 1997, article 75.1, ownership has its social dimension for housing investments, distribution of income and citizenship protection: “Public authorities shall pursue policies conducive to satisfying the housing needs of citizens, in particular combating homelessness, promoting the development of low-income housing and supporting activities aimed at acquisition of a home by each citizen”. That relation between capital and property revisits the debate on the social function as a value for socioeconomic development and justice, but intimately related to the macroeconomic order for urban planning.<sup>278</sup>

Even when the exhaustive interpretation of a constitutional norm does not make any explicit reference to the social function as a limit for the right to property, the 1917 Mexican Constitution was a pioneering political project for the protection of individuals oriented by a three-dimensional rationality observing the importance of an international paradigm as a rationale to make more effective the rights of people: “[...] las normas relativas a los derechos humanos se interpretarán de conformidad con esta Constitución y con los tratados internacionales de la materia favoreciendo en todo tiempo a las personas la protección más amplia”. In that sense, the international normative framework should be harmonized with the local needs such as the article 2, VIII, accommodates the reality of indigenous migration from rural to urban areas: “Establecer políticas sociales para proteger a los migrantes de los pueblos indígenas, tanto en el territorio nacional como en el extranjero, mediante acciones para garantizar los derechos laborales de los jornaleros agrícolas; mejorar las condiciones de salud de las mujeres; apoyar con programas especiales de educación y nutrición a niños y jóvenes de familias migrantes; velar por el respeto de sus derechos humanos y promover la difusión de sus culturas”. The same happens to the 1994 Constitution of the Republic

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<sup>277</sup> Jaskiernia, J. (2015). Influence of the European Democratic Standards on the Constitutional Development in Poland after 1989. *Armenian Journal of Political Science*, 1(2), 19-37.

<sup>278</sup> Crawford, C. (2011). The social function of property and the human capacity to flourish. *Fordham Law Review*, 3(80), 1089-1134. Read also Simioni, R. L. (2006). A sublimação jurídica da função social da propriedade. *Lua Nova*, 1(66), 109-137. See also for a macroeconomic view on property system and real estate investments, Rolnik, R. (2016). *Guerra dos lugares: a colonização da terra e a moradia na era das finanças*. São Paulo: Boitempo.



of the Argentina Nation when the article 75, section XXIII, affirms that it corresponds to the congress: “To legislate and to promote measures of positive action that guarantee the real equality of opportunities and of treatment and the full enjoyment and exercise of the rights recognized by this Constitution and by the existing international treaties on human rights”.<sup>279</sup>

## 2.2. The Spanish inequality and the social function of property

In our second example, the legislative power in Spain has approved a series of norms that imposed restrictive actions to housing questions. Notwithstanding the act of forgiving debts or recalculating mortgages under contract reviews, such as predicted in the Royal Decree 6, March 9<sup>th</sup> 2012, and the Act 8, June 26<sup>th</sup> 2013, the limits of the judge still remains in the Scipio’s role. In these norms, the judiciary competence is formally squared by the private contract clauses and the civil code text. The right to property is eventually an oppressor of the right to housing. We can mention also the term for time extension in executions previously foreseen in the Royal Decree 1975/2008, November 28<sup>th</sup> 2008, as another reinforcement act in the realm of the contract rights. At that time, a derivative interpretation of the economic crisis pended to urgent modifications in order to attend sensible economy of contracts. The reality of thousands of people losing their homes is interpreted as a case of irresponsibility of the mortgagers.<sup>280</sup> A social assistance norm, Act 1, May 14<sup>th</sup> 2013, rules the protection of the housing debtors and gives them social support in popular rents.

The competence of the central State, based on the article 149, 1978 Spanish Constitution, is vindicated by the Royal Decree 6, March 9<sup>th</sup> 2012. In its text, article 14, Competence Titles, it is said “Este real decreto-ley se dicta al amparo de lo dispuesto en las reglas 6.<sup>a</sup> [Mercantile Legislation], 8.<sup>a</sup> [Civil Legislation and contract obligations], 11.<sup>a</sup> [monetary system], 13.<sup>a</sup> [Economic Planning] y 14 [General Treasury and State Debt].<sup>a</sup> del artículo 149.1 de la Constitución española”. It is explicit also the exclusive State competence in “[...] legislación mercantil y procesal, legislación civil, bases de la

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<sup>279</sup> La Constitución de la Nación Argentina de 1949, artículo 38, tenía la función social de la propiedad como reto para establecer el bien común.

<sup>280</sup> See also the Law 41, November 7<sup>th</sup> 2007 that changed the Act 2, March 25 1981, about the mortgage market regulation and the financial rules of the mortgage system; Royal Decree 8, July 1 2011.

ordenación del crédito, banca y seguros, bases y coordinación de la planificación [...]”.

The administrative police delegates to the judiciary power contract obligations and executions procedures, but not out of the realm of property tradition.

The right to property is demandable in law courts and strongly defended by the *dominium* of some principles translated in constitutional texts as inviolability, security and liberty of the proprietor. In the 1978 Spanish Constitution and the 1988 Brazilian Constitution, the property is inserted in the list of individual guarantees and the right to housing in a politically socioeconomic tissue. However, it is not the rule of law that will regulate one of the most quintessential elements such as a place to live in. Different from property, which is evidently epitomized as a demandable right in the law courts of both countries, the right to housing is out of the *dominium* of the immediate juridical order. It is a kind of peripheral law even if it is intertwined in the private domain.<sup>281</sup> In the 1978 Spanish Constitution, Chapter IV, The Principles of the Social and Economic Politics, the article 47 predicts the right to housing would be promoted by the *potestas*. According to the text, the public administration would also incentivize the necessary conditions and establish norms to make effective this right and the utilization of the soil based on the general interest. In the article 148, third point, the autonomous community competences will order territory, urbanism and dwelling. It is a delegated power under political conditions and administrative police. In other words, the right to property is shielded by *dominium ex iure quiritium* taking into consideration family and individual liberties. The 1998 Constitution of the Federative Republic of Brazil is not diverse. In its Chapter II, Social Rights, the article 6 mentions the right to housing and in the article 23, ninth point, federal government, states, federal district and municipalities will be in charge of housing construction programmes and the promotion of sanitary betterments.

Our initial allusion to the conflict between property and the right to housing in the Numantia metaphor was devoted to the genealogy of a *dominium*. The private realm was defended by the *imperium* as a distinguishable element that completed the figure of the Roman citizen. However, the citizenship domination could not be vulnerable to governments and constantly menaced by political power. So, the Civil Law traditions and codes were the private guarantees beyond *potestas*. Inviolability, security and exequatur were the principles that the Roman society by force led outside the Italic

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<sup>281</sup> See some comments on the periphery of property rights on Kennedy, D. (1986). Form and substance in private law adjudication. *Harvard Law Review*, 80(1), 1685-1737.

peninsula. The right to property should be demandable in Ancient times as an adjudicative disposition where the possession is distinct to the title owner. Up to a certain extent, nowadays the law courts remount the imposition of a “foreigner norm” – *exequatur*.<sup>282</sup> The logical grammar in this normative system has been substantial to create a material language of commons. Juridical power, owners and judges should respect the same rules. The quantity of citizen demands could not be multiplied generating property instability, so the quality of a higher stable *dominium* would be guaranteed by a lower number of conflicts. This is why the vocation of Scipio descends of what we would say a primitive exercise of legal thought. The right to property in the Brazilian and Spanish civil codes, when claimed by lawyers, is ultimately defended by judges. It is said in the Spanish text, article 349, that “los jueces ampararán y, en su caso, reintegrarán en la posesión al expropiado”. The Brazilian Civil Process Code mentions in its article 927 the judge shall decree the property if it not is possessed or used by its owner. The article 1.228 of the Brazilian Civil Code predicts the judge is competent to dictate indemnity in case the property is demanded by the public administration under a social utility.

It is important to stress that the legal thought domain has its mainstreams, but the formalistic, doctrinal and autonomous ideas of law may converge in the concept of property. Although engraved in the private field, we shall include the right to property to a private-public sphere as a relation of proprietors. The contract and obligations that State and individuals are interested tend to have no difference in economic relations. If there is no respect to the formal aspect of a rule predicted in a title, for example, there is no legal thought dimension involved. Much more than an overview of scholars, it is a rationale of judges and advocates of all sorts in educational disciplinary circles. Besides, the legal thought repudiates studies or further enquiries beyond what is in text – *de jure condendum*, and is willing to rationalize the decision making process through a close-reading analysis. The exogenous values should be considered only if they come from legislators. They seem to be tautological when the act of law making derives from law

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<sup>282</sup> Nowadays, the principle of *exequatur* is a procedure in which a sentence dictated in the country A must be enforced in the country B since the former is competente under its own jurisdiction by contract with reference to the latter. Read: “O tipo do grande proprietário de terra romano não é o do agricultor que dirige pessoalmente a empresa, mas é o homem que vive na cidade, pratica a política e quer, antes de tudo, perceber rendas em dinheiro. A gestão de suas terras está nas mãos de servos inspetores (*villici*)”. See Weber, M. (1990). As causas do declínio da cultura antiga. In *Sociologia* (p. 44). São Paulo: Ática.

and the interpretation of a consolidated norm from the same *dominium*.<sup>283</sup> Furthermore, the continuous conception of what some would name rule of law is perpetuated by same intellectual group.<sup>284</sup> However, moments of a genuine vertigo may occur and the crystal clear reading stumbles.<sup>285</sup>

What happens if the loss of equilibrium comes from economy? If so, there is a huge difference between the elements that influenced the Roman civil legislature and the law matrix we live in. The *dominium* sounds to be captured by the *homo pecunia*, which is distinct from the *homo economicus*, since the former is related to pure financial motivations with finality in itself and the latter the home humanized economy among Greeks. In this sense, the concepts of property and dwelling are disproportional in front of law. First the idea of property is shielded by a long codified tradition of contract since the Ancient times; it is reinforced by the ideological liberal tradition; it is a demandable, enforceable and executable right for judges; it has been internalized in many constitutional charters and defended by private entrepreneurship while housing gravitates around property.<sup>286</sup> Secondly, the latest mercantile relations have disciplined and colonized the juridical views to abort the discretionary element of juridical thought in order to solve frequently financial capital crises.<sup>287</sup> Thirdly, the most conflictive approximation of the property idea to the right to housing reveals a constant dispute between public administrative police and the manner *potestas* manages the social function of property principle. The contradiction implicit in this model is based on the concept of private contracts in dwelling questions. The more the contracts and all their obligations are pursued, the less the deprivation of the public interest by the private interest. However, the more the clauses of the private contracts in terms of housing have been executed, the less the collective right has been achieved in Spain and Brazil. Although we may think social function of property as a supposed correction to material

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<sup>283</sup> Calabresi, G. (2003). An introduction to legal thought: four approaches to law and to the allocation of body parts. *Faculty Scholarship Series*, 2022(1), 2113-2151.

<sup>284</sup> Northrop, F. S. C. (1957). Philosophical issues in contemporary law, *Natural Law Forum*, 18(1), 41-63.

<sup>285</sup> Kennedy, D. (2008). One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream. *COLLEGIUM*, 4(1), 255-273.

<sup>286</sup> The constitutional debate around right to the city and property rights can be seen in many examples. We highlight the case also in South Africa. See Coggin, T. & Pieterse, M. (2011). Rights and the city: an exploration of the interaction between socio-economic rights and the city, *Urban Forum*, 23(1), 257-278.

<sup>287</sup> Kennedy, D. (2011). Some caution about property rights as a recipe for economic development. *Accounting, Economics, and Law*, 1(1), 1-62.

social distortions through a juridical order, the statistics and empirical data have pointed to the opposite direction.

### 2.3. Civil society movements and the construction of democratic internal limits of the right to property

In Brazil, the number of slums has doubled in twenty years. In 1990, the number of non-property system of occupation was exactly 3,183 and, in 2010, 6,329.<sup>288</sup> Between the years 2007 and 2012, the Spanish society witnessed more than 416,000 foreclosures. People have been losing their homes and acquiring an unpayable mortgage debt.<sup>289</sup> Not only has the sub-system of dwelling in “favelas” meant the failure of an efficient plan of housing in Brazil, but also the aggressive capitalization of housing programmes in Spain ended up in a deploring expectation of life. Yet taking into consideration the singularities of these two countries, we may observe thousands of people were destined to the fringes of a property system and were subdued to precarious systems of housing. The constitutional disposition of the social function of property remained relatively ineffective if we observe the number of empty houses in the two property systems.<sup>290</sup> According to the City Statute, the Brazilian Federal Act 10.257/2001; and the Housing Act 18/2007, Province of Catalonia, the social function of property should be applied by the municipalities in order to promote fair practices in housing questions from administrative competent powers.

But the idea of an adaptation of a legal-political *dominium* as a way to make possible social function of property a matter of social justice would be seen by Henri Lefebvre as the action of “les sciences parcellaires”. The excess of legalism is just a twig of a structure produced by the labour division and exploitation of the working class through exchange value. The idea of urbanism for him is the result of industrial

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<sup>288</sup> Instituto Brasileiro de Geografia e Estatística [on-line]. Table 01, Tabelas de resultados segundo as grandes regiões, as unidades da federação e os municípios [Accessed on 16 June 2015]. Retrieved from [http://biblioteca.ibge.gov.br/visualizacao/periodicos/92/cd\\_2010\\_aglomerados\\_subnormais.pdf](http://biblioteca.ibge.gov.br/visualizacao/periodicos/92/cd_2010_aglomerados_subnormais.pdf)

<sup>289</sup> Colau, A. & Alemany, A. (2013). Un procedimiento criminal. In *¡Si Se Puede!* (pp. 29-30). Barcelona: Destino. See also the *Boletín Información Estadística*, n. 35, junio 2013, Datos de Justicia in which more than 90.000 executions were counted during the year 2012 by the Consejo General del Poder Judicial (CGPJ) in Spain.

<sup>290</sup> The article 182, § 2, of the 1988 Brazilian Constitution mentions the social function of property. This right is receptioned by the Statute of the City, n. 10.257 (Brazil), article 1 and 39. In Spain, Catalonia, the Right to Housing Right Act 18/2007, article 5.

technical forces destined for the reproduction of capital. According to the author's discussion, this is why the intellectual expertise tends to formulate a synthesis that dismisses the philosophical totality in which the historical materialism was born.

En regardant de près, on s'aperçoit que les spécialistes qui ont étudié la réalité urbaine ont presque toujours (sauf dans le cas d'un positivisme logiquement extrémiste) introduit une représentation globale. Ils ne peuvent guère se passer d'une synthèse, en se contentant d'une somme de connaissances, de découpages et montages de la réalité urbaine. Ils prétendent alors, en tant que spécialistes, aller légitimement de leurs analyses à la synthèse finale dont ils empruntent le principe le principe à leur spécialité. Ils se veulent "hommes de synthèse" par le chemin d'une discipline ou d'une tentative interdisciplinaire. Le plus souvent, ils conçoivent la ville (et la société) comme un *organisme*. Les historiens ont fréquemment rattaché à une "évolution" ou à un "développement historique", ces entités: les villes. Les sociologues les ont conçues: même un "être collectif", comme un "organisme social". Organicisme, évolutionnisme, continuisme ont donc dominé les représentations de la ville élaborées par des spécialistes qui se croyaient savants et seulement savants. Philophes sans le savoir, ils sautaient du partiel au global et aussi du fait au droit, sans légitimer leurs démarches.<sup>291</sup>

The same situation occurs in the Brazilian case. In the City Statute, section about the Democratic Administration of the City, the article 45 refers that the public competent organisms are obliged to include the popular and civil participation as an instrument to exercise the right to citizenship with the presence of various segments of the society. Moreover, the article 45 says it is urgent to guarantee the immediate action of public organisms in metropolitan areas with dense urban agglomerations. The other discussable section of this practice is the juridical and institutional scale predicted in previous article about the same matter. The State instruments foreseen in the article 43

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<sup>291</sup> Lefebvre, H. (2009). Le sciences parcellaire et la réalité urbaine. In *Le droit à la ville* (pp. 36-37). Paris: Economica.

of the City Statute are a) collegial organs of public policy in national, state and municipal range; b) debates, public consultation and government hearings; c) conferences about the topic of democratic public urban management; d) popular legislative initiative in form of law project and planning models, programmes and projects of urban development. The fifth number in the article 43, popular referendum and plebiscite, was vetoed by the President in office Fernando Henrique Cardoso. It is very similar the standardization of participative rules and institutional norms that lead dwellers to the realm of experts. In this case, the incessant analogies between contracts and specific information about housing questions tend to inhibit bottom-up civil society actions. As Juli Ponce Solé commented about the right to housing in the XXI century, all public intervention should be oriented by the general interest and preoccupied with the market failures correction.<sup>292</sup> In other words, the private forces and the *homo pecunia* stupidities will persist if the *potestas* has the option to round the table to establish horizontal access to the right to housing and does not do so.<sup>293</sup> As a consequence, the discretionary power is not arbitrariness once we can count on some mechanisms such as public service quality instruments and the general interest for adequate non-segregated housing systems. It is also necessary to expose, propose and politicize the right to the city as a key element to favour the “demand [that] comes from those directly in want, directly oppressed, those for whom even their most immediate needs are not fulfilled: the homeless, the hungry, the imprisoned, the persecuted on gender, religious and radical grounds”.<sup>294</sup> Related to material questions, the politically philosophical thought can absorb the excluded from the extremely marginalized working class; the skilled less marginal labourers; the small business, the craftsmen and entrepreneurs; the gentry; the capitalists; the establishment intelligentsia such as media, academics and artists; the political powerful. All of them should be part of a paradoxical

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<sup>292</sup> Ponce Solé, J. (2008). Prólogo. In *El derecho a la vivienda en el siglo XXI: sus relaciones con la ordenación del territorio y el urbanismo* (pp. 9-13). Barcelona: Marcial Pons.

<sup>293</sup> “A landmark report by the Prefeitura Municipal de Niterói (2006, p. 14) shows that Niterói shares problems common to large urban centers in Brazil including ‘gentrification and densification of core infrastructure, slum areas close to these, and growing periferalization’”. See Friendly, A. (2013). The right to the city: theory and practice in Brazil, *Planning Theory & Practice*, 14(2), 158-179.

<sup>294</sup> Marcuse, P. (2012). Whose right(s) to what city. In *Cities for people, not for profit: critical urban city and the right to the city* (pp. 30-31). New York: Routledge. We may add that the right to the city is a right in construction. See Purcel, M. (2002). Excavating Lefebvre: the right to the city and its urban politics of the inhabitant. *GeoJournal*, 58(1), 99-108.

and boiling melting pot, but dialectically moving forward in community and opening new possibilities of a right to the city consciousness.

Based on the observations about the Right to Housing Act of Catalonia and the Brazilian City Statute, the right to housing via a social participation is institutionally controlled by the legislative and economic forces. However, the apparent aspect of rule of law related to the questions of property in the Spanish case has resulted in a series of socioeconomic distortions and hierarchy in the access of rights. According to Marcelo Neves, the progressive combinations of primary and secondary codes generated in the juridical order a peripheral modernity. He adds that lately the exercise of rights in those nations considered developed till today has been dominated by international political forces that perpetuate normative discrepancies. The neoliberal demands required governments the fabrication of high and low scale types of citizens. The integration of some individuals can be put in contrast to sub-integrated workers, systems and subsystems in the same society. In other words, a “Brazilianization” of the juridical order has been disincarnated by an economic rationale in the age of extremes.<sup>295</sup> We complement Marcelo Neve’s ideas observing that the affirmation of the right to property in this specific capitalized social organization is a manner to negate the construction of an equal citizen. It must be said that deregulation and flexibility in the normative order do not occur in the *dominium* of property. If the contracts are molded to make money go through faster than never in the market operations, in the field of land tenure the experience has been another. Nevertheless, is the social function of property a right for a community based on democratic aspirations? Is that favourably in harmony with the right to housing or both competing? Based on the review of the constitutional or civil codes previously commented here, we may say it is highly controversial or the social function of property is not necessarily linked to a democratic State of right.<sup>296</sup> We may as well understand the conflict between the right to property and the right to

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<sup>295</sup> Excess of legalism is also seen in the Brazilian juridical practice. See Neves, M. (2006). Uma breve referência ao caso brasileiro. In *Entre Têmis e Leviatã: uma relação difícil* (pp. 244-258). São Paulo: Martins Fontes.

<sup>296</sup> The central argumentation seems to be that economic development could not impede the authoritarian regimes or governments in the periphery of capitalism. We may add that for the housing questions the more consumers signing and being affected by the foreclosure of contracts; the more inequality we apprehend from housing market questions. Constitutional issues on housing matters were not part of the political party agendas. However, it seems to be a very sensitive topic in public opinion. To read further on public opinion and national decision-making process, see Inglehart, R. (1993). Democratização em perspectiva. *Opinião Pública*, 1(1), 09-67.



housing from the citizenship's perspective. If civil society can indicate some hints about social movement demands.

#### **2.4. The Brazilian City of São Paulo and the roofless working class**

The initial pragmatism of social demands linked to housing questions can be observed in Brazil and Spain. However, we may say the beginning of the efforts for more participation from urban civil society movements face the State resistance too. In Brazil, during the 2014 World Cup, the *Movimento dos Trabalhadores Sem-Teto* (MTST) started a campaign called “Copa sem povo, tô na rua de novo!”.<sup>297</sup> The members were really interested in those actions that could question the investments for the construction of a mega-infrastructure for the football matches and, after, re-used by the 2016 Olympic Games. Certainly, these two events may have increased the image of Brazil in the international repercussion. The urban social movement allied the sportive happening to the local demands of the roofless to make pressure on the legislative power in the municipality of São Paulo city. The document was about to be voted, amended and approved as it happened on July 31 of the same year making concrete the Municipal Urban Planning Act 16.050.

Nevertheless, the participation of the *Movimento dos Trabalhadores Sem-Teto* was really present with the executive power, the mayor Fernando Hadadd, member of the Labour Party (PT), we must highlight the importance of negotiation from a formal and an institutional perspective. The dialogue is not a pact based on an emotional right and privileged classes, but a bridge between the public administration – mayor, architects, technicians, lawyers and other expert advisers at housing issues – and the interlocutors of the collective decisions of the assemblies' movement. The number of meetings and public talks from both sides are even proportional to the increasing list of occupations in São Paulo municipality.<sup>298</sup> In the article 5 of the Urban Planning Act

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<sup>297</sup> We can freely translate the idea as “If there will be World Cup without the participation of the excluded, we are on the street again”. Retrieved from <http://www.mtst.org/>

<sup>298</sup> The quantity of occupations has been three times more compared to the previous mayor, Gilberto Kassab (Democratic Party – DEM). This is evaluated from the democratic perspective since the legislation in progress has put in practice more participation, transparency and reported the abuses of owners in leaving their properties speculating in one of the most expensive cities in the world. See the numbers from a conservative administration around 200 hundred occupations to a more tolerant centre one with more than 600. Retrieved from <http://www1.folha.uol.com.br/cotidiano/2014/11/1552793->

16.050, clause VII, Municipality of São Paulo, it is said the political principles for the urban construction must include a democratic management. It is explicit also the matter of housing in the first paragraph respecting the logic of the right to the city.<sup>299</sup> In the article 327 of the same document, the legislation predicts the creation of a Municipal Council for Urban Policies with the presence of social movements, neighbourhood associations and different sectors of society.<sup>300</sup> Vila Nova Palestina, Copa do Povo and Ocupação Carlos Marighela are some the examples in the periphery of São Paulo where the *Movimento dos Trabalhadores Sem-Teto* has acted denouncing the poor use of such urban areas. Not only has this collective action denounced the negligence of private proprietors in following the social function of property legislation, but also amended the normative disposition with city construction proposals included by the 2014 São Paulo Urban Planning Act with more social participation in the Municipal Council of Public Policies. The next section, we will point out another example that took place in Catalonia, an autonomous region of Spain.

## 2.5. The Catalanian City of Terrassa and the roofless working class

There are more and more people with no home, but even much more houses without dwellers. The paradox has been led in different fashions, but the appearance of the *Plataforma de Afectados por la Hipoteca* (PAH) was decisive for a turning point. In 2009, with the help of the *Movimiento de 15 de Mayo* or simply the *Movimiento de los Indignados* (15M), actions all over Spain were motivated by dissatisfaction and

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[invasoes-de-sem-teto-quase-triplicam-durante-gestao-haddad.shtml](http://gestaourbana.prefeitura.sp.gov.br/arquivos/PDE-Suplemento-DOC/PDE_SUPLEMENTO-DOC.pdf)

<sup>299</sup> “§ 1º Função Social da Cidade [Social Function of the City] compreende o atendimento das necessidades dos cidadãos quanto à qualidade de vida, à justiça social, ao acesso universal aos direitos sociais e ao desenvolvimento socioeconômico e ambiental, incluindo o direito à terra urbana, à moradia digna, ao saneamento ambiental, à infraestrutura urbana, ao transporte, aos serviços públicos, ao trabalho, ao sossego e ao lazer. § 2º Função Social da Propriedade Urbana [Social Function of Urban Property] é elemento constitutivo do direito de propriedade e é atendida quando a propriedade cumpre os critérios e grau de exigência de ordenação territorial estabelecidos pela legislação, em especial atendendo aos coeficientes mínimo”. See the entire 2014 Urban Planning Act, Number 16.050. Retrieved from [http://gestaourbana.prefeitura.sp.gov.br/arquivos/PDE-Suplemento-DOC/PDE\\_SUPLEMENTO-DOC.pdf](http://gestaourbana.prefeitura.sp.gov.br/arquivos/PDE-Suplemento-DOC/PDE_SUPLEMENTO-DOC.pdf)

<sup>300</sup> “Art. 327. O Conselho Municipal de Política Urbana - C MPU, órgão colegiado integrante da estrutura da Secretaria Municipal de Desenvolvimento Urbano, tem por finalidade estudar e propor diretrizes para a formulação e implementação da Política Municipal de Desenvolvimento Urbano, bem como acompanhar e avaliar sua execução, conforme dispõe a Lei Federal nº10.257, de 10 de julho de 2001”. Retrieved from [http://gestaourbana.prefeitura.sp.gov.br/arquivos/PDE-Suplemento-DOC/PDE\\_SUPLEMENTO-DOC.pdf](http://gestaourbana.prefeitura.sp.gov.br/arquivos/PDE-Suplemento-DOC/PDE_SUPLEMENTO-DOC.pdf)

disillusionment with the disclosure of the 2008 economic crisis. The quantity of evictions has been multiplied when the working class could not pay for a living and started using their money to basic needs such as food, water, energy, medicines and education. The 15M was indispensable for the creation of a citizenship platform related to housing issues.<sup>301</sup> After some years, the list of Catalan municipalities interested in fining those vacant housing units for more than two years increases. According to the social function of property principle, explicitly cited in the constitutional text, but also in the Catalonia regional framework, the administrations must apply fines to those non-occupied places since there is calamitous crisis in the housing system. At first, they were not enthusiastic with the idea. However, the bit a bit supra-operative economic-administration with much financial support for private market, *i.e.*, the national government and the banks related to housing questions, convinced part of the Catalan mayors about strategic changes. The first one was the normative framework. The second was the change related to the interlocutors interested in the question. Finally, the participation of urban social movements to fine the irresponsible proprietors.<sup>302</sup>

If the philosophical approach can put forward the dimension of the right to the city, so the organic involvement of the society is fundamental. It is in the effective participative social strength that thoughts are ameliorated and, consequently, refined in community. David Harvey defined the right to the city as the “right to changing ourselves by changing the city”.<sup>303</sup> The case of Catalonia is outstanding, but it can present some critical points. It is true they achieved a legislative consensus under the legal normative framework 18/2007, known as the Catalan Housing Act, to make the participation of civil society real. In the Preamble of this document, Part II, the social function of property is mentioned as a reality that must be achieved based on the general interest principle. The article 5 has detailed a list for those dwellings under overpopulated status and official protection. Besides, in its article 2, letter “j”, the present law is devoted to stimulate the civil society participation and social entities in

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<sup>301</sup> In 2014, evictions were still an object of debate. See Ribas, M. (2014, December 13). El desahucio. *El País*. Retrieved from [http://elpais.com/elpais/2014/12/12/opinion/1418389349\\_009576.html](http://elpais.com/elpais/2014/12/12/opinion/1418389349_009576.html)

<sup>302</sup> The role of the *Plataforma de Afectados por la Hipoteca* was central to make the City of Barcelona impose penalties on banks for keeping empty housing units in a period of economic austerity. Read Mumbrú, J. (2014, January 16). Barcelona aprobará la moción de la PAH y multará a los bancos con pisos vacíos. Retrieved from [http://ccaa.elpais.com/ccaa/2014/01/15/catalunya/1389806062\\_020040.html](http://ccaa.elpais.com/ccaa/2014/01/15/catalunya/1389806062_020040.html)

<sup>303</sup> Harvey, D. (2008). The right to the city, *New Left review*, 53(1), 23-40.

the matter of housing politics. Two critiques must be referred. The first one is the competence of the Ministry in the *Consejo Asesor de la Vivienda* – “consejero” or “consejera de la Generalitat”. They are supposed in their offices to propose actions, elaborate informative documents and rules for the general and local administration. According to the article 9, the Right to Housing Act 18/2007, the normative arrange says the administrative *potestas* has the obligation to appreciate the proposals of the *Consejo Asesor de la Vivienda*, but the law does not force the government to accept any recommendation. The crucial element is the representatives of the “science parcellaires” in the article 9, number IV. A series of experts, technicians and a myriad of professionals are supposed to participate. Many of them tend to be the experts of housing questions while the civil assemblies are not incentivized out of the institutional State arrangement.

En el Consejo Asesor de la Vivienda deben estar representados: la Administración de la Generalidad y la Administración local; los consumidores y usuarios; el Consejo Nacional de la Juventud de Cataluña; los agentes sociales sindicales y empresariales; las asociaciones de vecinos; los colectivos profesionales de arquitectos, aparejadores e ingenieros industriales, entre otros; los colectivos empresariales vinculados a la construcción y promoción de viviendas y los agentes vinculados al sector de la vivienda; las asociaciones de promotores públicos de viviendas; la Federación de Cooperativas de Viviendas de Cataluña, y las organizaciones sin ánimo de lucro que se dediquen principalmente a la promoción del derecho a la vivienda de colectivos desfavorecidos.<sup>304</sup>

After the notification of fines received by the Terrassa banks, which were mainly the owners of 450 thousand non-occupied housing units, Catalonia started the negotiation with the financial institutions. The negative results from the offenders got more and more inviable for the municipal governments. To matters worse, some of the mayors noticed the centralised Spanish government, which has been led by the right wing Popular Party (PP), was not able to face the housing crisis. It is interesting how the

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<sup>304</sup> Retrieved from <https://www.boe.es/boe/dias/2008/02/27/pdfs/A11653-11696.pdf>

public opinion also understands the political position of the Spanish State in bailing out banks as a counterproductive measure for society. For people, if the public funds were used to face the economic disequilibrium caused by the financial institutions, it would be more reasonable legal remedies to compensate with public policies for housing those individuals and families affected by the 2008 economic crisis.<sup>305</sup> The Royal Decree 1713/2010 refers to those public funds destined to the private housing market with the support of the Development Ministry. In other words, when the national government is engaged in saving the real estate financial system, which is the main actor in property contracts, the Spanish State is in fact promoting indirectly a model of urban planning based on speculative purposes. The article 16.1 of the 18/2007 Catalan Housing Act had already materialised the notion of urban planning with reference to housing issues and defined also the administrative competences: “El planeamiento urbanístico debe ser coherente con las determinaciones de la planificación y la programación en materia de vivienda”. In the same provision, clause II, the purpose of residence shall comply with other rights such as environmental issues, sustainable mobility and the integration of the housing with the surrounding area. At that time, the article 16.2, letter “d”, affirmed the public administrations should comply with an effective right of all inhabitants to enjoy an urban life to promote the social coherence and the residential use of the property. As it says the legal text: “Debe velarse para garantizar el derecho de todos los habitantes a disfrutar de condiciones de vida urbana y de hábitat que favorezcan la cohesión social y para asegurar en cada núcleo la coexistencia del uso residencial con otros usos y la diversidad de tipos de vivienda”. Years later, the Spanish Parliament passed the 7/2015 Real Decree affirming the exact content of the Catalan Housing Act in its article 3.

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The state budget or the rental market and the rehabilitation of the housing supply have immensely encouraged the practices of traditional private-public privileges as we have mentioned before in Roman Civil Law society.<sup>307</sup> Carma Labòria Rojas, member

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<sup>305</sup> The Housing Support for the Rental Market and Flexible Measures Act 4/2013 recognises there is an enormous deficit in making fluid the economic relation between property owners and their business of rentability. However, the act imposes some difficulties for the poorest strata to present all formalities in order to get any benefit. Read the Preamble, Part I; Second Additional Disposition, letter “b”. Retrieved from <http://www.boe.es/boe/dias/2013/06/05/pdfs/BOE-A-2013-5941.pdf>.

<sup>306</sup> In the following chapter, we introduce the article 3 of the 7/2015 Spanish Legislative Real Decree making some observations about the importance of the act.

<sup>307</sup> Retrieved from [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2010-19461](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2010-19461)

of the Partit dels Socialistes del Catalunya (PSC) and councillor of Terrassa City, affirmed Spanish banks had not been committed to their responsibilities based on what the law predicts for empty houses in Catalonia.<sup>308</sup> The number of fines reaches around 5.000 empty units. Other municipalities such as Girona, Santa Coloma de Gramonès and Reus have opened administrative and juridical procedures to accomplish the 18/2007 Right to Housing Act. Nowadays, the number of official notifications in order to fine the lawbreakers, which have been not only banks but also Catalanian estate agencies and other housing business institutions, has increased to 61 municipalities with formal administrative or judicial process and other 40 have been preparing their initial legal notifications. The collective actions of the *Plataforma de Afectados por la Hipoteca* (PAH) goes far beyond the problem of affected individuals by the mortgage and property system. They have bravely assisted the local governments in monitoring the non-occupied housing units, invigilating the law, giving legal support through the net of collaborating lawyers and experts at the matter. Furthermore, the civil society movement has put in practice other logic of monitoring, managing and administrating the public funds in housing questions.<sup>309</sup> This is a very intriguing moment to see how the law can be effective in practical examples, but mainly with an urban social movement pragmatism.

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<sup>308</sup> The *Plataforma de Afectados por la Hipoteca* started giving support to the enforcement of the 18/2007 Catalanian Housing Act with reference to empty housing units. See Vallespín, Ivanna. (2013, December 31). Terrassa multa a tres bancos por tener pisos vacíos durante más de dos años. *El País*. Retrieved from [http://ccaa.elpais.com/ccaa/2013/12/30/catalunya/1388428224\\_184332.html](http://ccaa.elpais.com/ccaa/2013/12/30/catalunya/1388428224_184332.html)

<sup>309</sup> Blanchar, C. (2014, February 8). Los pisos vacíos irán al juzgado. *El País*. Retrieved from [http://ccaa.elpais.com/ccaa/2014/02/08/catalunya/1391884095\\_144885.html](http://ccaa.elpais.com/ccaa/2014/02/08/catalunya/1391884095_144885.html). The legal activism for an adequate judgement: “Desde la PAH, la abogada y activista Mercè Pidemont, responde a los augurios sobre la pugna que se puede librar en los juzgados que “por más que los bancos intenten buscar pequeñas trabas legales, no habrá quien lo frene: estamos en emergencia habitacional desde 2008”, argumenta. “Llevamos decenas de miles de desahucios y descubrir una herramienta legal vigente desde 2007 para dar salida a los pisos vacíos ha supuesto que 61 ayuntamientos hayan aprobado mociones —como Reus o Barcelona— y otros 40 las estén preparando”. The following newspaper articles are relevant to show how the PAH’s efforts were made and designed to face the housing conflict. About the latest relevant procedures. Retrieved from [http://ccaa.elpais.com/ccaa/2014/01/31/catalunya/1391174244\\_520248.html](http://ccaa.elpais.com/ccaa/2014/01/31/catalunya/1391174244_520248.html). Retrieved from <http://www.lavanguardia.com/local/terrassa/20141217/54421555291/cien-multas-bancos-ceder-pisos.html>



CHAPTER IV. CONSTITUTIONAL LEGAL SYSTEMS, ADEQUATE DECISIONS AND TRANSCENDING THE  
ABSOLUTE RIGHT TO PROPERTY





## 1. The singularities of the Brazilian and Spanish Constitutional Courts

The conflict on the usufruct of the right to property was also extracted from concrete cases observed in the constitutional field. Brazil and Spain have faced in their property history the construction of a system that is prone to a Civil Law traditions as showed in the previous chapters. However, the notion of an emotional right introduced in the jurisdictions of the Iberian Peninsula at the very beginning of the XVII century still impedes public powers to enforce the social function of property as an adequate limitation for the *domina*. All those external controls, which are materialised in forms of sanctions, coercive fines and taxes imposed by public administrations to proprietors that subuse their properties, are still not a consensus in the constitutional judgments of both countries. With reference to the internal controls for ownership in penal and civil matters, which are the ones the proprietor used to manage inside his own property, are not existent anymore. However, a great deal of the *dominium* inheritance persists once local administrative powers still struggle to enforce law against real estate speculative markets and vacant dwellings based upon the social function of property. As a general comment, we have not seen in the following decisions made by the constitutional courts any effort in creating a binding legal theory to limit the modern concept of property when in confront with public administrations. In this chapter, we will analyse some judgments of the Constitutional Court of Spain and the Federal Supreme Court of Brazil in demands linked to the legal procedures for the *recurso de amparo* or *mandado de segurança*.<sup>310</sup>

### 1.1. Constitutional Court of Spain, litigants and the individual right to protection

We have two types of litigants in the cases selected. One of them is individual, the other regional parliaments. With reference to individual claims, they are usually addressed to proprietors in order to stop eviction orders in ordinary decisions at law

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<sup>310</sup> *Recurso de amparo* is a very similar constitutional remedy in the Spanish Constitution for individual protection to the Brazilian version of *mandado de segurança*. In both cases, when the rights of a person is clearly stated by the law, there is not any reason to postpone a decision. Evidences of *periculum in mora* and *fumus boni iuris* are usually the *ratio decidendi* for these two constitutional remedies.

courts. So, the judicial disputes were oriented expropriation and urban acts till the moment they enter the Spanish Constitutional Court. The Civil Law traditions have constantly supported property rights in connection with economic matters once the unpayment of any contract, either a rent or a mortgage, does not lead the constitutional debate to other guarantees such as housing, private life and social rights. Moreover, the judgments we found tend to fulfil procedural matters with the legal notion of a fair trial to avoid a more extensive debate on what eviction would mean from a constitutional view. Either refusing or accepting *recurso de amparo* to null or suspend lower courts acts, the judges only considered acceptable a broader interpretation of individual protection limiting the abuses of proprietors in some cases in which the instrument of *periculum in mora* is used. Most of the time the constitutional court judgments rely on details like the expiry dates, material proofs, serving notice, witnesses, communication of ordinary courts, procedural formalities for motions in individual petitions for protection or some obligations lawyers are formally incumbered. So, at first, we have individuals litigating with proprietors. We advance to our readers that the individual claims have been part of a lower rank of interest in the following judgments.

Other type of litigant has to do with the autonomous legislative power in Spain and their supposed unconstitutional acts. So, regional parliaments have been demanded by the Spanish State in questions related to sanctions, taxes and the usufruct of the right to property. Yet the Spanish Constitutional Court has made a huge progress in property matter for the constitutional debate in favour of autonomous powers, its routine insisted in an extreme dedication to legal contract formalities if the conflict of property system and housing rights is between individuals. Extensive exercises of interpretation and more innovative legal approaches involving the debate of the external limitation for property system are recurrent in State-regional constitutional thesis. However, the constitutional judgments tend to diminish the autonomous legislative interest in giving more power to local administrations when public norms are thought to limit ownership abuses.

So, after analysing a great deal of constitutional judgments, we divided them into three categories. The first one brings up land use, eviction and housing matters uttered by the justices of the Constitutional Court of Spain. Secondly, those judgments about supposed unconstitutional acts emanated from regional parliaments referring to

property expropriation, housing issues and territorial matters. Thirdly, the unconstitutionality on national parliamentary acts being questioned by rental contracts.

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**Table 1. The three main legal topics around the right to housing.**

**CONSTITUTIONAL COURT OF SPAIN'S JUDGMENTS/ORDERS**  
**Eviction – Housing – Land Issues**

<b>A</b> <i>Recurso de amparo</i> and Judgments Constitutional Remedies for Individual Protection	<b>C</b> National Legislative Acts Questioned by Rental Contracts
<b>B</b> Supposed Unconstitutional Acts in Autonomous Legislative Power	

In these debates of constitutionality, the National Congress and other regional parliaments in some occasions are the plaintiffs. The time series covers the years 1978-2016 and we justify that selection based upon the re-democratic political spirit of Spain after its last promulgated 1978 Magna Charter. Our intention reading the judgments has nothing to with conclusive theories that made the magistrates decide the way they did. When we describe the legal apparatuses and the actors involved in the cases, we are

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<sup>311</sup> We will present a series of constitutional judgments with reference to autonomous acts questioned by the Spanish State. See the Judgment 259/2015, Catalanian Parliamentary Resolution 1/XI, containing housing matter; 154/2015, Andalusian Parliamentary Act 13/2005, housing and land planning; 135/2015, Canary Islands' Parliamentary Act 2/2014, housing and land planning; 93/2015, Andalusian Decree Act 6/2013, measures to official protected housing and land; 32/2015, Andalusian Parliamentary Act 4/2013, social function of housing; 69/2014, Navarra's Parliamentary Act 24/2013, housing and mortgage contract foreclosures; 137/2012, Galicia Parliamentary Act 18/2008 and 9/2002, urban and rural legal dispositions; 149/1998, Basque Parliamentary Act 4/1990, territorial planning; 37/1987, Andalusian Parliamentary Act 8/1984, land reform. There is one case evolving a private versus the Spanish State on the same matter of ownership abuses in which the pattern observed in the previous judgments is the same. See 111/1983, *Rumasa Bank v. Spain*, expropriation for tax evasion, fraud and misappropriation. It is also true autonomous parliaments fight against State legislative acts in Spain. See the Judgments of the Spanish Constitutional Court numbers 137/2011 – Royal Decree Act 4/2000, Socialist Wing from the Spanish Congress *versus* Spanish State, housing sector liberalisation; 152/1988 – Royal Decree Act 3.280/1983 – Basque Country *versus* Spanish State, housing mortgage; 141/2014 – Royal Decree Act 8/2008; the Judgments 89/1994, 340/1993 and 222/1992 for Urban Rental Act.

more interested in systematic legal notions of an institutional body used to support the decisions and why they avoided non-dogmatic views the legal reasoning produced. Other of our motivations is why Constitutional Court utterers echoed the Fiscal Ministry's positions excessively relying on formalities most of the time since this body is expected to be more innovative on principles such as the general interest and individual rights. Another curious fact is why the cases related to autonomous acts have caused an immense discomfort in the State advocates in property matter.

Although we highlighted the property system as conflictual in historical and Civil Law traditions on land issues, there is still the need for concrete analyses in real cases involving eviction and property. From now on, the cases we have prepared in a curated list will design certain singularities to affirm whether the judgments are representative of individual rights to protect the right to housing or not. The cases of eviction found in the archives of the Spanish Constitutional Court do not reveal any connection between the Article 47, which is the right to housing explicitly supposed to be defended as one of the principles for social and economic State policies, and the Article 24 about the right to individual protection. In these selected cases, the notion of defenselessness is avidly commented or prioritised by the majority of the judges in detriment of the right to housing or even the social function of property. The Articles 2.1, "b" and 55.2 from the Rules of the Constitutional Tribunal<sup>312</sup> tend to reinforce the *recurso de amparo* logic on extraordinary recourses to impede the vulnerability of individual protection. We see two probable reasons for that very narrow tendency yet they are not the scope of our discussion. The first one is the tradition of avoiding extensive approaches on the *recurso de amparo* and, consequently, a juridical culture of dogmatic schools of law. It is true there are some advantages and disadvantages of such conduct for the Spanish law system especially if we think about European Community.

<sup>313</sup> Our second supposition is related to the judicial mechanisms to obstruct systematic

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<sup>312</sup> See Ley "Orgánica del Tribunal Constitucional", final text consolidated by the Acts 8/1984, 4/1985, 6/1988, 7/1999, 1/2000, 6/2007 and 1/2010.

<sup>313</sup> "Como el lector probablemente haya adivinado ya, mi opinión es que los jueces españoles podrían – deberían – haber empezado a comportarse como algo distinto a cobradores del frac (algunos de ellos lo hicieron) desde el primer momento, desde que la 'crisis' [2008 global economic breakdown and the housing bubble in Spain] produjo, entre otros desastres, este de los desahuciados. Y que lo que les impidió actuar así (y sigo hablando en términos generales) fue, en cierta medida, una determinada idea o concepción del Derecho a la que solemos llamar formalismo". See Atienza, M. (2013). Los desahucios, los jueces y la idea del Derecho. In *Podemos hacer más: otra forma de pensar el Derecho* (pp. 117-118). Madrid: Pasos Perdidos.

jurisprudence and motivate strict answers based on dogmatic readings of the law. Spanish society lived under a dictatorial regime until 1976 and the monarchy is still alive in a parliamentary system with autonomous regions. Once constitutional decisions evoke political reflection and more complex institutional arrangements for the radical consolidation of a social and democratic State governed by the rule of law, the courts forge their dogmatic firm decisions making pressure on the legislative power. Law is assumed in our present debate as a deep expression of complex human social relations not the desire of States. We reiterate law and society in order to broaden our constitutional horizons and paving the road to more compatible readings of modern Magna charters in post-dictatorial eras.<sup>314</sup>

## **1.2. (A) Spanish singularities on the recurso de amparo for the individual right to protection**

In 1984, the Spanish Constitutional Court received a petition with a property conflict.<sup>315</sup> A person rented a housing unit in Madrid without a proper written contract. It was an official protected dwelling, which means that part of its venal amount was subsidised by the public funds, and its owners were not living in it. When the rules of the existent verbal contract were breached by the tenant's default, the proprietors decided to lead him to ordinary justice. From that moment on, they considered his ex-verbal contractual part as a squatter and so did the courts. The defendant questioned the decision declared by the first instance and then the second. The sources of law he used to defend himself were the Articles 9 and 24 of the 1978 Spanish Constitution, respectively, referring to the principles of social and economic equality predicted in the document. The principles of legal certainty and legality are mentioned as well. To make matters worse, the tribunal of second instance, after analysing the case, maintained the

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<sup>314</sup> Read also “El referente necesario del Derecho es únicamente la sociedad como realidad compleja, articuladísima y con la posibilidad de que cada una de sus articulaciones produzca Derecho, incluso la fila frente al edificio público. No se trata de una precisión banal; muy al contrario, rescata el Derecho de la sombra condicionante y mortificadora del poder y lo devuelve al regazo materno de la sociedad, convirtiéndose de esta manera en expresión de la misma”. Grossi, P. (2005). *¿Que es el Derecho?* In *La primera lección de Derecho* (p. 25). Madrid: Marcial Pons.

<sup>315</sup> See Recurso de Amparo 461/1984, Auto 588/1984, de 10 de octubre de 1984, Sala Sección Primera, Magistrados Don Manuel García-Pelayo y Alonso, don Ángel Latorre Segura y doña Gloria Begué Cantón.

order of eviction for rent non-payments under the terms of a “sanction convicting a felony”. Before the Constitutional Court, the defendant also claimed the Article 25 of the Magna Charter to ask the effective legal protection for the Fiscal Ministry<sup>316</sup> once all tribunals had been using penal law categories in their language. For him, the Constitutional Court’s refusal in contextualising his demand through an equivocal due process would diligently conduct the case. The defendant’s intention was the configuration of what is called in the Spanish constitutional law “recurso de amparo”, *i.e.*, a constitutional complex remedy to shield juridical guarantees in a rule of law State, individual protection, freedom, citizen equity, innocence presumption, right to assemble, life, work, education, human and fundamental rights among others. It is an exceptional constitutional remedy, which is presented in a format of appeal after primary and secondary courts’ decisions, addressed to supreme tribunals to guarantee fundamental rights, full information under the concept of *certiorari*, *mandamus*, individual liberties, *habeas corpus* etc. The article 53.2 of the 1978 Spanish Constitution affirms: “Cualquier ciudadano podrá recabar la tutela de las libertades y derechos reconocidos en el artículo 14 y la Sección primera del Capítulo segundo ante los Tribunales ordinarios por un procedimiento basado en los principios de preferencia y sumariedad y, en su caso, a través del recurso de amparo ante el Tribunal Constitucional. Este último recurso será aplicable a la objeción de conciencia reconocida en el artículo 30”.<sup>317</sup>

After the presentation of the defendant’s cause, the Spanish Constitutional Court declined the extraordinary petition affirming there was a lack of documents that could prove the violation of the Articles 9 and 24. The judges said one cannot simply list the articles of the Spanish Magna Charter without providing for facts, proofs and other documents to confirm allegations. The Article 25 was misinterpreted by him and yet used in previous tribunal judgments inappropriately, the Fiscal Ministry had already made clear it had nothing to do with a sanction for an offense in penal area, but a simple judicial mandate of eviction. The Spanish Constitutional Court re-phrased that what the defendant in fact wanted was first and second instances were declared in disagreement

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<sup>316</sup> Among many obligations, it is the power that defends the legality of justice system, the citizenship rights and the public interest ruled by law. The body may act by enquire *ex officio* or reasoned act.

<sup>317</sup> See the Recurso de Amparo 538/1984, Auto 591/1984, de 10 de octubre de 1984, Sección Tercera, Magistrados Don Jerónimo Arozamena Sierra, don Francisco Rubio Llorente y don Antonio Truyol Serra.

with the Article 24 of the Spanish Constitution.<sup>318</sup> However, the major constitutional instance affirmed it was not able to appreciate the merit of civil issues based on the Article 117.3 of the Spanish Constitution. Principles of jurisdictional *potestas*, limited legal power and non-interference are extremely important for the juridical equilibrium in different instances.

The same year of 1984, the Constitutional Spanish Court analysed another petition for the constitutional individual protection in the sentence 538/1984. As the first controversy we have mentioned before, it was a case of eviction for non-accomplishment of the contractual clauses between privates. Once more, the article 24 of the 1978 Spanish Constitution was used to address a formal petition to the Fiscal Ministry. The litigants pleaded the court precautionary measures against the proprietor abusive power. In his extraordinary petition, the defendant alleged he was defenseless since the eviction was maintained even after he had honoured his debts with the owner fo the house. The decision of the first and second instances based their judgments strictly on the lack of rental payment till the day the contention arrived at court. It was true the debtor had met some of his contractual obligations, however, in judges' opinion, he was not exempt of a supposed breach of contract because he was still in debt of other rentals subsequently his initial claim. The constitutional remedy was denied and the judges of the Constitutional Court confirmed constitutionality of the previous decisions. The records disesteemed the extraordinary petition and found the hypothesis of the defenselessness not well-supported relying on the parameters found in the Spanish Constitution. The sources of law were the articles 44.1 "c" and 50.1 of the Rules of Constitutional Court, respectively, mentioning the violation of a constitutional right in the petitions directed to ordinary courts and formal defects.<sup>319</sup>

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<sup>318</sup> The Rules of the Spanish Constitutional Court, which is known as the Ley Orgánica del Tribunal Constitucional, 2/1979 Act with specific Act for its Preamble, 6/2007, establish the rite for the *recurso de amparo*. In its Article 2.1, letter "b" we find the reference to the rights and public liberties with an explicit quotation of the Article 53.2 of the Spanish Constitution. This section of the constitutional Court rules is important since the principle of equity for Spanish nationals and the individual protection. The Article 41, items 1, 2 and 3; 43.1 the legal proceedings for appeals; 43.2 and 44.2 about time to present petitions; Art. 46.1 and 46.2 related to the competences of the Fiscal Ministry and County Solicitor may interpose the *recurso de amparo*. In the Article 49, we see the details and the legal proceedings to present the extraordinary *recurso de amparo*. The Article 50 says the *recurso de amparo* shall be a recourse based on at least an ordinary law court decision. The Article 54 affirms the Spanish Constitutional Court will decline of any consideration with reference to judges' conduct and decisions from infra-constitutional tribunals. The Article 56.1 guarantees that its use does not suspend any decision dictated yet.

<sup>319</sup> In that case, the due process for remedies in the Constitutional Court should comply with the Article 404.2, Spanish Civil Law, Ley de Enjuiciamiento Civil. The records registered at that time affirmed the



A series of abuses with reference to the usufruct of the right to property appears in the Spanish constitutional debate. The Judgment 70/1989 refers to a conflict between the proprietor of a building and a shop. The landlord wanted the tenants to leave the place, because he said the property needed some improvements. The shoppers alleged a considerable loss in their enterprise if the contract were breached. The affected looked for an administrative solution and, having being disappointed by the local powers, started a litigation in an administrative court. The case was apparently solved with a surety of 100.000 Pesetas deposited by the landlord to compensate the tenants. The proprietor did not condescend into that status and confronted the local businessmen appealing to ordinary civil courts insisting on the quantity offered to them. Then the ordinary court did not accept the allegation of the plaintiff in the *recurso de amparo* saying they were not observing the sources of law on which the administrative report was based on. The tenants said the Article 117.5 of the 1964 Urban Rental Act was explicit in that sense of how a contract between private should be carried on. The ordinary court did not accept the legal basis presented by the tenants and, if they did not leave the place, an eviction order would be dictated. With reference to the quantity of compensatory measure, the judgment did not agree with the plaintiff. The sentence did not consider the possibility of a compensation more than the one already set by the proprietors once the owner was acting relying on a government authorisation to demolish the place at any time. Not satisfied with the ordinary court and the court of appeal, the tenants went to the Constitutional Court of Spain. Once there, the judges of the Constitutional Court said the administrative powers could not formulate jurisprudence in issues related to private contracts. Moreover, the tenants were not entitled to claim the postponement of the contract, because the Article 79.1 of the 1964 Urban Rental Act supported the will of the proprietor in detriment of the needs of the tenants in that case.<sup>320</sup> The Constitutional Court used the jurisprudence of the judgments 77/1983, 62/1984 and 158/1985 to affirm the claimants were not using adequately the 1964 Urban Rental Act and they were distorting the constitutional doctrine about the interruption of contracts. The tenants also argued they had the right to

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constitutionality of a norm and its application were the tasks of the Constitutional Court understanding, but the contestation of a law was supposed to be the responsibility of ordinary tribunals.

<sup>320</sup> The Urban Rental Act we use most of the time is the 1964 version once it was valid till the year of 1994. So, the cases before the 1990s are treated under that normative body. The new document is reconisised as 29/1994 Urban Rental Act.

claim the judicial protection once they could not negotiate the terms of the contract breach. About that point, the Constitutional Court denied the *recurso de amparo* formulated with the idea of defenselessness, because the court understood the Article 24.1 could not be used in that case.

The use of constitutional remedies as an instrument to avoid eviction orders mushroomed in the Spanish Constitutional Court after 1978. The *Recurso de Amparo* 479/1984, 16/1985, 468/1985 and 328/1991 were repetitive in the matter of individual protection.<sup>321</sup> It is important to understand why the judges declined all petitions and declared the constitutional irrelevance of them in formulating technically their recourses. The opinion of the Court was that the defendants blurred the content of the Article 24 in not showing to the ordinary magistrates how their fundamental rights were in fact at risk. They said the plaintiffs presented basically a collection of enouncements without a material or a procedural consistency from a constitutional perspective. The claimants also did not make evident in which points their proceedings were coherent to the local and regional competences in order to enable them to demand effectiveness in rule of law.

The constitutional debate on the usufruct of the property revealed also conflicts in private contracts in which the landlord was not able to exercise his legal capacity for a mental diagnosis. The *Recurso de Amparo* 468/1985, 624/1985 Order at the Constitutional Court of Spain, for example, was formulated based on a demand in which the proprietor noticed the housing unit he rented had been left unoccupied. In that case, the tenant was not in debt, but the lawyer representing the housing owner mentioned the person that lived in the house was asked to leave. Then, the tenant demanded a legal procedure in which the proprietor had to be in person once the claimant against the eviction suspected the owner of the house had a mental diagnosis. The owner showed up and it was clear he had not been mentally apt to have assumed any juridical act against the tenant. The constitutional judgment declined the litigant's

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<sup>321</sup> See *Recurso de Amparo* 479/1984, Auto 203/1985, de 20 de marzo de 1985, Sección Primera, Magistrados Don Manuel García-Pelayo y Alonso, don Ángel Latorre Segura y doña Gloria Begué Cantón; *Recurso de Amparo* 16/1985, Auto 210/1985, de 20 de marzo de 1985, Sección Tercera, Magistrados Don Jerónimo Arozamena Sierra, don Francisco Rubio Llorente y don Antonio Truyol Serra; *Recurso de Amparo* 468/1985, Auto 624/1985, de 25 de septiembre de 1985, Sección Segunda, Magistrados Don Manuel Díez de Velasco Vallejo, don Rafael Gómez-Ferrer Morant y don Ángel Escudero del Corral; *Recurso de Amparo* 328/1991, Auto 85/1992, de 30 de marzo de 1992, Sección Segunda, Magistrados Don Carlos de la Vega Benayas, don Luis López Guerra y don José Vicente Gimeno Sendra.

petition saying the judges could not declare invalid the ordinary sentences of eviction once legal procedures to contest the mental condition of the owner was not the object of the conflict. Other aspect was the time that the plaintiff did not respect.

The Judgments 203/1985 and 85/1992, respectively, against Darsa de Praga S.A Real Estate Agency and the Diputación Provincial, brought out more cases about orders of evictions. The object of conflict was what the public administrators of the housing units in question would do after the process of eviction. The affected included in their petitions their interest in having some information about coming dwellers. The judges disesteemed the plaintiff petition once they understood the public and private owners did not have the obligation to justify the use of the property for the evicted. In other words, the formalities did not end up in a careful consideration on the constitutional usufruct of the *dominium*. Then eviction was an interpretative matter as a secondary relevance for the magistrates once the right to property had its prerogative in law contracts. Therefore, we summarise our first critical point observing two guidelines. On the one hand, the Spanish Constitutional Court does not usually interfere in the merit of those norms contextualised in private contracts and the constitutional judges do not link such demands in which evictions affected the right to housing. On the other hand, lower jurisdictions tended to be extremely dogmatic and as more technical as possible.

The Judgment 34/1993 is about a proprietor against an old man who did not pay the rents of his house on time. According to the owner, once he did not pay the rents regularly, he breached the contract. An ordinary decision was set by a local court in Madrid, although the tenant presented a recourse. He deposited a surety to compensate the quantity of money he owed to the proprietor and pleaded the judge of an ordinary court to extend the time to honour his monetary obligation. The judge dictated five days more to the tenant as the Article 148 of the Urban Rental Act says in order to make the lessee come to terms with the landlord. Not accomplished that decision, the proprietor demanded the eviction. However, it was impossible to be carried out once there was a motion to impede the eviction presented by the tenant. The ordinary Court Number 2 from Madrid left ineffective the order of dislodgement for many reasons. The first one was related to the unclear title of domain presented by the claimer. Then, the court orders dictated did not make evident if there was any kind of resistance in not paying the rents. Much the opposite, along the due process there were payments and deposits in

proprietor's benefit yet formalities and time not well-observed. The judge quotes the article 117.1 of the 1978 Spanish Constitution once the place is used as a local of domestic enterprise too: "El local de negocio da trabajo al demandado y a quince personas más; no decide esta cuestión un proceso, pero es un dato más, de especial importancia social y no puede pensarse la sociedad, sino que 'la justicia emana del pueblo' com dice el art. 117.1 de la Constitución". Moreover, the Article 35 of the Magna Charter defends the right to work and the right to housing, Article 47, is clearly connected to the concrete case. The key argumentation on the constitutionality of the connecting factor between housing and other rights is based on the ordinary jurisdiction adding the article 3.1 of the Spanish Civil Code in which the progressive interpretation of the norms shall be conformed by the social reality. Nevertheless, the Constitutional Court deemed the *recurso de amparo* presented by the proprietor affirming the article 24.1 and 118 of the Spanish Constitution shall be observed. The decision had clear in the proposition the chronological formality of the legal proceedings evolved and, eventually, the non-payment of the rents after the decision of the lower instances. The Constitutional Judgments 32/1982, 26/1983 and 33/1986 were quoted as case law to support the notion of defencelessness at the side of the landlord.

The Court Order 179/2002 and the Judgment 158/1997 repeat the formalism that was considered by the Constitutional Court as necessary to carry on the petition of defenselessness based on the Article 24.1 of the 1978 Spanish Constitution. The former one was denied. The reason was that the tenant had signed a rental contract with a person who had the possession, although the lessor was not the proprietor. The former case was the one linked to a mortgage foreclosure for not honouring the debtors their contract. The Article 131, 1946 Spanish Mortgage Act, was invoked by the Popular Bank of Spain to evict the couple in debt and re-assume the possession of its property. The boiling point happened when they said it was not possible to give up the possession once they had let the housing unit for the parents of one of the debtors. The order of eviction was against the mortgagor and, because of that, it did not proceed. The Judgment 41/1981 is quoted as a source of law in the Judgment 158/1997 as an appropriate jurisprudence applied to the conflict involving third parties since the presence of strange actors to the concrete case does not impede the tribunal to give room to the contract foreclosure with defenselessness. The particular vote of the

magistrate Fernando García-Mon y González-Requeral stressed the importance of hearing the affected during the legal proceedings of eviction. He says the Judgment 41/1981 was not coherent to the one in question. The board referred to a doctrine that was dictated disesteeming directly the possessor's *recurso de amparo* as part of a mortgage contract. Sir. García-Mon y González-Requeral adds the Judgment 6/1992, which was also quoted by the court board, was inappropriate once the plaintiff of the *recurso de amparo* could not be part of the legal proceedings in the Article 131, Spanish Mortgage Act.

The definition of rights, the creation of institutions and legal principles that came after Francisco Franco's regime has an ambiguous role.<sup>322</sup> On the one hand, Spain advanced those themes related to fundamental rights passing a very generous set of constitutional commands. On the other hand, jurists were not invited to re-think the role of democratic rights specially in the system of property and its usufruct. The article 33.2 of the 1978 Spanish Constitution guarantees the social function of property, but judges remained insisting in not opening that question. The constitutional doctrine of the 1990s reiterates that the Constituency was born in ambiguous context: "La naturaleza de esas Cortes [Cortes Españolas] era ambigua; pero en la práctica se convirtieron, de manera inmediata, en constituyentes. La nueva Constitución derogó todas las Leyes Fundamentales, incluida la de Reforma Política. Un Sistema autoritario dejaba paso a un régimen democrático; las Leyes Fundamentales quedaban atrás y una nueva Constitución comenzaba su andadura".<sup>323</sup> The political power belonged to a dictator and all popular participation doctrinaire. Individuals were taught to vote in *referenda*, but the culture for social rights based upon a constituent pact was timidly introduced in courts. As we have seen previously, judgments did not advance much in connecting the social prerogatives to a constitutional thesis on the usufruct of the right

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<sup>322</sup> About Franco's regime and his policies using the system of property as a political question, read: "La política de vivienda fue una de las políticas sociales clave en el franquismo, el buque insignia de los avances sociales del "régimen" —se atribuye a Franco el lema "un propietario más, un comunista menos"—, especialmente a partir de 1957, cuando se aprueba el llamado "Plan de Estabilización", que supone la apertura de la economía española a los mercados internacionales, superadas las tensiones de la postguerra mundial, el Estado se convierte en el primer promotor de vivienda". See Gaja i Díaz, F. (2015). Políticas de vivienda, suelo y urbanismo en la España del siglo XX. De la penuria a la falsa opulencia. Los costes de la hiperproducción inmobiliaria, Seminario Hábitat y Suelo. Retos de las políticas de suelo para la producción social de vivienda. Retrieved from <http://personales.upv.es/fgaja/publicaciones/andes.pdf>

<sup>323</sup> Villarroya, J. T. (1997). Las leyes fundamentales. In *Breve historia del constitucionalismo español* (p. 160). Madrid: Centro de Estudios Constitucionales.

to property, but mainly on formal issues. The 1947 Succession Act and the 1966 Organic State Act were devoted to the veneration or validation of an absolute symbol. The political faculties in the Spanish constitutionalism were co-opted and breathed few years of a stabilised democratic regime along the XX century. In the 1978 Spanish Magna Charter, the making of individual rights were separated from the social rights in the Title I, Chapters II and III. That division has generated in the Spanish doctrine thesis affirming fundamental rights are pure *ius* and socioeconomic rights only principles for public policies. Such explanation serves many of the constitutional judgments in disconnection with the whole section about social rights such as education, health and housing matters. It also represents the symbolic construction of born-breached social contract in which property may not take part of. In the Court Order 203/1985, the Spanish Constitutional Court stated the case of eviction under the political perspective for public policies or housing debate was not its competence. The board added the human problems related to eviction as a result of unemployment might be solved by the public powers: “Cuestión distinta sobre la que no procede que se pronuncie este Tribunal Constitucional, por no ser de su competencia, el que se busquen por los Poderes Públicos soluciones a los problemas humanos que plantean los desahucios por cese de la relación laboral”.<sup>324</sup>

The Judgments 198/1993 and 249/1994 had their *recurso de amparo* declined once they did not present, respectively, the signature in an ordinary recourse and non-payment of the rents. The Spanish Constitutional Court understood the plaintiffs did not use all the possibilities previously and adjective law was essential to avoid the supposed violation of the Article 24.1. The eviction in both cases was not commented by the judges. The idea of defenselessness is literally interpreted by the court as we see in the Judgment 92/1996 in which it is clear a State lawyer was denied to the plaintiff once the ordinary law court said the presence of a representative was not necessary based on the

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<sup>324</sup> See *Recurso de amparo 479/1984, Auto 203/1985, de 20 de marzo de 1985, Sección Primera, Magistrados Don Manuel García-Pelayo y Alonso, don Ángel Latorre Segura y doña Gloria Begué Cantón. P.* About the democratic period after 1978, Lucas Verdu classified the contradictions between Franco’s regime and the ulterior democratic legal system based on the rule of law as a “cross-eyed” juridical-political system. Suárez Reform was taken into consideration by Miguel A. Aparicio under the notion of “political operation”: “[...] se tratara de un plan preconcebido, estructurado y planteado como una especie de operación militar, con objetivos prefijados y contando con unas determinadas fuerzas de apoyo”. See Verdú, P. L. (1976). *La octava ley fundamental. Crítica jurídico-política de la Reforma Suárez*. Tecnos: Madrid; Aparicio, M. A. (1980). *Introducción al sistema político y constitucional español*. Barcelona: Ariel.

article 10.2, Ley de Enjuiciamiento Civil. The Spanish Constitutional Court stated the nature of that denial was completely against its doctrine. The magistrates say the complexity of the case, the limited cultural preparation of the claimant and his lack of juridical knowledge provoked defenselessness. Nevertheless, either rejected or not the *recurso de amparo*, the act of dislodging a person did not encourage the court in noting anything.

Other interesting formal aspect estimated by the Constitutional Court is in the Judgment 225/1996. The claimant interposed an ordinary recourse against Tesorería Territorial de la Seguridad Social de León and the proprietor of the place the plaintiff lived. The local treasury in question bought the lessor's house and informed the tenant he had to leave the place. The lessee looked for the public service responsible to claim his rights as a third party based on the Ley de Enjuiciamiento Civil, Articles 614-620. So, the treasury uttered it was not possible once the lessee did not have presented a previous complaint filling in the governmental formers. A first instance judgment dictated a decision and denied the tenant's petition. He presented a recourse and again declined with re-affirmation of the previous status. The magistrate did not want to deepen the analysis of the facts. So, the *recurso de amparo* was the possibility of having the lessee's credit and suspend the first instance decision under the principle of *periculum in mora*. In the Spanish constitutional system, extraordinary petitions rely on the *recurso de amparo* notion. If there is a remedy at risk, the Spanish Constitutional Court may interfere in procedural arena to guarantee an individual right or liberty to hinder the condition of *periculum in mora* as an irreparable damage against the individual. The Judgment 156/1997 is an example of that. According to the Rules of the Spanish Constitutional Court, in its Article 56, a *recurso de amparo* petition shall not suspend the judgments from ordinary justice. The Fiscal Ministry did not see any *ex lege* connection between the content of the previous judgments, the initial formulation of the *recurso de amparo* and the plaintiff's intention in suspending the judicial final act. The Constitutional Court did not accept new facts in the petition since the final order for dislodgement and its realisation were formally out of the scope of the *recurso de amparo*. Yet they were true, they could not be included in the demand of the claimant. The eviction was carried out and the court denied the *recurso de amparo*

based on the lack of manifest constitutional content.<sup>325</sup> The same rationale for the Court Order 111/2003 that was linked to a verbal contract existing for more than thirty years. An elderly person was under eviction peril, so the *recurso de amparo* evoked the principle of *periculum in mora* to suspend the ordinary order of eviction and avoid irreparable damage. Based on the Article 56.1, Rules of the Spanish Constitutional Court, the board denied the suspension since the question would lead to a review of previous legal proceedings.

After reading the decisions emitted by the Spanish Constitutional Court, we point out some interesting matters for investigation if observed the role of the highest constitutional competence. The first one is the debate of eviction in itself in the tribunal's appreciation of the cases. Most of the time, the judges of the court avoid the topic of dislodgement and refer to the lack of procedural elements as the main obstacle for it when they analyse the *recurso de amparo*. Defects such as time in legal proceedings, non-observation of the official communications by the victims of eviction or the judicial power working on the cases and other formalities like jurisdictional competence are the mechanisms the court affirms that defendants shall pay heed to before stepping into the realm of constitutionalism. The second deviation we noticed is connected to the fact solicitors are expected to present excessively material proofs and documents to support their allegations. The more the court digests the cases along time since 1978, more complexity is imposed to the litigators. Other example is the testimony acceptance that has been considered insufficient formality especially in those cases involving verbal contracts between lessors and lessees. The second matter found in our reading task is the difficulty of the court in transcending the content of the *recurso de amparo* and deepening the constitutional debate. It is common in the cases of eviction the premiss that the court considers dislodgements those situations in which there is more a conflict of competences than constitutional matters: “[...] no procede que se pronuncie este Tribunal Constitucional, por no ser de su competencia, el que se busquen por los Poderes Públicos soluciones a los problemas humanos que plantean los desahucios [...]”.<sup>326</sup>

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<sup>325</sup> The Order 255/2007 denied the *recurso de amparo* once the Spanish Constitutional Court understood the author did not present manifest constitutional content in the petition. The Fiscal Ministry elaborated the document in which the item 3, Article 50, from the Rules of the Constitutional Court, supports the position of the fiscal authority.

<sup>326</sup> See *Recurso de amparo* 479/1984, Auto 203/1985, de 20 de marzo de 1985, Sección Primera,



Among the judgments under our analysis in the present thesis, concentrated on housing matters and eviction, the Spanish Constitutional Court only admitted some of those *recurso de amparo* in which *periculum in mora* concept was fundamentally the argumentation. The first case we make some comments is about an elderly person *versus* a proprietor who wanted to put an end in a rental contract as we see in the Judgment 170/1998. The owner of the housing unit in question demanded the application of her full right in order to cancelling a formal contractual obligation. The lessor alleged that a descendant of hers was about to come and live in the city of Seville where the property was.<sup>327</sup> The tenant interposed recourse in primary instance and the ordinary court declined his petition in admitting artificial facts produced by the proprietor. After that, he appealed to a provincial tribunal, but his claim was not deferred. The date of eviction was set. A series of reasons came forward to justify the irreversible or the difficulty re-establishing the prior situation in case the dislodgement proceeded. Nevertheless, before the final judgment we mentioned before, the Constitutional Court accepted his challenge in the Court Order 156/1997 relying on the Article 88, from the Rules of the Constitutional Court. The document containing the written testimony of the claimer was required and the court made some considerations. Some of them were very transconstitutional if we consider the tradition of the body. An extensive use of the Articles 24.1 and 24.2 of the Spanish Constitution. The judges added principles like “general interest” and the “protection of individual rights” linked to irreparable damages if the eviction proceeded. The age of the claimant corroborated a delicate situation in court’s view. The judges made a curated reading list of complex jurisprudence in order to admitting and well-supporting the *recurso de amparo* proposed. The writ demands “[...] procede otorgar la suspensión solicitada, por cuanto de no accederse a la misma el presente recurso perdería sua finalidad. De nada serviría, señala, la estimación de la demanda de amparo, e incluso que el resultado de la prueba propuesta y no practicada le fuese favourable y se dictara Sentencia revocatoria de la de primera instancia, declarando haber lugar al desahucio, pues una vez lanzado ya de la vivienda, el recurrente nunca podría volver a habitarla de nuevo, con lo que se le

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Magistrados Don Manuel García-Pelayo y Alonso, don Ángel Latorre Segura y doña Gloria Begué Cantón. See also the Court Order 435/2006, Larreatxa, SL *versus* proprietor. The owner of the shop proved he would have irreparable damage in case of eviction. The Spanish Constitutional Court deferred the *recurso de amparo*.

<sup>327</sup> See Art. 114, item 11, 1964 Urban Rental Act and Art. 62.

causaría un daño irreparable”. The court affirms: “El art. 56.1 LOTC [differently but complementing the Article 88 quoted before by the claimer] dispone que la Sala que conozca de un recurso de amparo suspenderá, de oficio o a instancia del recurrente, la ejecución del acto o resolución impugnados cuando la ejecución hubiere de ocasionar un perjuicio que haría perder al además la avanzada edad del recurrente (ATC 314/1994), procede, en aplicación de la doctrina expuesta en el fundamento anterior, accede a la suspensión instada”.<sup>328</sup> The judgment was dictated affirming also economic reasons could not restrict the individual defense of a fair analysis of the case for the proprietor as well. Yet a very advanced essay in the Court Order, the final Judgment 170/1998 held in low regard the petition of the claimer in leading his right of demanding proofs that the proprietor’s daughter was about to come and live in the city the housing unit was. The Constitutional Judgment 89/1986, 3<sup>rd</sup> point quoted in the Source of Law; and other Judgments 40/1986, 212/1990, 87/1992, 233/1992, 131/1995 and 1/1996, paved the road for denying the *recurso de amparo*. The material proof was other aspect that the court considered fundamental: “En el presente caso, no estamos ante pruebas con las que se pretendieran acreditar hechos acaecidos después de dictarse la Sentencia de instancia, ni ante medios probatorios admitidos y que no pudieron practicarse; se trata de pruebas sobre cuya falta de relevancia ya se pronunció de manera motivada el Juez de Primera Instancia, lo que no exoneraba a la Audiencia de resolver motivadamente acerca de su necesidad y pertinencia”.<sup>329</sup>

None of the judgments we selected evoked the question of the social function against abusive use of property. As a brief final comment for the present section, we suggest a reflection on the themes of individual protection, the usufruct of the right to property and urban issues. Not only have the magistrates internalised a corporate behaviour delegating to them the principles of adjective law schools, but also had their political faculties amputated while operating law. The Fiscal Ministry illustrates very well that sort of technicism in the nature of Spanish law related to individual protection. The judicial body does not recognise defenselessness based on the Article 24 of the Spanish Constitution, for example, if the legal proceedings are followed by the ordinary judicial competences, solicitors and attorneys. The Court Order 9/2007, for example,

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<sup>328</sup> See the *Recurso de Amparo* from the Court Orders 314/1994, 171/1995 and 213/1995 uttered by the Spanish Constitutional Court.

<sup>329</sup> See the judgment 170/1998, 18 August 1998, BOE n. 197, p. 87

exalts adjective law stating the constitutional doctrine about accepting or denying a *recurso de amparo* should be clear for the claimants. The petitions have to meet the procedural and material pre-requisites, but also the premisses before having access to ordinary legality, to act diligently according to the article 117.3 of the 1978 Spanish Constitution.<sup>330</sup>

The 1964 Urban Rental Act, 2<sup>nd</sup> Section, letter “a”, embodied in its Additional Dispositions the notion of occupying empty housing units in case anyone lived in them. In 1994, a restated legal text substituted the old one and aborted that legal force of law in housing matter. The old document authorised the Government of Spain to dictate gradually where the sovereignty of the State would have jurisdiction. If the whole or part of the national territory would be under executive *potestas*: “El alquiler obligatorio de aquellas viviendas que, susceptibles de ser ocupadas, no lo fueran por nadie”. Consequently, the provincial governments were encumbered with checks and balances of the denouncements in concrete cases: “A tales fines, el Gobernador civil de la provincia, comprobando sumariamente las denuncias que se le formulen, concederá al propietario el plazo de un mes para que se ocupen, precisamente como casahabitación y no como escritorio, oficina, depósito, almacén o local de negocio”. Some aspects call our attention such as the external limits imposed to vacant housing units, the social invigilation once people were invited to denounce inappropriate uses of these properties and the obligation of the owners in converting themselves in landlords based on a decree. The legal proceedings and time were very effective once the potential lessee was a person who accepted that legal instrument as part of a social value. In other words, it was a legal fast track to correct a mal-use of the property for housing purposes once there was an immense demand for social housing: “Y transcurrido dicho plazo sin hacerlo, dentro de los quince días que sigan, acordará aquella autoridad que sea ocupada por el primer aspirante a inquilino, en turno riguroso de antigüedad, que se hallare dispuesto a pagar como renta la exigida por el arrendador, si no fuera superior a la

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<sup>330</sup> “En efecto, conforme a la doctrina de este Tribunal [Constitutional Court] la decisión sobre la admisión o inadmisión de un recurso, o la verificación de los presupuestos y requisitos procesales y materiales a que está sujeto, son cuestiones de legalidad ordinaria que corresponde resolver exclusivamente a los Juzgados y Tribunales en el ejercicio de la potestad jurisdiccional que les atribuye el art. 117.3 CE, sin que este tribunal pueda corregir la interpretación a que lleguen salvo que en ella concurren las notas de arbitrariedad, irrazonabilidad o error patente; ni es su función la de, entre dos interpretaciones razonables de una norma, elegir cuál de ellas le parece más razonable (STC 13/2002, de 28 de enero, FJ 6, entre otras)”.

última declarada a fines fiscales o a la que sirva de base al tributo, de no haberse formulado declaración, y el aspirante advendrá inquilino de la vivienda con los derechos y deberes que le impone esta Ley, aunque el arrendador se niegue a otorgarle contrato, en cuyo caso la renta se determinará conforme a los datos fiscales que se expresan”. Cases of eviction for social housing were taken into consideration if the unit were unoccupied most of the time as it says the letter “b”, yet the 2<sup>nd</sup> Section, Additional Dispositions of the 1964 Urban Rental Act: “El desahucio por causa de necesidad social de aquellas viviendas ocupadas que, sin mediar justa causa, se hallaren habitualmente deshabitadas, o el de las que no sirvan de casa-habitación oficinas o local de negocio del arrendador, o si se hallaren alquilados, de su inquilino o arrendatario”. Personal circumstances should be under analysis of the tribunals. Furthermore, the judicial approaches determined by the law were expected to note the criteria of occupation and the urban context comparing the unit under dispute to others in its surroundings. The Fiscal Ministry was responsible for the legal proceedings to base the eviction after being advised to do so by the administrative power: “El desahucio lo instará el Ministerio Fiscal a excitación del Gobernador civil de la provincia y previa sumaria investigación de la denuncia que hará esta Autoridad”. A judge from ordinary instance was designated to cope with the case evolving eviction of the non-assiduous tenant. The proprietor and the lessee, who was subpoenaed, had both to pose their reasons to avoid the cancellation of the contract: “Se deducirá ante el Juez de Primera Instancia respectivo y habrán de ser llamados al juicio como parte demandada, el propietario o titular, y de hallarse alquilada la vivienda, también el inquilino”. Legal proceedings, judicial costs and accomplishment of the judgment did not impose any monetary penalty for the renter. The time for eviction was estimated in fifteen days if proved the tenant was not in fact present with their domestic life in the housing unit.<sup>331</sup>

The first Urban Rental Act of 1964, which was elaborated during Franco’s regime, remained legally valid from 1978 when Spain came back to democracy until the

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<sup>331</sup> “Para su efectiva ocupación o, en su caso, alquiler, se aplicará lo prevenido en la letra a) de esta disposición. Tan luego se adopte alguna de las medidas de que trata la presente disposición se procederá a la constitución en los Gobiernos Civiles de un registro público y gratuito de aspirantes a inquilinos, que comprenderá todos los de la provincia que en tal caso se hallaren, clasificados por localidades, y en el cual figurará, junto a cada aspirante, la renta que estuviere, dispuesto a pagar. El Gobierno podrá disponer además la adopción de cuantas medidas fueren necesarias para la mayor eficacia de las que se dejan enunciadas. Lo dispuesto en la letra b) de esta disposición se entiende sin perjuicio de lo previsto en el apartado tercero del artículo 62”.

Urban Rental Act of 1994. One of the possible reasons for that has to do with the strong tradition of property in the country since Franco used to say “one more proprietor, one less communist”. The other one is also linked to how legal culture is taught at schools of law and the mentality of a private equity yet a social distinction. Joaquin Tomas Villarroya avers that “el caudillaje”, which is defined by the purposes of our discussion as a political responsibility of General Franco to the people, was an ample moral agreement. The invisible social contract was cohesive under the values of respect, trust and devotion. The institutions operated strictly as technical instruments for the State: “Las instituciones del regimen – Cortes, Consejo del Reino, Consejo Nacional del Movimiento – eran para él instrumentos técnicos de gobierno, pero que no debían menoscabar el mando que, en determinados dominios, se reservaba absolutamente”.<sup>332</sup> Franco constructed in his personality a figure for the individual tutelage that transcended the reign of the law. As the State supreme political force, as an absolute sovereign in past or the chief of weapons during the military regime, Franco assumed the power to dictate the Fundamental Acts. Religion, fatherland, family, social order, and property were the main pillars of the Spanish political organization during the period of 1936-1975. The institutional culture inherited by the Spanish Constitutional Court was deeply wounded by the brilliance of technical labour in lawsuits and the notion of solidarity forged in non-institutional apparatuses.

The inexistent allusion of the housing right from a constitutional perspective may be supplanted by the identification of errors or failures in legal proceedings. The Judgment 135/1986 brings the case of a divorced woman that was about to be evicted. Her extraordinary recourse pleads the nullification of an ordinary decision once the decision of the court assumed a marital status to dictate the judgment. She declared she was not notified about the legal conflict and was not married anymore. Consequently, she could not question appropriately the decision and change the status of defenselessness. Until the moment the judicial communication was realised, she was not aware of the legal proceedings and the silence of her husband was interpreted as a

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<sup>332</sup> “La responsabilidad política ante el pueblo no se planteaba por cuanto se consideraba que éste profesaba al Caudillo devoción y respeto, además, le dispensaba una confianza total, permanente y continuamente renovada. La adhesión o supuesta adhesión de los españoles al General Franco se manifestó, formalmente, en los referéndum, de claro signo plebiscitario, celebrados con ocasión de la aprobación de la Ley de Sucesión en julio de 1947 y de la Ley Orgánica del Estado en diciembre de 1966”. Read Villarroya, J. T. (1997). *Las leyes fundamentales*. In *Breve historia del constitucionalismo español* (pp. 147-148). Madrid: Centro de Estudios Constitucionales.

procedural defect once she was not married anymore to the debtor. The *recurso de amparo* was accepted and the Constitutional Court declared null the judgment of the Salamanca District Court number 130/1985. According to the judges, the right of being a defendant could not be rejected by the legal order as the Article 55.1, “c”:  
“Restablecimiento del recurrente en la integridad de su derecho o libertad con la adopción de las medidas apropiadas, en su caso, para su conservación”. In other words, the formal proceedings to avoid defenselessness and the Article 24.1, which was followed by the Articles 7, 90, 91, 96 and 445, Spanish Civil Code, gave support to the Constitutional Court’s decision.<sup>333</sup>

We found other few cases with serious defects when the ordinary justice carried out the due procedure. The Judgment of Spanish Constitutional Court 193/2005, which was previously accepted in the form of extraordinary recourse as we see in the Court Order 2001, is a very good example of that kind of outlier. The conflict we have posed along the present chapter is treated differently. Suspended, nullified and contradictory judgments do not conform to the general rule of the *recurso de amparo* appreciation. However, the nullified and suspended ordinary judgments, which were in fact orders of eviction, missed the target using the rationale of “established domicile” and “irreparable damage”.<sup>334</sup> Other element found in cases we classify as exception was the principle of legal certainty or *res iudicata* applied to judicial judgments. In that case the court said the lessee could not use the mechanism of infinite recourse interpositions to delay the justice and being still in possession of a place, but accepted the *recurso de amparo*. The principle of *ratio decidendi* of the board was more intuitive than formally construed.<sup>335</sup>

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<sup>333</sup> According to the Spanish Civil Code, Article 7 defends the right to the others; Articles 90 and 91, familiar housing unit; Article 96, equal responsibility and mutual consent and the Article 445 refers to co-possession. The Article 10 of the Spanish Constitution about right of the others was also quoted by the Court.

<sup>334</sup> The Court Order 137/1998 presented a defect in the legal proceedings related to address. The person was not found by the competences to be communicated of eviction. Article 734, defect along the due procedure, Ley de Enjuiciamiento Civil. The Court Order 233/1998 recognised an evidence of legal procedural defect, but the *recurso de amparo* interposed by the plaintiff exceeded the time to claim his right. The tribunal used the Article 44.2, the Rules of the Spanish Constitutional Court, to construct the argumentation of the Judgment 199/1993.

<sup>335</sup> “Por esta razón, la Audiencia Provincial, después de afirmar que la ‘finalidad del requisito procesal tiene por finalidad asegurar los intereses del arrendador que ha obtenido una sentencia favorable y evitar que el arrendatario se valga del recurso para dejar de satisfacer la renta durante el mismo – es decir, evitar que instrumentalice el proceso como una maniobra dilatoria –’, se basó para inadmitir el recurso en que, a partir de la fecha en que la Sentencia se dicta, 3 de enero de 2000, la demandante y su esposo adoptaron una actitud dilatoria en su actuación procesal, mediante la cual continuaron disfrutando la vivienda hasta el mes de unio sin efectuar contraprestación [...]”. See Judgment 197/2005. Observing the jurisprudence

Yet many *recursos de amparo* were denied evolving individuals under eviction threat, there are some singularities in few cases deferred by the Spanish Constitutional Court. The first characteristic in these petitions that is groundbreaking has to do with the subjects of the litigiousness. They were housing construction companies, public or private estate agents and varied types of enterprise *versus* individuals. The abuses of the economic power produced abnormal judicial errors and their rapid response to the lessees unlawful.<sup>336</sup> The Judgment 199/1998 presents the public actor called Gerencia Municipal de Urbanismo trying to enter into a domicile via administrative formalities. The conflict of jurisdiction also appears since there are always questions whether the competence is able to act: “Por razones lógicas se imponía la misma conclusion, pues dado que constitucionalmente la Administración se encuentra inhabilitada por el art. 18.2 C.E. para autorizar la entrada en domicilio, el antiguo art. 87.2 le indicaba a qué orden jurisdiccional debía acudir cuando la ejecución de un acto administrativo requería como presupuesto una autorización judicial de entrada”. The costs for all the juridical power were immense. In that particular case, the Order of dislodgement from the Madrid Instruction Court Number 42, the recourse interposed and the Order of the 5<sup>th</sup> Provincial Madrid Court were nullified.

The Spanish Constitutional Court deferred a *recurso de amparo* of possessors living in an area object of *usucapio*. The Judgment 197/2013 describes the occupation of a land in a rural perimeter in the region of La Laguna, Cristina Island, Canary Islands. The possession was demanded by the State once the family that used the property did not have a title or any other contractual document. The State officials tried to communicate the existence of the due process using the traditional post-office, but the place was not found. The judge ordered a State official to give the notification of eviction in person. Having problems in finding the local where exactly the property was, the Ordinary Instance Number 2, Ayamonte, carried out formalities informing the representative of the Spanish State to indicate another address. The actors answered the possessors continued living at the same place. The judge instructed the State officials to contact the claimers before the other attempt in communicating the illegal occupiers. At the end, the State attorneys asked the judge to publish the names of the possessors in an

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even related to different matters, in the Judgment 207/1989, the court recognised that the right to individual protection could not be under threat and defects in legal order tend to corroborate defenseless.

<sup>336</sup> The Article 24 of the 1978 Spanish Constitution is currently used in these cases as well.

official bulletin of the Court in question: “Al nuevo requerimiento del Juzgado, el actor solicitó que la demanda fuese notificada por edictos, a lo que se accedió por diligencia de ordenación de 16 de Julio de 2012, procediendo a la publicación de éstos en el tablón de anuncios del Juzgado [...]”. There was finally a recourse when the squatters were found, but the judge did not accept the challenge based on the production of defenselessness. The individuals started a demand using the *recurso de amparo* to make valid the Article 24 of the 1974 Spanish Constitution. According to the Articles 51 and 56.6, the Rules of the Constitutional Court, the ordinary order was suspended and the legal proceedings for the eviction stopped. Then, relying on the Article 52.1, the Constitutional Court asked the ordinary instance and the Fiscal Ministry to show the written diligences that supported the legal proceedings. After realising the possessors were not lawfully communicated, the Constitutional Court considered *inaudita parte debitoris* and the Article 24.1 of the Spanish Constitution violated. The concept of *periculum in mora* was also used by the court. The Judgments 219/1999 and 61/2010 were quoted as relevant jurisprudence in order to avoiding ineffective legal proceedings unlawfully dictated. The ordinary judgment was nullified and all instructions to form the due procedure had to come back to the stage of communication.<sup>337</sup>

The *recurso de amparo* proposed by Girabelmar S.L., which is in the Judgment 181/2015, was basically due to the denial of the lessor in sending an electronic mail to its debtors. The conflict started when the tenants did not pay the rents they were obliged to for the letting of a commercial place. The ordinary instance was evoked by Vista Isleña S.L. Estate Agency, because of the debt and the fact of the lessees leaving the place without formally cancelling the contract. The lessor demanded the Number 1 Court of Marbella to dictate a judgment of eviction and the obligation of the old possessors in honouring their financial obligations. The petition was accepted and the judge proceeded to the hearings. As a consequence of not finding the tenants at the place established in the contract for communication, an interlocutory judgment was uttered. When the lessees knew they were part of a trial without having the chance to defend themselves, they questioned the decision affirming they could have been communicated with the second address that was present in the contract. Moreover, they

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<sup>337</sup> See Court Order 37/2014 and finally the Judgment 169/2014, the case *Noelia Rodríguez Gil v. Mercantil Construcción Cogucho S.L.* brings the same issues of nullifying acts and stepping back with adjective law.



were aware of the judgment, because the Estate Agency used the optional address to inform them of the finalised trial. When the tenants started their demand at the Constitutional Court, they alleged defenselessness. After analysing the case, the Constitutional Court confirmed the violation of the Article 24, items 1 and 2, and added the Article 156, Ley de Enjuiciamiento Civil, to emphasise the tenants could have had the opportunity of a fair trial if they would have been communicated in time: “[...] el contenido argumental de la primera queja se refiere, más que al derecho a un proceso con todas las garantías del art. 24.2 CE o al derecho de acceder al proceso, o al derecho a la tutela judicial efectiva sin padecer indefensión del art. 24.1 CE, siendo éste, precisamente, el derecho cuyo reconocimiento se pide de manera inequívoca en el *petitum* de la demanda”. The *recurso de amparo* was esteemed, all acts before the interlocutory judgment nullified and the legal proceedings should move back to the stage of hearings. In the sources of law, the judges of the Constitutional Court quoted the principles of “adversarial proceedings” and the “procedural bad faith” of the lessors. The managers of the property could use electronic mail as they did to inform the debtors of the trial and their financial obligations. Once more costs and the negligence led to errors and defects of due procedure.<sup>338</sup>

Yet there have been cases producing an important constitutional debate at a minimum level, it is necessary to emphasise the permanence of a residual dogmatism in the legal reasoning of the Spanish Constitutional Court. As dogmatic we refer to a set of prerogatives that should be reviewed after the 1978 Magna Charter. The first one is the excessive close-reading exercise in selective terms. What strictly the norms say is convenient if the social reality does not have any unstable movement. Nevertheless, we have showed before property is as incessant concept in transformation. Other inquiry is about prevailing techniques in the *habitus* of a supposed sacred body as the Fiscal Ministry and the magistrates acting at the constitutional level. So, a group responsible for constitutional guarantees should be wide-awake of the symbolic protection they promote to the right to property in not mentioning or doing scarcely the social function debate. Nowadays, the enforceability of property rights updates the tradition in land disputes favouring economic powers. The *dominium* seen in the judgments previously is apparently the similar to the one in giant corporations, housing investments and urban

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<sup>338</sup> Jurisprudence in that sense can be found in the Judgments 30/2014, 122/2013 and 58/2010, 155/2009 dictated by the Spanish Constitutional Court.

developers. This is why dogmatism cannot solve owner's abuses on the usufruct of the right to property and the massive investments in real estate businesses pose numerous conflicts to the right to housing.<sup>339</sup> Although we do not deny the importance of legal proceedings as part of law, it must be clear we see as necessary a political level in reasoning the *recurso de amparo* as a practice of halting the excesses of the actual economic domain.

### **1.3. (B) Spanish singularities on supposed unconstitutional acts in autonomous legislative power**

In 1983, an action of unconstitutionality was presented to the Spanish Constitutional Court in a polemic case evolving Rumasa Bank in tax evasion, fraud and misappropriation. In that occasion, the political party Alianza Popular questioned the use of the Royal Decree 2/1983 to expropriate the bank which belonged to the business man José María Juiz-Matteos y Jiménez de Tejada, Olivera Marquis.<sup>340</sup> At that time, the politicians of Alianza Popular Party prepared a petition with the help of fifty Spanish parliamentary representatives to contest the unconstitutionality of the Royal Decree 2/1983. After the case appreciation, there was an undecided situation since the judges were equally divided in two sides. The magistrate Manuel García-Pelayo y Alonso, who was the president of the Tribunal at that time, gave the vote of Minerva and Rumasa Corporation was expropriated.<sup>341</sup> The Judgment 111/1983, Rumasa Bank v. Spain, represented a dubious expectation in the re-democratic Spanish society. On the

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<sup>339</sup> In Chapter I and II of the present thesis, we constructed the historical notion of property, *dominium* and sovereignty to make evident there is still a set of political and economic powers emanating from the property system. We re-visit these notions debated previously adding the symbolic dimension of habitus to the unleashed desire of the proprietor or the emotional right. Techniques, judicial formalities and dogmatism in law guarantee the custom of non-constitutional analyses around the social function of property.

<sup>340</sup> In 1989, the Alianza Popular was re-founded with many right-wing politicians acquiescing in a new political party called Partido Popular. This is one of the most affluent organisations in Spain and linked to the housing crisis bailing out the bank system evolved in the housing bubble of 2008.

<sup>341</sup> "A) La Sección Tercera del Tribunal Constitucional en providencia de 3 de marzo acordó admitir a trámite la demanda interpuesta por don José María Ruiz Gallardón, como representante y comisionado por otros cincuenta y cuatro Diputados más contra el Real Decreto Ley 2/1983, de 23 de febrero, y conforme previene el artículo 34.1 de la LOTC se acordó dar traslado de la misma al Congreso de los Diputados y al Senado y al Gobierno por conducto del Ministerio de Justicia, al objeto de que en el plazo de diez días pudieran personarse en el proceso y formular las alegaciones que se estimaran oportunas, al mismo tiempo que dispuso la publicación de la formalización del recurso en el 'Boletín Oficial del Estado'". Judgment 111/1983.

one hand, the notion of an untouchable property system based upon the Article 33 of the Spanish Constitution and other provisions would give support to the view of non-constraint on private entrepreneurship. The Articles 38 and 22, respectively, about freedom in economic enterprise and the right to association were used also to strengthen the primary source of law in property issues. The provision 14 related to an equal status in law claimed the right to a fair trial since the plaintiffs of the *recurso de amparo* said the Spanish Government could use the 1954 Expropriation Act to reach the same purpose and arbitrariness avoided.<sup>342</sup> The Article 24 relying on the right to an effective protection and the 9.3 evoking legal certainty were used also as subsidiary legal instruments as well. On the other hand, some magistrates saw in the case *Rumasa Bank v. Spain* the presence of force of law since the Royal Decree was not considered a permanent norm. However, the executive act in form of legal exercise of law was not originally from the Spanish Congress, it was approved by the parliamentary through the Royal Decree Act 7/1983. The legal reasoning of the Constitutional Court of Spain referred to *ex tunc* principle and reassured there was a coherent rationale in the legal proceedings.<sup>343</sup> If the present need for a general interest defense. Based upon the Articles 86.1 and 128, the judges who voted for the constitutionality of the Royal Decree 2/1983 defended the logic of extraordinary acts in harmony with ordinary law. For them, the congress had the prerogative to bar any illegality as the constitutional provision 86.2 says if the executive power proceeds to an illegitimate legal norm. Before the constitutional control, there are parliamentary tools to veto abuses and set limits to governmental policies. Although the judges were aware of discretionary power use in royal decrees, they pointed out the constitutional limits executive bodies had to observe.<sup>344</sup> The Spanish Constitutional Court affirmed all sort of control on *potestas* should be oriented by the principles of reasonableness, connecting factor and

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<sup>342</sup> Ley de Expropiación Forzosa de 1954.

<sup>343</sup> The Royal Decree 2/1983 instrument was converted into Decree Act 7/1983 with the support of the Spanish General Courts: “[...] en un procedimiento legislativo que tiene su origen en un Decreto Ley se culmina con una Ley que sustituye – con los efectos retroactivos inherentes a su objeto – al Decreto-Ley”. Judgment 111/1983

<sup>344</sup> “El Gobierno, ciertamente, ostenta el poder de actuación en el espacio que es inherente a la acción política; se trata de actuaciones jurídicamente discrecionales, dentro de los límites constitucionales, mediante unos conceptos que si bien no son inmunes al control jurisdiccional, rechazan – por la propia función que compete al Tribunal – toda injerencia en la decisión política, que correspondiendo a la elección y responsabilidad del Gobierno, tiene el control, también desde la dimensión política, además de los otros contenidos plenos del control, del Congreso”. Judgment 111/1983, p. 17.

transparency.<sup>345</sup> Even after the parliamentary validation of the Royal Decree, the governmental decision in expropriating the Rumasa Bank was taken inside technical limits as the Spanish Bank Bulletin corroborated.<sup>346</sup> The court analysis was innovative once just few years after the promulgation of the Spanish Magna Charter it was understood by the judges the need for sanctions against the abuses of proprietors in pursuing illegal financial practices in the housing market. However, the political bonds of the right-wing, which inherited top-down perspectives in the construction of power in alliance with economic powers financing its political campaigns, resisted.

The Spanish Constitutional Court did not reject the *recurso de amparo* and the Royal Decree 2/1983 was declared constitutional. The magistrates understood that the expropriation without any compensation was an extraordinary act and the urgent singularity sanctioning private property was under the name of general interest. The Article 33.3 could not be applied strictly with reference to compensation since the act of expropriation was not derived from an ordinary cause. The economic balance and the stability of the financial system depended on discretionarily rapid action: “Es justamente la indicada situación extraordinaria y urgente la que legitima la expropiación dentro de la exigencia de una norma habilitante para cumplir con el primero de los requisitos de la expropiación forzosa cual es la declaración de utilidad pública o interés social, no reservada necesariamente a Ley formal en el sistema del régimen general expropiatorio y, desde luego, no reservada a Ley formal en la Constitución (artículo 33.3)”.<sup>347</sup> The groundbreaking decision 111/1983 sets the stage of a constitutional

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<sup>345</sup> “Es claro que el ejercicio de esta potestad de control implica que dicha definición sea explícita y razonada y que exista una conexión de sentido entre la situación definida y las medidas que en el Decreto-Ley se adoptan”. Judgment 111/1983, p. 18.

<sup>346</sup> “Según el Banco de España la situación del Grupo comprendido en la medida ordenada por el Decreto-Ley en cuestión reclamaba una acción pública inmediata; el informe analiza las medidas o alternativas de acción posible y entre ellas, con una insinuada preferencia, la de toma de control del Grupo como conjunto ante el riesgo que se anuda a las otras alternativas o ante su inoperatividad. Dentro de este análisis, el Gobierno optó por la alternativa del control global a través de una expropiación, ordenada por el Decreto-Ley impugnado”. Judgment 111/1983, p. 18.

<sup>347</sup> “La expropiación que estamos considerando es, sin duda, un caso singular, no responde a esquemas generales y tampoco puede llevarse, sin hacer quebrar la institución, a modelos expropiatorios de signo sancionatorio, pero atiende a una situación extraordinaria de grave incidencia en el interés de la comunidad, comprometido por el riesgo de la estabilidad del sistema financiero y la preservación de otros intereses, que reclamaron, junto a una acción inmediata que no podría posponerse a la utilización de mecanismos legislativos ordinarios, la actuación global a través de la técnica expropiatoria”. The payment before hand is just acceptable if the expropriation comprises ordinary cases and causes. In that situation, the complexity of the Rumasa Bank is linked to an illegal condition and thus it requires an extraordinary treatment. The sources of law are extensively commented and many provisions presented by the authors of the *recurso de amparo* clarified. Nevertheless, our goal is just to show extraordinary concrete cases

debate that is also political, but very proportionate. The law in that specific case in a vivid re-democratic atmosphere tended towards opposite direction of the property system tradition. The decision of the Spanish Constitutional Court did not turn a blind eye to the irresponsibility and illegalities of Rumasa's proprietor.

Four years later the polemic about Rumasa Bank, the Judgment 37/1987 was the result of a contestation from dissatisfied politicians bringing up again the matter of expropriation. At that time, a group of Spanish parliamentary representatives in the National Congress put forward an action of unconstitutionality against the Andalusia Parliamentary Act 8/1984. The first issue assailing the local act was the competence of the autonomous power. The petition used the Article 149.1 of the Spanish Constitution, items I and XVIII, to justify that the Parliament of Andalusia did not have the juridical prerogatives to regulate matters of expropriation. With reference to territorial and economic planning, they affirmed the act infringed also the item XIII of the same constitutional provision. The Senator Luis Fernández Fernández-Madrid, who was commissioning 53 other senators, accused the local legislation of menacing the right to property once the Andalusian representative were not observing the limits posed by the Articles 53 and 53.1 of the Spanish Magna Charter. The claimers also said Andalusia could not establish objective criteria about land use. Neither were they able to dictate norms with the excuse of land protection nor defend any environmental question targeting property system. In their view, the Article 33.2 of the Spanish Constitution providing for the social function of property was disguised by the local act since the Spanish Civil Code was also under attack. According to the senators, the item VIII of the Articles 1, 14, 139.1 and 149.1 might be taken into consideration to avoid discrimination, observe agrarian reforms and compare other local acts. So, all proprietors should be treated equally in law. Other autonomous statutes like Catalanian and Basque legal frameworks would be affected since the entrepreneurs were about to face different market conditions. The Organic Act for Local Financing 8/1980 in its Article 6.2 could not coincide or collide with State taxable transactions. The senators finished their petition affirming the local act confronts the idea of entrepreneurship freedom as the Article 38 of the Spanish Constitution. The difficulty in delimiting the essential content of the right to property, defining the subjective law in the theme and

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lead to a deepened constitutional debate. Judgment 111/1983, p. 20.

the constitutionality of the social function of property supported the court decision. It was important to the magistrates the meaning of social as part of a private obligation implicit in the process of expropriation. The Spanish Constitutional Court attacked the tradition of defending legal norms on unlimited usufruct of proprietors' faculties. It was also said any imposition of positive duty to the landowner shall be rejected if the figure of the right to property is at risk.<sup>348</sup>

Yet the debate on expropriation was constitutionally qualified in the Judgments 111/1983 and 37/1987, dogmatic readings on other conflicts came back to the scene. The topic of legal capacity on land issues between local legislative power and Spanish government appeared again as an example of a pure exercise of adjective law. The judgment 149/1998 reiterated that conflict of competences in territorial planning basically defending the legal reasoning we have previously seen in the judgment 37/1987. The State attorney referred to the Basque Parliamentary Act 4/1990, Articles 21 and 25, as an inappropriate coordination of power distribution with inobservance of the Article 149.1, Constitution of Spain. So, the court rejected partially the action of unconstitutionality dictating null specific points of the local act. Although the Andalusian legislation could be more effective in territorial planning, the Article 21 would cause restrictions to the State competences. Its reference to the § 2, Article 17.3, 4/1990 Act, interfered in the free application of Spanish State enactments for territorial matters. Moreover, the Spanish norms could not be menaced by the Basque provision once the local act opened a legal parameter giving to the autonomous body the power to nullify State planning authority.<sup>349</sup> The Article 25 was also seen as unconstitutional since it collided with the public interest in aspects of authorisation on urban planning and revising illegal proceedings.<sup>350</sup> The Judgment 137/2012 repeats the conflict of

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<sup>348</sup> See the Judgment 37/1987: “[...] en efecto, esa dimensión social de la propiedad privada, en cuanto institución llamada a satisfacer necesidades colectivas, es en todo conforme con la imagen que de aquel derecho se ha formado la sociedad contemporánea y, por ende, debe ser rechazada la idea de que la previsión legal de restricciones a las otrora tendencialmente ilimitadas facultades de uso, disfrute, consumo y disposición o la imposición de deberes positivos al propietario hagan irreconocible el derecho de propiedad como perteneciente al tipo constitucionalmente descrito”.

<sup>349</sup> Read the second point of the Judgment 149/1990. The State lawyer, letter “a” of the petition, affirms: “Supone también, extremo al que se contrae exclusivamente la impugnación, que, en virtud de lo establecido en el apartado 3.º, párrafo segundo, del art. 17 de la Ley de Ordenación del Territorio del País Vasco, el Gobierno Vasco puede no consentir las rectificaciones solicitadas por el Estado en supuestos en los que exista un excepcional interés público, así como que, por el juego del apartado 5.º del mencionado art. 17, sean nulas ex lege aquellas determinaciones de la planificación estatal que contradigan la ordenación territorial vigente en el País Vasco”.

<sup>350</sup> “De otro lado, a tenor del citado precepto, al que se remite el art. 25 de la Ley de Ordenación del

competence in the Galicia Parliamentary Acts 18/2008 and 9/2002 once they obstruct a fluent application of State norms: “Para el Abogado del Estado, el precepto que es objeto del recurso de inconstitucionalidad vulnera las competencias del Estado derivadas de los artículos 132 y 149.1 apartados 1, 8 y 23 CE, por resultar contrario a la legislación estatal dictada en ejercicio de tales competencias constitucionales”.<sup>351</sup>

The disagreement between different levels of competence assumes a more complex facet. The Judgment 154/2015 was dictated after a petition proposed by more than fifty parliamentary representatives of the Spanish Congress on various provisions of the Andalusian Parliament Act 13/2005. One of the central issues for us is the right of the proprietors to estimate the prices of their officially protected houses when transmitting them to future buyers. The State attorney said the faculties of the owners should be guided by the Article 33 of the Spanish Constitution affirms and the limits for the usufruct of the property respected as the legislation established.<sup>352</sup> The measures for the protection of land and housing passed by the local legislative power were seen as unconstitutional since they menaced through its arbitrariness State public authorities, property rights, expanded local authority and the responsibility for urban planning. The Spanish Constitutional Court nullified the autonomous legal precepts attributed to the

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Territorio del País Vasco, son dos las decisiones diferenciadas a tomar: una, sobre si procede o no ejecutar el proyecto contrario al planeamiento y otra, vinculada a la anterior, sobre la iniciación del procedimiento de revisión o modificación del planeamiento. En tanto que la primera corresponde al Estado, y así se reconoce en el art. 25.2, los órganos que tienen que intervenir en la revisión del planeamiento y en las posteriores decisiones de trámite de los nuevos planes de naturaleza estrictamente urbanística o de ordenación territorial son los competentes en estas materias”. See the fifth part of the Judgment 149/1990, section Sources of Law or “Fundamentos Jurídicos”.

<sup>351</sup> See the Judgment 5/2015 about the conflict of competences evolving territorial, seashore and housing planning in the Canary Islands Parliamentary Act 7/2009. The Articles 132 of the Spanish Constitution related to the State patrimony and 149.1 are used to base the action of unconstitutionality. In other case, more than fifty senators proposed a discussion on the constitutionality of the Cantabria Parliamentary Act 3/2014 which was materialised in the Judgment 57/2015. The local norm gave competence to the autonomy to dictate territorial studies of environmental impact maneuvering the prerogative of State. A report for those areas of more than 100 hectares were including necessary to the Directive 85/337/CEE.

<sup>352</sup> “Respecto de la primera impugnación, el recurso expone el contenido de los arts. 12 y 13 de la Ley 13/2005, relativos al régimen jurídico de la transmisión *inter vivos* de viviendas protegidas, que atribuye derechos de tanteo y retracto a la Junta de Andalucía. Los diputados recurrentes no discuten que el legislador andaluz pueda legítimamente combatir la especulación en relación con las viviendas protegidas a través del establecimiento de límites a la transmisión y, en particular, mediante la atribución a la Administración de derechos de tanteo y retracto. Discuten que pueda constreñir las facultades de libre disposición de los titulares de viviendas protegidas más de lo que lo hacía la legislación precedente en contra del derecho de propiedad (art. 33 CE) y la prohibición constitucional de retroactividad de las disposiciones restrictivas de derechos individuales (art. 9.3 CE)”.

regional administration based upon the logic of subsidiary exercise of the powers in the matter.<sup>353</sup>

The importance of the constitutional debate is connected to the notion of limiting an abuse already noticed by the public competences. The notion that public urban investments result in surplus value is one of the cornerstones for an adequate analysis of the housing problem in Spain.<sup>354</sup> Regardless of the constitutional decisions till the present moment, with the two exceptions of the Judgments 111/1983 and 37/1987, it is important to make crystal clear that the implicit rationality in the quarrels evolving competences does not permit us to enter the economic disproportionality on the judgments related to the usufruct of right to property. Even when the petition does not demand whether speculation and surplus value can be considered unconstitutional or not, the court does not see the importance of creating jurisprudence with those elements compatible with a social aspect in a systemic view. The Court Order 135/2015 decided to suspend the Canary Islands Parliamentary Act 2/2014, items 1, 4, 6, 7, 23 and others, once these specific points in the legislation were understood to affect the general interest. If the fines predicted in the norm were applied for those empty housing units under companies' ownership, or if the non-occupied places available under social plans, the responsibility assumed by the proprietors could not be honoured. The judges understand the financial entities in Spain could be led to bankruptcy as the reports of European Commission, European Central Bank and World Bank confirm if the private debt structured with public funds after the 2008 crisis is ruined.<sup>355</sup>

As a contrast of the previous case, the decision 93/2015 was partially coherent with the notion of social function of the property, although the dispute between State and regional parliament was a dispute on the distribution of competences. The Spanish

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<sup>353</sup> See the Judgment 51/2004

<sup>354</sup> Hereon the surplus value is understood as the extra quantity of money increasing the property equity based upon the housing sale price before and after public investments. For many reasons, the property is historically one of the mechanisms for income concentration in real numbers and defended by political agreements in public administrations.

<sup>355</sup> The aspect of legal certainty was also put in appeal of unconstitutionality by the State attorney once the use of empty housing units could generate financial disequilibrium in the Spanish credit system: "Hace, finalmente, alusión a la vulneración de las competencias que atribuyen al Estado los apartados 11 y 13 del art. 149.1 CE, por cuanto las disposiciones impugnadas interfieren y afectan negativamente a la política económica y al sistema bancario y crediticio y ponen en peligro diversos bienes jurídicos, lo que se predica de toda la norma impugnada y, en especial, de la disposición adicional cuarta, y se apoya en los informes del Banco de España y de la Sociedad de gestión de activos procedentes de la reestructuración bancaria (SAREB) que se adjuntan con la demanda".



Constitutional Court declared null the first paragraph of the Article 1.3 of the Andalusian Parliamentary Act 1/2010 which affirmed it was part of the essence of the right to property the duty to effectively allocate good to residential use provided by law. The paragraphs 5 and 6 of the Article 25 and the Article 53.1, letter “a”, were rejected. The State attorney also impugned the Decree 6/2013 used to set the stage for the social function of the housing.<sup>356</sup> The rest of the Article 25 was declared constitutional provided it is interpreted as a tool of the regional development for policy housing. The second additional provision of the Decree 6/2013, which was used by the Andalusian Parliamentary Act 1/2010, was considered invalid. The rest of the appeal dismissed. However, the Spanish Constitutional Court has in its collegiate a non-consensual decision. One of the magistrates mentioned the inexistence of the jurisprudence in the matter discussed sufficiently construed to reject the second additional provision of the Decree 6/2010. In the view of the judge Adela Asua Batarrita, a *sui generis* rationality prevailed since the housing policies commented in the victorious judgment were all the ones that happened before the 2008 economic crisis.<sup>357</sup> Her particular vote seems to expose in fact the exercise of powers respecting the actual contingency in Spain. As we have already mentioned before more the four-hundred thousand foreclosures and 3.4 million of empty houses. How do the authorities have to act in that scenario?

#### **1.4. (C) Spanish singularities on supposed unconstitutional acts in private contracts**

The Constitutional Court of Spain almost elaborated what we call an adequate judgment about the conflict involving the usufruct of the right to property between proprietors and tenants with the sentence 89/1994 on 17 March 1994. The legal dispute

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<sup>356</sup> It is curious the notion of social function of the housing since the Article 33.2 of the Spanish Magna Charter makes explicit the social function of the property.

<sup>357</sup> “Para declarar la inconstitucionalidad de la disposición adicional segunda, la Sentencia de la que discrepo construye un canon *sui generis* que no tiene precedente alguno en nuestra doctrina constitucional. El eje de la argumentación que ofrece la Sentencia se basa en la contraposición de las políticas públicas adoptadas por el Estado y las adoptadas por Andalucía ante el mismo problema social derivado del desahucio de viviendas, y la consideración de que la norma autonómica ‘interfiere’ en las medidas estatales de política económica. En concreto se afirma que tal norma ‘interfiere, al menos el ejercicio de la competencia estatal en materia de ordenación económica (art. 149.1.13 CE), al realizar una regulación que se proyecta sobre un ámbito material que ya había sido regulado por el Estado’ y que ‘el legislador andaluz ha ejercitado la competencia que le incumbe en materia de vivienda de un modo que menoscaba la competencia estatal *ex art. 149.1.13 CE*’”.

started when the owner of the property questioned the constitutionality of the article 57 of the Spanish Urban Rental Act, 4.104/1964 Decree, related to the enforced extension of rental contracts. At that time, the law said the landlord was obliged to renew the contract observing specially the original clauses related to the price of the rent established by the parts. Concepción Aguirre Gómez had rented an apartment paying systematically a monthly amount that was considered by the renter inferior to the sum currently practiced in the market. The litigation arrived at the Constitutional Court of Spain when the proprietor María del Mar Bernaldo de Quiró pleaded the adjustment of the rent in almost hundred times more the quantity agreed. The decision of the court was categorical respecting the elements of connection between the right to property and its social function. The article 33 of the 1978 Constitution of Spain predicted in its clause II the notion of a non-absolute usufruct of the constitutional provision. Moreover, the decision connected the social function to the right to housing and the right to a stabilised familiar domicile as it is seen, respectively, in the articles 47 and 39.1 in the Spanish magna charter: “La historia de la regulación de los arrendamientos urbanos muestra efectivamente que la introducción de la prórroga forzosa, entre otras medidas, respondía a una finalidad tuitiva de intereses que se consideraban necesitados de una especial protección, concretamente la de los arrendatarios ante la situación del mercado inmobiliario; ello se verifica incluso en las mismas Exposiciones de Motivos de las leyes reguladoras de este tipo de arrendamientos (así, en la de la Ley de Bases de 22 de diciembre de 1955). En el contexto de la vigente Constitución, esa delimitación del derecho de propiedad encuentra una justificación en la proclamación del art. 47 del Texto fundamental, que recoge el derecho a disfrutar de una vivienda y ordena a los poderes públicos que promuevan las condiciones para ello necesarias. Además, no puede olvidarse la relevancia que la continuidad del arrendamiento reviste para la protección de la estabilidad del domicilio familiar, y de la misma familia, en la línea de lo dispuesto en el art. 39.1 de la Constitución. Responde así a la función social de la propiedad inmobiliaria, sin vulneración constitucional, que el legislador establezca una limitación de esa propiedad que, sin suponer su vaciamiento o desfiguración, pueda contribuir ( con mayor o menor fortuna, según las distintas teorías económicas) a satisfacer un derecho constitucionalmente afirmado. Y debe señalarse que un razonamiento similar puede llevarse a cabo respecto del arrendamiento de locales de

negocio, en cuanto que la prórroga forzosa representa un favorecimiento, por el legislador, del mantenimiento de empresas o actividades económicas ya establecidas, atendiendo a consideraciones de apoyo a la producción y al empleo, respaldadas por los mandatos de los arts. 35, 38 y 40 de la Constitución”.<sup>358</sup>

However, it is interesting the analysis of the rationale posed by the claimant in that case once it reveals the overcoming economic interest behind the petition. From a historical perspective, the judges of ordinary instances that had appreciated the conflict before said the article 57 created a margin of abusive benefits for the tenants since they could renew unilaterally their contracts without taking into consideration the property market changes along the years when the Urban Rental Act was passed: “La Exposición de Motivos de la Ley de Bases para la reforma de la legislación de arrendamientos urbanos de 22 de diciembre de 1955 exponía y justificaba como fundamento del mantenimiento de la prórroga forzosa en dichos contratos que, “sin embargo, no se pretende ofrecer con la presente Ley otras soluciones al problema que las estrictamente permitidas por las circunstancias actuales. La escasez de viviendas, determinante de un profundo desequilibrio entre la oferta y la demanda para la adquisición arrendaticia de aquéllas, subsiste con el agobio de una realidad incontestable, y esta misma realidad impide al Gobierno alterar los principios cardinales que sirvieron de norte al legislador de 1946, como antes a sus predecesores, a partir del Decreto de 21 de junio de 1920”. In other words, it is said: “Es decir, las razones que inspiraron al legislador de 1955, y posteriormente al de 1964, son las mismas, se han mantenido invariables y hacen referencia a una situación de postguerra, donde la falta de viviendas, como manifestación de la falta de desarrollo económico, podía justificarla necesidad de favorecer a un arrendatario económica y socialmente débil, frente a un propietario, en teoría, económica y socialmente más poderoso, probablemente con la finalidad legalmente reconocida de fomentar el derecho a una vivienda digna y además estable, frenando la especulación que sobre la vivienda podría existir precisamente por su escasez. Ahora bien, las circunstancias históricas de 1946, de 1955 y de 1964 no tienen identidad con las realidades jurídicas, sociales y económicas que disfruta nuestro país en 1989”.

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<sup>358</sup> Read the complete Judgment 89/1994 by the Constitutional Court of Spain affirming: “Que no hay lugar a declarar la inconstitucionalidad de los arts. 57 [prórroga forzosa de alquileres], 70, 71 y 73 de la Ley de Arrendamientos Urbanos”. *BOE*, núm. 89, jueves 14 de abril 1994, 56-70.

On the one hand, the plaintiff defended that if the tenant could not afford the place where she had lived it was urgent to find a more appropriate home coherently to her economic, social and cultural conditions. Furthermore, it was said that: “El Estado debe buscar fórmulas en su política que den cumplimiento al art. 47 de la C.E. para solucionar el problema existente: viviendas de protección oficial, ayudas a fondo perdido, abaratamiento de los créditos, generalización del derecho de superficie, etc”. On the other hand, the General Attorney of the Spanish State pleaded the Constitutional Court of Spain do dismiss the connection of the article 57 of the Urban Rental Act with supposed abusive restrictions on the right to property. The defendant affirmed the law in question was not contrary to the articles 14 and 33 of the 1978 Constitution of Spain. He added also that it was equivocal the argumentation of the plaintiff saying the right to renew rental contracts by tenants was an absolute prerogative of a unilateral unequal non-justified legal reasoning: “En primer lugar, no existe ni puede existir discriminación alguna en el art. 57 de la L.A.U. Del art. 14 C.E. no se deriva con carácter general y absoluto el principio de la igualdad contractual, sin desconocer su indudable importancia como auténtico principio estructural clásico del Derecho civil y, en general, del Derecho de contratos. El derecho fundamental a la igualdad proyectará sin duda sus exigencias sobre el derecho de contratos, y en determinadas ocasiones postulará la igualdad de las partes, o un determinado alcance y características de tal igualdad; pero no puede exigir una igualdad perfecta de las partes contractuales en todo contrato y situación, igualdad perfecta que ni el propio derecho de contratos recoge en todos los casos y que está sujeta a variadísimas configuraciones. Pero, respecto de la vulneración no del principio de igualdad contractual, sino del art. 14 C.E., falta uno de los presupuestos necesarios para constatar la existencia de discriminación; y es que las partes tratadas desigualmente no parten previamente de una posición de igualdad, sino que son sustancialmente desiguales. Ello porque así ocurre estructuralmente en gran número de contratos y, sobre todo, porque en este caso la desigualdad previa radica en un elemento absolutamente irrelevante desde un punto de visto económico, social y jurídico: la titularidad del derecho de propiedad, que una de las partes posee y la otra no”.

The background of the sentence 89/1994 recovers the initial part of our thesis on the economic reasons involving what we called previously the *poor demography*. For an

adequate judgment, which does not mean court or tribunal's work, the restrictions of the system of ownership must be thought in order to impede proprietors of progressively absorbing the gross capital formation and the aggregate income from the working class in a country. Therefore, it is important to understand that any legal act regulating the stabilization of prices in rents forces the excess of wealth in a society to be redirected to production. However, if there is not a public protagonism in implementing policies such as progressive taxes on the income from property contracts, the proprietors tend to spread a false legitimate interpretation of their ownership usufruct to guarantee a sort of proportional income they had seen going to the poor through rental contracts. As we posed before, it is also true that the history about property as an exponential source for the accumulation of capital creating the impediments to democratise the acces to an affordable place to live. That rationale is clearly apprehended in the parliamentary acts that tend to promote a legal protection of those families and individuals vulnerable after the 2008 economic crisis while "the forces of the market" feel such legislative acts as unfair. The following case of the 1/XI Resolution of the Catalanian Parliament makes evident how the Spanish State does not coalesce into an adequate judgment of the right to housing linked to the economic capacity of families as a tool to overcome the impoverishment of the working class.

In the Judgment 259/2015, the General Attorney of Spanish State assailed the 1/XI Resolution of the Catalanian Parliament which was forged during the political process promoted by *Junts pel Sí*. A coalition of right-center-leftists regarding the political process of Catalanian sovereignty. It was a pact mainly, because the President Artur Más advanced the local elections believing the opposition could pave the way to the process of independence. The first polemic point was the high costs of the electricity bill in Spain and measures to protect poor families from the constant cuts especially during the winter. So, previous communication to local authorities before suspending the services linked to heating or electricity was seen as indispensable. Moreover, the increase of public funds supporting the families with low incomes should be one of the priorities in public policies to confront the effects of economic crisis. The second item of the list was a defense of the right to housing. In that context, the future government elected after a constituency might avoid the process of eviction mainly affecting individuals and households at risk of social exclusion. It was proposed a principle of

relocation for the affected individuals and specific policies for the owners in order to make more effective the social function of property.<sup>359</sup> Health and education were respectively the parts three and four of the 1/XI Resolution.<sup>360</sup> They were presented as matters that should be shielded as public, free and with high quality. The fifth point was about the public liberties and more specifically the right to protection. The sixth the local authorities; the seventh about the reception of refugees; and the eighth the right to abortion. The ninth point was the one linked to a Debt Audit and restructuring of the public debt reviewing the contracts. The document had a list of nine issues in its appendix that were understood as confronting the central government. The collegiate of the Spanish Constitutional Court dictated a firm sentence saying the 1/XI Resolution passed by the Catalanian Parliament was unconstitutional. The magistrates' reasons for rejecting the regional norm were based upon the Catalanian inadequate use of the State distributive system of competence, a process of constituency with the intention of being independent and the political right of the individuals to decide about the creation of the Catalanian State. In order to connect the right to housing established by the article 47 of the 1978 Spanish Constitution, we collected a series of cases in which local powers try to limit the property usufruct enforcing an administrative order to banks, real estate agencies or urban developers with vacant dwellings. Then, some comments on the same issue are presented connecting the right to individual protection as it is affirmed by the article 24 of the Spanish Magna Charter and the right to housing from an international perspective.

## 2. Transcending dominium and possessio for adequate decisions

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<sup>359</sup> The Catalanian Act 24/2015 will be the object of a future analysis in the following Chapter V of the present thesis. The fight between the Spanish State and the Autonomous Community of Catalonia is up to a certain extent a renovated constitutional dispute of an open political contract. Abstract meanings, vagueness and empty contents in defining principles are some of the negative aspects of the Spanish Magna Charter. See Llorente, F. R. & Reyes, M. A. (1979). Enunciados aparentemente vacíos en la regulación constitucional del control de constitucionalidad. *Revista de Estudios Políticos*, 7(1), 161-169. About the organic laws and the simple majority, read Trujillo, G. J. (1979). Juicio de legitimidad e interpretación constitucional: cuestiones problemáticas en el horizonte constitucional español. *Revista de Estudios Políticos*, 7(1), 145-159. With reference to permanent aspects that make Spanish political system a continuous constituency is described by Vega, P. (1978). Los órganos del Estado en el contexto político en el contexto político institucional del proyecto de Constitución. In *La Costituzione Spagnola nel trentennale della Costituzione Italiana* (pp. 9-15). Bologna: Arnaldo Forni.

<sup>360</sup> We call the attention to the fact that the Catalanian Parliament impugned the Organic Acts 8/2013 and 4/2015 passed by the Spanish State.

## 2.1. Catalan judgments towards the right to housing

The idea of transcendence can be seen with the appreciation of the right to property belonging not to individuals. The conflict starts when a bank called Bankia S.A. receives an order to make the housing unit available in the market by a local administration for not respecting the Catalan Housing Act 18/2007. In its article 41.3, it is said all dwellings shall not be unoccupied for more than two years predicting pecuniary penalties varying in different amounts.<sup>361</sup> In case the proprietor disrespects the administrative order to avoid vacant houses, the owner breaches the constitutional prerogative of the social function of property. If the owner does not put in practice the condition of occupancy within the time established, the city is able to enforce the law including some sanctions for the proprietor. The rationale of obliging the use of the property within the interval predicted is based upon the social function of property stated in the Preamble, Part II, and the article 5 of the same act. The idea of “social” is also an urban contribution proprietors are expected to pay back to public resources once the equity of their ownerships comes from taxpayer money invested in the surroundings of the property. The bank disagreed with the local power saying that it had complied with the law provisions once the date presented by the city had been mistakenly counted. The institution showed documents to confirm the possession of the property was in fact ulterior the time calculated by the administration. The City of Terrassa did not accept such allegation, because the property had had its water supply contract interrupted for more than two years. The conclusion was that the place had not been occupied and the institution could not use the argumentation of possession to defend itself against the fine. The process came to the public eye in Catalonia as the *Bankia S.A. v. Ajuntament de Terrassa*.<sup>362</sup>

The conflict continued in other ordinary administrative court with the concept of *possessio* being presented again by the bank. The case was known initially as a legal

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<sup>361</sup> In Spanish, the expression is “utilización anómala de la propiedad”, which means literally in English “anomalous use of property”.

<sup>362</sup> *Bankia S.A. v. Ajuntament de Terrassa*, Recurso 472/2014-J Recurso ordinario, NIG: 08019 - 45 - 3 - 2014 – 8009897, Sentencia Núm. 192/2015, 10<sup>th</sup> Administrative Court of Barcelona, July 2015. Retrieved from <http://www.aclegalabogados.com/noticias/>. In the case Banco Popular Español S.A. v. Ajuntament de Terrassa, Procedimient Ordinari 155/2015-B, Sentència N. 255/2016, 5<sup>th</sup> Administrative Court of Barcelona, October 2016, the judge points out other ways of checking the dwelling in that situation was unoccupied beyond water bills. Among them, resident register in the City of Terrassa, the consume of gas, electricity and other registers.

battle between cities fighting for the right to housing in Catalonia and financial agents owning several homes still unused. The institution stressed its interest in denying its responsibility in that situation and, as a consequence, not paying the fine reasoning it was an inadequate procedure. The ordinary court appreciated the claim interposed in order to review the administrative penalty, but it held in low regard the proprietor's claim and disesteemed the legal recourse. The water supply contract was a material proof to give reason to the Terrassa City Council. The fine was understood as proportional and had to be paid regarding the bank was also responsible in making effective the social function of property.<sup>363</sup>

The same bank and the Terrassa administrative power had another legal debate since Bankia S.A. tried to convince the court the dominium of the property was not effective when another fine was applied for a different vacant housing unit: “[...] la Administración no tuvo en cuenta que la actora no había adquirido el dominio de la finca [...]”.<sup>364</sup> The financial institution also tried to convince the court an agreement for cooperation was signed with the Catalan Housing Agency in order to make the unit occupied in a two-year term.<sup>365</sup> The Catalan administration refused that argumentation once there was not a formal communication from the bank about any sort of co-work with other public agencies.<sup>366</sup> As the previous case, the dispute between private ownership and the public power arrived at the 12<sup>th</sup> Administrative Court of Barcelona. The court reiterated the same legal foundations presented by the Terrassa City Council and shed light on the definition of what would be considered a vacant housing unit. In addition, the sentence brings the fact of an adjudication decree transmitting the *dominium* of the property and the inexistence of a water supply contract. The judge called the attention to two aspects in that case. The first one has to do with enforcing the proprietor in renting the place. The second one is about the expropriation of the property usufruct. Both of them affirmed respectively by the articles 5 and 42.6, Catalanian

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<sup>363</sup> A similar case is also found in *Criteria Caixa Holding S.A. v. Ajuntament de Terrassa*, Procedimiento Abreviado 137/2015, Sentencia [no number], 9<sup>th</sup> Administrative Court of Barcelona, December 2015.

<sup>364</sup> *Bankia S.A. v. Ajuntament de Terrassa*, Procedimiento Ordinario 475/14-2A, Sentencia Núm. 179/2015, 12<sup>th</sup> Administrative Court of Barcelona, July 2015. See also the same parts in another case, Recurso Ordinario 467/2014 F-1, Sentencia 315/15, October 2015. The judgment favoured the local public administration of Terrassa once the bank could not prove its effort in making effective the social function of property.

<sup>365</sup> *Generalitat de Catalunya* [on-line]. Agència de l'Habitatge de Catalunya [Accessed on 4 december 2017]. Retrieved from <http://agenciahabitatge.gencat.cat/>

<sup>366</sup> See also the case *Bankia S.A. v. Ajuntament de Terrassa*, Procedimiento de Ordinario N. 469/2014-A, Sentencia 372/2015, 8<sup>th</sup> Administrative Court of Barcelona, December 2015.



Housing Act 18/2007. The court did not accept the procedural motion presented by Bankia S.A. and the fine had to be paid once the housing unit was unoccupied for more than two years. Another case evolving Criteria Caixaholding S.A. and the Ajuntament de Terrassa had the same debate of non-complete dominium of the proprietor to make effective the social function of the property. The judge did not accept the reasons presented by the litigant, because it was proved the bank did not have any impediment to formally possess the housing unit. Moreover, the judge said a decree of award in favour of the bank had transferred the property in question in a time that made the proprietor a legal ownership being totally responsible for the usufruct of the place. As a consequence, the administrative fine and understanding of the situation cannot be considered illegal as requested the representatives of Criteria Caixaholding S.A. against the Terrassa City Council.<sup>367</sup>

The Judgment 343/2015 evolving Bankia S.A. and the Terrassa City Council is very innovative in the sense of a social usufruct. After two years of leaving a dwelling vacant, the local administration required the bank a formal concession of the place in order to make it available in a social housing list. According to the financial institution, the property had already been occupied and the council did not take into account such information. In addition, the plaintiff of the motion affirmed the City of Terrassa did not consider the nature of the contract between the bank and third part that was in possession of the property with a social rent contract. The litigation was appreciated by the 7<sup>th</sup> Administrative Court of Barcelona and the sentence dictated. In fact, the property was in use and accomplishing its the social function.<sup>368</sup> However, the judge pointed out that the housing unit had been vacant two years before the interval referred by the local administration. Although, it is observed in the decision that the economic crisis in Spain affected the usufruct of properties, the bank was not exempt in making effective its social function through the occupation of the dwelling: “[...] el no haber atendido la

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<sup>367</sup> We translate “decreto de adjudicación” into decree of award as found in the literature. Procedimiento Ordinario N. 137/2015-E, Sentencia 317/2016, 8<sup>th</sup> Administrative Court of Barcelona, December 2016.

<sup>368</sup> The pecuniary penalty was also nulled for the same reason in the cases *Banco Popular Español S.A. v. Ajuntament de Terrassa*, Recursos Contencioso-Administrativo Ordinarios N. 156/2015-B and 176/2015-F, Sentencias 401/2015 and 402/2015, 7<sup>th</sup> Administrative Court of Barcelona, December 2015. The bank proved the housing unit was occupied by the time the administrative power imposed the fine. A real estate corporation was also adverted by the Terrassa City Council once the usufruct of the property did not meet its social function based upon the local power diligences. The proprietor Abanca Corporación, División Inmobiliaria SL, before NCG División Grupo Inmobiliario SL, proved the housing unit was available in open market and, posteriorly, was sold for a private resident. See Procedimiento Ordinario N. 427/2014-4, Sentence 18/2016, 1<sup>st</sup> Administrative Court of Barcelona, January 2016.

actora, en tiempo, al requerimiento de la Corporación local de Terrassa”. Moreover, the litigation in question shed light on the financial support from a public fund used to bail out banks and the judge used the article 3.1 of the Spanish Civil Code to construct in part his legal argumentation to reinforce a responsible usufruct of the property: “[...] la temática de fusiones-integraciones de la antigua Caixa d’Estalvis Laietana en Bankia, etc, son circunstancias todas ellas relevantes que justificarían cuanto menos parcialmente (se ha de estar la realidad social del tiempo en que han de ser aplicadas las normas, art. 3.1 CC) [...]”. The first instance recourse offered by the bank was partially esteemed regarding the period referred by the local administration, but the court recognised the importance in making effective the Catalanian Housing Act 18/2007.<sup>369</sup>

In the case *Building Center S.A.U. v. Ajuntament de Terrassa*, the builder says the Catalanian Housing Act 18/2007 does not give a proper legal basis to the local powers in order to apply fines. Furthermore, the litigant avers the City of Terrassa incurred in administrative acts that are not proportional to what is specified by the article 113 of the Catalanian Housing Act. According to the article 119, however, the public administration disagrees with the litigant saying its competences are fully legal and appropriate. In order to solve the dispute whether the administrative was or not competent to fine the proprietor, the court revisited the legislative context of the urban debate on the control of empty dwellings. It is legally accepted the most indicated body in the Spanish State to control the adequate usufruct of the property was clearly the local administration and such competence did not reveal any conflict with other public powers. As a result, the judge considered the proprietor had to conform its financial

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<sup>369</sup> *Bankia S.A. v. Ajuntament de Terrassa*, Recurso Administrativo-Contencioso Ordinario N. 472/2014-F, Sentencia 343/2015, 7<sup>th</sup> Administrative Court of Barcelona, September 2015. In the sentence, the judge mentions that the litigant received a financial support of 4.5 billion Euros from the Structural Fund for Banks in Spain, FROB in Spanish, Fondo de Reestructuración Ordenada Bancaria (FROB). Here, the implicit notion of tax payers money contributing to the financial system of property when the neoliberal rule is against of any public intervention in economy. In a different litigation with the same parts, the judge of the 1<sup>st</sup> Administrative Court of Catalonia, Procedimiento Ordinario N. 468/2014-4, Sentencia 189/2015, October 2015, put an end in the case for understanding the object of conflict was not vacant for unjustifiable reasons as mentioned by the local administration of Terrassa. The bank proved there was an agreement of cooperation between the institution and the Catalanian Housing Agency. The proprietors also showed the lack of information evolving the local and regional agents: “[...] al encontrarse dicha vivienda ofrecida a la administración autonómica de vivienda desde el 21 de febrero de 2014 y, más tarde, efectivamente arrendada mediante contrato social de arrendamiento”. See the case *Criteria Caixaholding S.A. v. Ajuntament de Terrassa*, Recurso Contencioso-Administrativo Abreviado N. 132/2015-A, Sentencia 282/2015, November 2015, 15<sup>th</sup> Administrative Court of Barcelona. Recourse partially accepted favouring the bank, but not denying the responsibility of the proprietor in making effective the social function of property.

practices with the total responsibility in making effective the occupation of its vacant dwelling. It was also mentioned the administrative had competence for imposing pecuniary penalties to enforce the accomplishment of the social function of property and decided that the fine in question was proportionate.<sup>370</sup> In this case, the litigant tried to convince the court the best remedy for the constitutional and infra-constitutional norms related to the social function of property was a defense making relative the local power in urban issues. The following case makes more explicit that strategy in weakening the cities competence on those matters related to what kinds of limits proprietors should be complied with.

The case *Banco Popular Español S.A. v. Ajuntament de Terrassa* leads us to a legal debate calling the attention to the constitutional prerogatives on urban planning. The judge affirms the bank, as a proprietors, could not question the competence of the local administration in imposing fines for unoccupied houses. The article 148.3 of the Spanish Constitution paves the path to territorial policies, although the Spanish State may also coordinate exclusively general economic policies as it is seen in the articles 149.1.11 and 149.1.13. The judge did not see any conflict with reference to the local power in implementing also through administrative procedures what is predicted in the Catalanian Housing Act 18/2007. So, the conflict should be solved taking into account whether the dwelling was vacant or not. According to many registers and documents, the Terrassa City Council made evident the dwelling was not occupied the time the bank was adverted. The judge confirmed the proofs were enough to decide on the proprietor's refusal in being committed to the social function of property based on the article 41.3, Catalanian Housing Act. The appeal was not upheld by the court and the bank had to pay the fine.<sup>371</sup>

The constitutional debate re-appears in another case evolving, again, *Bankia S.A. v. Ajuntament de Terrassa*. The financial institution insisted on the acts its legal representatives made to commit with the occupation of property showing a contract of

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<sup>370</sup> See *Building Center S.A.U. v. Ajuntament de Terrassa*, Procedimiento Abreviado N. 147/2015-B, Sentencia 267/2015, 13<sup>th</sup> Administrative Court of Barcelona, October 2015; also the dispute *Banco Popular Español S.A. v. Ajuntament de Terrassa*, Procedimiento Ordinario N. 148/2015-C, Sentencia 196/2016, 11<sup>th</sup> Administrative Court of Barcelona, June 2016; then the same bank against the Terrassa City Council, Procedimiento Ordinario 245/2014 – BY, Sentencia 193/2016, 14<sup>th</sup> Administrative Court of Barcelona, July 2016.

<sup>371</sup> See *Banco Popular Español S.A. v. Ajuntament de Terrassa*, Recurso ordinario 178/2015 – V, Sentencia 10/2016, 3<sup>th</sup> Administrative Court of Barcelona, January 2016.

cooperation with the Catalan Housing Agency. The judge said the effectiveness of the social function of property could not be realised with a simple formality in making available the housing unit. The bank had to do more than this. Moreover, the sentence refers to the article 1, Catalanian Housing Act, as very explicit wish of the legislator in supporting the social function of property through different solutions. One of them is the possibility of financial or institutional support with the help of public measures, as it happened during the 2008 economic crisis or even the role of actors such as the Catalan Housing Agency. The second one if the proprietors do not show any effort to pursue their obligations, a proportionate remedy is the application of a fine as a fiscal policy to make evident the costs are enormous for maintaining a vacant housing unit. The third one and the most severe action is the use expropriation through enforceable rents. All of the fines are in favour of what is constitutionally guaranteed as an adequate and social limits for non-occupied houses units since the constitutional legislator had in mind the property creates obligations.<sup>372</sup> The legal remedies are thought to reconnect the use of property to residential purposes and, consequently, avoiding speculation in real estate market. We reiterate the importance of regulating the property usufruct for those private enterprises such as banks, housing agencies and builders with massive quantities of housing units unoccupied.<sup>373</sup>

Procedural matters are also present in the disputes between the Terrassa City Council and financial institutions. The Judgment 32/2016, 11<sup>th</sup> Administrative Court of

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<sup>372</sup> Read the second legal basis as follows: “La Ley 18/2007, de 28 de diciembre, del derecho a la vivienda, tiene por objeto regular el derecho a una vivienda digna y adecuada según lo establecido en la Constitución (artículo 1 de la Ley). Para ello, entre otras medidas, declara que la desocupación permanente de una vivienda constituye una “situación anómala” (art 41) que habilita a las Administraciones competentes en la materia para instruir un expediente y conocer los hechos por los que se produce esa falta de ocupación y , si se confirman, adoptar medidas de distinto calado con el objetivo de incentivar su ocupación y penalizar su desocupación injustificada, entre las cuales se prevén medidas de fomento (subvenciones) y medidas fiscales (art. 41 y 42). E, incluso, si llega el caso de incumplimiento de la función social de la propiedad, estas medidas pueden desembocar en el alquiler forzoso de la vivienda o en la expropiación del usufructo ( art. 5 y 42.6)”. See *Bankia S.A. v. Ajuntament de Terrassa*, Procedimiento Ordinario N. 471/2014, Sentencia 4/2016, 9<sup>th</sup> Administrative Court of Barcelona, January 2016. The case *Banco Santander v. Ajuntament de Terrassa* brings forward the same conflict with a sentence observing the constitutional prerogatives for urban matters and the competence of the local administration to impose fines. The content of the decision can be consulted in the Procedimiento Ordinario N. 568/2014, Sentencia 10/2016, 9<sup>th</sup> Administrative Court of Barcelona, January 2016.

<sup>373</sup> See the case *Banco Popular Español S.A. v. Ajuntament de Terrassa*, Procedimiento Ordinario 153/2015 – BR, Sentencia 206/2016, 14<sup>th</sup> Administrative Court of Barcelona, September 2016, in which the bank brings forward a lengthy argumentation about the differences between individuals and companies as private owners. The judge refuses such extensive debate observing the responsibility of the proprietor in being committed to the social function of property regardless of its juridical nature.

Barcelona, refers to the omission of the bank in showing the contracts and services hired by Bankia S.A. in order to adequate the use of its property. The proprietor did not make the public power know two other third parties the Catalan Housing Agency and Haya Real Estate S.L.U. were in charge of managing the vacant housing unit in question.<sup>374</sup> The judge called the attention to the material proofs the local power had in hands when the litigant interposed a legal recourse at the Terrassa City Council. It also came into light the fact that the administration had not had clear the vacant unit was under third-party care in order to show its commitment to the social function of property. Nonetheless, not always procedural issues operate in favour of the Terrassa City Council. Analysing the case *Banco Popular Español S.A. v Ajuntament de Terrassa*, the judge points out it is difficult for proprietors to make effective the social function of property once the Spanish socioeconomic reality still suffers from the effects of the 2008 crisis. According to the judgment, it is not even feasible to rent or sell a housing unit with so strict time of ten days imposed by the administrative penalty. Moreover, the fines aggravate the financial condition of the institution if the time limit imposed by the local administration is acceptable as reasonable. The judge esteemed totally the legal recourse of the bank.<sup>375</sup>

The case *Buildingcenter S.A. v. Ajuntament de Terrassa* is a dispute in which the private owner as a litigant intends to put in evidence the local administration shall comply beforehand with the Spanish normative framework for sanctions and, only after that, apply coercive fines. The proprietor points out the 30/1992 Act for Public Administrations and Common Administrative Procedures says public powers must carry on instructions first and then proceed to the stage of fines. However, the judge in charge of the case argues that the monetary penalties predicted in the Catalan Housing Act 18/2007 have a different and independent nature. In other words, it is possible the application of coercive fines without being necessarily an administrative sanction: “Así, este precepto lleva por título ‘Multas coercitivas no sancionadoras’, prevé la imposición de este tipo de multas ‘con independencia de la acción sancionadora’ y solo exige como requisito para imponerlas que ‘transcurran los plazos señalados para llevar a cabo una acción u omisión previamente requerida’. Además, la

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<sup>374</sup> See Procedimiento Ordinario N. 472/2014-A, Sentencia 32/2016, February 2016.

<sup>375</sup> See *Banco Popular Español S.A. v. Ajuntament de Terrassa*, Recurso Contencioso-Administrativo Ordinario N. 155/2015-A, Sentencia 59/2016, 15<sup>th</sup> Administrative Court of Barcelona, March 2016.

Ley 18/2007 no ubica este precepto dentro del régimen sancionador, sino de manera independiente”.<sup>376</sup> The other aspect presented by the litigant was the fine could not be applied once the dwelling in question was inappropriate to be occupied. The judge refused that reasoning, because it is the responsibility of the owner to keep the property in adequate condition and all the imperfections were a clear evident proof of abandonment of the housing unit. Any serious structural or physical problem was found in all inspections realised by the administrative competences that needed a *sui generis* attention to the case. Last, but not least, the owner tried to convince the court the penalty applied was not proportionate since the selling or the rent of the property could never result the quantity of money requested by the public administration. The judge mentions the fine corresponds less than a year of rents and refers to the fact the housing unit was empty for more than two years.<sup>377</sup> The court disesteemed the recourse demanded by the Buildingcenter S.A. against the Terrassa City Council.<sup>378</sup>

As a consequence of the local administrative actions in applying pecuniary penalties to make owners more committed to the social function of property, some of the disputes have arrived at the Catalan Superior Court of Appeal for administrative questions.<sup>379</sup> In order to repeal a first instance decision in favour of Bankia S.A., the Terrassa City Council appealed to the superior court pleading the annulment of a precautionary measure in which the financial institution was the plaintiff. The bank had succeeded in suspending local administration coercive actions restricting their property usufruct of the empty housing unit. In that case, the city did not base which actions

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<sup>376</sup> See *Buildingcenter S.A. v. Ajuntament de Terrassa*, Procedimiento Ordinario 146/2015 – AA, Sentencia N. 267/2016, 14<sup>th</sup> Administrative Court of Barcelona, November 2016.

<sup>377</sup> The legal debate evolving proportionality is also found in *Criteria Caixaholding S.A. v. Ajuntament de Terrassa*, Procedimiento Ordinario N. 137/2015-E, Sentencia 317/2016, 8<sup>th</sup> Administrative Court of Barcelona, December 2016.

<sup>378</sup> Read “Las sentencias favorables en Terrassa validan la potestad y competencia del Ayuntamiento para incoar expedientes de acuerdo con el artículo 41 LDHCat; afirman que la desocupación incumple la función social del derecho de propiedad; validan el procedimiento administrativo aplicado por el Ayuntamiento, que daba garantías suficientes, sin ninguna necesidad de esperar a un futuro Reglamento de desarrollo de la LDHCat; validan la potestad para imponer multas coercitivas y su proporcionalidad; afirman que no son causas justificativas de mantenimiento de una vivienda vacía por más de dos años supuestos como por ejemplo la suscripción de convenios entre una entidad bancaria y la Agencia de la Vivienda de Cataluña, la imposibilidad de ocupación por la crisis inmobiliaria, el hecho que las viviendas se encuentren en comercialización o la imposibilidad de la ocupación por la inestabilidad de las fusiones y absorciones de entidades”. See Ponce Solé, J. (2016). El derecho subjetivo a la vivienda exigible judicialmente: papel de la legislación, análisis jurisprudencial y gasto público. In Caballería, M. V., Ponce Solé, J. & Ramos, R. A. (Eds). *Propuestas jurídicas para facilitar el acceso a la vivienda* (p. 132). Madrid: Fundación Coloquio Jurídico Europeo.

<sup>379</sup> Tribunal Superior de Justicia de Cataluña, Sala de lo Contencioso Administrativo.

should be taken to avoid the anomalous use of the dwelling and it is shown in the sentence dictated by the Catalan Superior Court of Appeal. Beyond that, the judge called the attention to the fact a suspension of the ordinary sentence did not result in the effective occupation of the vacant housing unit. The article 42 does not give any legal basis to what presented the local administration: “este Tribunal advierte que la actuación para evitar la desocupación permanente de la vivienda ordenada por la resolución recurrida, en principio, a sua fecha y a la fecha de incoación del respectivo expediente, el 4 de marzo de 2014, no parece tener encaje entre las previstas por el artículo 42 de la Ley 18/2007, de 28 de diciembre, del derecho a la vivienda[...]”.<sup>380</sup> The judge disesteemed the appeal presented by the city and confirmed the ordinary decision on precautionary measures which was the object of the dispute. However, not consenting to the local administration rationale does not mean the public powers cannot make an agreement with the financial institutions to make more effective the right to housing. Such understanding is more evident in a different sentence with the same actors with the intention of enforcing the law: “acordar el alquiler forzoso de la vivienda’, lo que el Ayuntamiento apelante no cuestiona [...]”.<sup>381</sup>

Few days after the previous case, the Catalan Superior Court of Appeal had to appreciate a similar conflict in which the Banco Santander S.A claimed precautionary measures against the administrative actions of the Terrassa City Council in forcing the bank to rent an empty housing unit. Using a different strategy, the city representatives proved the administration presented incessantly a quantity of documents adverting the proprietor about the anomalous use of the property. The judge accepted the legal basis of the local power as a coherent rationale to the purposes of the social function in making effective the property usufruct. The magistrate also emphasised that the bank had never presented a proof of being committed to its legal obligation in putting in practice the occupation of the dwelling in question. In other words, the court used the same reasoning to refuse the appeal of the Terrassa City Council against Bankia S.A. in the dispute we have commented previously to favour in the present case the local

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<sup>380</sup> Case *Bankia S.A. v. Ajuntament de Terrassa*, Rollo de Apelación Auto N. 258/2015, Sentencia N. 932/2015, Tribunal Superior de Justicia de Cataluña, Sección Tercera, December 2015; Recurso Contencioso-Administrativo N. 470/2014, 6<sup>th</sup> Administrative Court of Barcelona, March 2015.

<sup>381</sup> Case *Bankia S.A. v. Ajuntament de Terrassa*, Rollo de Apelación Auto N. 159/2015, Sentencia N. 105/2006, Tribunal Superior de Justicia de Cataluña, Sección Tercera, February 2016; Recurso Contencioso-Administrativo N. 473/2014, 14<sup>th</sup> Administrative Court of Barcelona, January 2015.

power: “[...] la tesis sustancial que se hace valer la parte actora [Santander Bank S.A.] en primera instancia, hoy parte apelante [Santander Bank S.A.], es que nunca ha declarado ni se ha establecido la obligación legal de ocupación de la vivienda de autos con la tramitación del correspondiente expediente que la imponga”. So, the judge decided to disesteem the appeal of Santander Bank.<sup>382</sup>

## 2.2. International judgments towards the right to housing affecting Spain

The case *Mohamed Aziz v. Caixa d’Estalvis de Catalunya, Tarragona i Manresa Catalunyaacaixa*, document C-415/11, November 8, 2012, is an emblematic dispute about abusive clauses evolving a mortgage contract. After being appreciated by a local judge from the 3<sup>rd</sup> Commercial Court in Catalonia, the object of the controversy was submitted to a consult at the Court of Justice of the European Union in order to clarify whether Mr. Mohamed Aziz had his rights violated according to the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. The first issue addressed to the juridical institution of the EU raised the question of incompatibility in the Spanish law with what would be considered fair terms of a consumer contract. The article 3 of the Council Directive aforementioned affirms that any clause in a contract shall be negotiated individually and the conditions for the debt payments must observe the principle of *bona fide*: “[...] in order to assess whether the imbalance arises ‘contrary to the requirement of good faith’, it must be determined whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to the term concerned in individual contract negotiations”. Until that time in Spain, mortgages used to be sold without a personal criterion assuming equivocally that all consumers could be treated as just one economic body. Other conflictual point was about the interest rates applied automatically to those

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<sup>382</sup> Case *Banco Santander S.A. v. Ajuntament de Terrassa*, Rollo de Apelación Auto N. 237/2015, Sentencia N. 115/2006, Tribunal Superior de Justicia de Cataluña, Sección Tercera, February 2016; Recurso Contencioso-Administrativo N. 566/2014, 8<sup>th</sup> Administrative Court of Barcelona, February 2015. There are other international cases, judgments and references related to the right to housing and property system in the context of European Union and the Council of Europe. See Ponce Solé, J. (2008). El derecho a la vivienda. Nuevos desarrollos normativos y doctrinales y su reflejo en la Ley Catalana 18/2007, de 28 de diciembre, del derecho a la vivienda. In Ponce Solé, J. & Sibina Tomàs, D. (Eds). *El derecho a la vivienda en el siglo XXI: sus relaciones con la ordenación del territorio y el urbanismo* (pp. 65-175). Barcelona: Marcial Pons.



consumers in case of default. The European Court saw as an uncommon practice the annual amount of 18.75% without any need for notice, but did not declare in its opinion whether the Spanish State permitted such unfairness. However, based upon the concept of “significant imbalance”, article 3.1, Directive 93/13, Spain had to assess: “[...] in the light of an analysis of the rules of national law applicable in the absence of any agreement between the parties, in order to determine whether, and if so to what extent, the contract places the consumer in a less favourable legal situation than that provided for by the national law in force”. The court also emphasised the unfair practices in consumer rights predicted in the article 3.3 of the Directive 93/13 was not exhaustive, but indicative.<sup>383</sup>

Back to Spain the case, the 3<sup>rd</sup> Commercial Court in Catalonia dictated a final decision making explicit the clauses present in the contract were abusive.<sup>384</sup> Although the case *Mohamed Aziz v. Caixa d’Estalvis de Catalunya, Tarragona i Manresa Catalunyacaixa* was more a legal debate on consumer law, its effects favoured the concept of the right to the individual protection based upon the article 47 of the European Charter of Fundamental Rights as the Catalan judge mentions in his final decision. Other aspect is the international dimension in that debate of how local legislation shall implement European rights. Other positive consequences generated by the case were the limits Spain should take into account for conflicts evolving evictions. Mr. Mohamed Aziz was evicted from his house with his family without having the right to defend himself once there was not a legal instrument permitting the affected to face his mortgage foreclosure at that time. For the Spanish society, a simple defense of consumer law intimately connected to a property was symbolic among the social movements fighting for the right to housing in times of crisis.<sup>385</sup>

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<sup>383</sup> See Court of Justice of the European Union, First Chamber, Press Release N. 30/13, Luxembourg, 14 of March, Judgment in Case C-415/11, *Mohamed Aziz v. Catalunyacaixa*. In May 2013, after having the declaration on abusive clauses from the Court of Justice of the European Union, the judge José María Fernández Seijo conformed his decision to the article 695 and the following provisions of the Spanish Civil Code averting the consumer defense in that case was clearly limited. He adds the individual protection of the consumers in Spain was not plainly exercised once the national law for mortgages foreclosures imposed also material obstacles. See SJM B 21/2013, Tercer Juzgado Mercantil de Barcelona, Recurso N. 13/2011, Sentencia, May 2013.

<sup>384</sup> Juliane Kokott was the general lawyer that conducted Aziz’s defence at the Court of Justice of the European Union. She has been a professor of the St. Gallen University in Switzerland and fought for the importance of reviewing the contracts containing abusive clauses in the European context. Retrieved from <http://curia.europa.eu/juris/document/document.jsf?text=&docid=129481&pageIndex=0&doclang=ES&mode=req&dir=&occ=first&part=1&cid=475722>

<sup>385</sup> See Micklitz, H. (2013). Unfair contract terms. Public interest litigation before European Courts. In

The individual protection in case of defaults in mortgage contracts resulted in a debate on up to a certain extent the Spanish State had violated the right to housing in a case known *I.D.G v. Spain*. The plaintiff was a client of private bank and paying a housing mortgage when stopped the monthly payments. The lending institution immediately after demanding in full the loan given proceeded to enforce the mortgage's debt through a foreclosure procedure in the 31<sup>st</sup> Trial Court of Madrid. After the formal request of the bank in initiating the foreclosure procedure, the judicial power had failed in communicating to the national the bank's intention in auctioning and evicting her at the beginning of the litigation. Ms. I.D.G. was finally aware of what was happening and contested the court position in not making effective the information arrival in order to give her the possibility of an appropriate defense. According to her, the ordinary court had to nullify the bank's petition, because its procedures corroborated the violation of her rights predicted in the Spanish Civil Procedure Act in informing properly the affected. However, the Court of Madrid stated "[...] it had no jurisdiction to annul the auction order of 11 February 2013, under articles 5 and 562, paragraph 2, of the Civil Procedure Act and article 455 of the Organic Act on the Judiciary".<sup>386</sup>

The possibility of the plaintiff in defending herself was reduced once she could not even know an auction was undergoing under her name. Therefore, without being aware of the foreclosure procedures published on the Official Gazette, Ms. I.D.G. presented a motion affirming her right to a defence and effective legal protection, *inter alia*, was violated under the articles 156 and 164 of the Spanish Civil Procedure Act. The 31<sup>st</sup> Trial Court of Madrid declined her petition. In May 2013, Ms. I.D.G. files an appeal in *amparo* and presented it at the Constitutional Court affirming her rights to an effective individual protection under the articles 24 and 25 of the Spanish Constitution of the State party had been violated. The plaintiff pointed out the Court of Madrid had failed to exhaust: "all available means of serving notice in person, in accordance with articles 155, 156 and 683 of the Civil Procedure Act". In October 2013, the Spanish

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Colaert, V. & Terry, E. (Eds). *Landmark cases of EU consumer law: in honour of Jules Stuyck* (pp. 639-652). Cambridge: Intersentia. Read also Sánchez, S. I. (2014). Unfair terms in mortgage loans and protection of housing in times of economic crisis: *Aziz v. Catalunyaixa*. *Common Market Law Review*, 51(3), 955-974.

<sup>386</sup> *Committee on Economic, Social and Cultural Rights (CESCR)*, Communication No. 2/2014, Views adopted by the Committee at its fifty-fifth session (1-19 June 2015). It is relevant in that case the presence of the *amicus curiae* represented by the International Network for Economic, Social and Cultural Rights (ESCR-Net).

Constitutional Court disesteemed the plaintiff's appeal and confirmed the previous decision dictated by the Court of Madrid: "manifest absence of violation of any fundamental right covered by *amparo*". As a final decision, the constitutional mentioned its interpretation of the case was "in accordance with articles 44, paragraph 1, and 50, paragraph 1 (a), of the Organic Act on the Constitutional Court".<sup>387</sup>

Regarding the article 91, paragraph 1, of the Optional Protocol of the *International Covenant of Economic, Social and Cultural Rights*, as Spain a State party of the document, Ms. I.D.G claimed her rights on the lack of effective access to the courts in protecting the right to adequate housing. Bearing in mind the lack of effective access to the Spanish courts in protecting her right to adequate housing, Ms. I.D.G. requested the Economic and Social Council whether the Spanish State as party of the Optional Protocol had disrespected or not the articles 11 and 2, paragraph 1, about the right to an adequate housing and the individual protection. The economic crisis was used to contextualise her own demand: "[...] the author missed several mortgage repayments, totalling around € 11,000". In addition, Ms. I.D.G. said the bank was not prepared to negotiate: "On 21 June 2012, the Court admitted the enforcement application in the amounts of the € 381,153.66 (principal), € 5,725.80 (ordinary interest) and € 856.77 (default interest)".<sup>388</sup> In response to the Economic and Social Council, the Spain affirmed: "With the aim of ensuring the effectiveness of the right established in article 11, paragraph 1, of the Covenant, the State party promulgated Act No. 1/2013 of 14 May, on measures to strengthen protection for mortgage holders, debt restructuring and social rents; and Royal Decree-Law No. 27/2012 of 15 November, on urgent measures to strengthen protection for mortgage holders. Moreover the State party is of the view that the mortgage enforcement procedure regulated by the Civil Procedure Act strictly meets the obligations arising from the right to effective judicial protection". At

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<sup>387</sup> "It adds that the Constitutional Court has found that the mortgage enforcement procedure, and more specifically articles 695 and 698 of the Civil Procedure Act, do not affect the right to effective judicial protection as regards the equality of the parties and the right to decent and adequate housing, since the ruling handed down in this procedure does not produce effects of *res judicata* and the ordinary procedure is always available". See *Committee on Economic, Social and Cultural Rights* (CESCR), Communication No. 2/2014, Views adopted by the Committee at its fifty-fifth session (1-19 June 2015). It is relevant in that case the presence of the *amicus curiae* represented by the International Network for Economic, Social and Cultural Rights (ESCR-Net), p. 5.

<sup>388</sup> *Committee on Economic, Social and Cultural Rights* (CESCR), Communication No. 2/2014, Views adopted by the Committee at its fifty-fifth session (1-19 June 2015). It is relevant in that case the presence of the *amicus curiae* represented by the International Network for Economic, Social and Cultural Rights (ESCR-Net), p. 3.

the end, the Economic and Social Council declared Spain violated the right to an effective remedy in ensuring that the auction of the plaintiff's property should not proceed until the moment a due procedural protection and due process guaranteed. The Committee called the attention to the State parties that the Economic and Social Council's General Comments Numbers 4 and 7 had the mission of avoiding evictions. Then Spain had to "reimburse the author for the legal costs incurred in the processing of this communication". Related to the general recommendations, the Committee said: (a) Ensure the accessibility of legal remedies for persons facing mortgage enforcement procedures for failure to repay loans, (b) Adopt appropriate legislative or administrative measures to ensure that notification by public posting of notice in mortgage enforcement procedures is strictly limited to situations in which all means of serving notice in person have been exhausted [...], (c) Adopt appropriate legislative measures to ensure that the mortgage enforcement procedure and the procedural rules contain appropriate requirements (see paras. 12.1-12.4 and 13.3-13.4 above) and procedures to be followed before going ahead with auction of a dwelling, or with eviction, in accordance with the Covenant and taking into account the Committee's general comment No. 7".<sup>389</sup>

### 3. The Federal Supreme Court of Brazil and its singularities

As a contrastive view between the Constitutional Court of Spain and the Supreme Federal Court in Brazil, we have selected plenty of judgments on the usufruct of the right to property. The cases were divided into two branches, i.e., constitutional remedies for individual protection and appeals against ordinary decisions on property tax, garbage, construction and *usucapio*.<sup>390</sup> Yet in this second branch, the reader will

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<sup>389</sup> *Committee on Economic, Social and Cultural Rights (CESCR)*, Communication No. 2/2014, Views adopted by the Committee at its fifty-fifth session (1-19 June 2015), pp. 15-16.

<sup>390</sup> The Brazilian Federal Supreme Court is a body that decides on cases in which a constitutional right is the object of a litigation in all levels of the federation. It has eleven justices and the sessions are realised individually, in groups or, depending on the relevance of the case, by the plenary including all judges. Among its main attributions, it is competent to determine the direct actions of unconstitutionality either of a federal or a state law or act; declaratory action of constitutionality either for a federal law or normative act. It also appreciates any allegation about the breach of fundamental precept deriving from the Magna Charter itself and extradition requests by a foreign State. After Constitutional Amendment 45/2004, it was introduced the possibility of approving, after repeated decisions on a range of constitutional matters, a summary with a binding effect to the other organs of the Judiciary and to the direct and indirect exercise of public administration. The rationale of "binding summaries" is valid at the federal, State and municipal

find one extraordinary legal dispute on *usucapio*, three requests on technical measures of construction, two about municipal garbage tax and one connected to labour collective rights. All cases we collected from the archives of the Brazilian institution refer to the social function of property, its logic and constitutional disputes around the principle. The time series covers the years 1988-2016 and we justify that selection based upon the re-democratic political spirit of Brazil after the promulgation of the 1988 Magna Charter. As before in the Spanish section, our intention analysing the judgments does not corroborate conclusive theories that made the magistrates decide the way they did. When we describe the legal apparatuses and the actors involved in the cases, we assume again our preference for systematic legal reasonings since the institutional body of a constitutional tribunal is originated in a social pact that is unavoidably political too. Hereon we reiterate that dogmatic views produced by constitutional tribunals is a relevant matter for the judges since they believe the quality of their sentences is elevated by the emphasis on adjective law and legal proceedings. However, the effects of all decisions uttered with excess of formalities and reticent in trespassing the boundaries of motivation tend to promote distortions.<sup>391</sup> Other aspect related to the sentences is the juridical competences that intervene in property conflict and are evolved in the *mandado de segurança* or appeals. Private proprietors are overwhelmingly demanding their rights against State decrees of expropriation, local acts regulating taxes and technical diligences for construction. State lawyers are more defensive. Another curious fact is why the social function of property was not used by the local administrative authorities to implement progressive taxes on property. Its internal and external limits most of the time were defined by the Brazilian Suprem Federal Court without being necessarily motivated.

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levels (article 103-A of the CF / 1988). Regarding penal law and the competence of the Court, it is competente to conduct any investigation, trial and judgment when the accused is the President of the Republic, the Vice-President, the members of the National Congress, his own Ministers and the Attorney General of the Republic, among others (Article 102, I, a and b of CF / 1988). In May 2017, the Brazilian Senate passed a constitutional amendment to exclude the members of the National Congress of that mechanism of individual protection. The idea is to guarantee the same conditions for politicians' defence as they are for common citizens.

<sup>391</sup> In the following section of the present chapter, we will introduce the idea of the usufruct of the right to property as an instrument to correct distortions between public investments and owner's contribution to society after an increase of the surplus value. There are also other questions such as the external and internal limits of the right to property under a constitutional concept and how local power deal with the abuses of proprietors.

*Periculum in mora* and *fumus boni iuris* were also presented by the judges of the Brazilian court to balance the conflicts in property. There are legal formalities, adjective law prerequisites, dates and the need for the appropriate use of competences, however, those impediments derived from whether being motivated or not were not a legal excuse to deny other principles relevant to the cases. The social function of property, the right to property and expropriation were gaining more and more presence along sentences we selected. Nonetheless, we also found problematic issues in our empirical effort related to the time judicial review was taken by the court to be elaborated. Binding decisions on the conflict of property system lasted twelve years and the diffuse control of constitutionality did not convince proprietors about the limits property. Social contents and the surplus value are not a consensus neither in juridical nor administrative realms. State decrees used to expropriate and promote diligences were constantly questioned by a myriad of proprietors. The legal entity responsible for the inspections of productivity and land efficiency descends from the Military Regime (1964-1985). In terms of its social function for agrarian reform, the Instituto Nacional da Colonização e Reforma Agrária (INCRA) is still seen as an attack to what we called emotional right previously since it is an attempt to impede the excess of irresponsible proprietors.<sup>392</sup>

**Table 2. The two main legal topics around the right to housing.**

**BRAZILIAN FEDERAL SUPREME COURT’S JUDGMENTS/ORDERS  
Enforcement– Housing-Land Issues**

Mandado de Segurança Constitutional Remedy to Individual Protection <b>A</b>	Appeals against Ordinary Decisions on Property Tax, Garbage, Construction and <i>Usucapio</i> <b>B</b>
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<sup>392</sup> The Decree 1.110/1970 creates the INCRA and puts an end to the Instituto Brasileiro de Reforma Agrária, Instituto Nacional de Desenvolvimento Agrário and the Grupo Executivo da Reforma Agrária. The Statute of the Land, 4.504/1964 Act, affirms in its Article 14 the preference and support of the government in order to helping families and cooperatives occupy unproductive lands with the goal of making the territory socially productive. The Article 2, *caput*, and the same provision paragraphs 1 and 2, “b”, defend the social function. Retrieved from [http://www.planalto.gov.br/ccivil\\_03/leis/L4504.htm](http://www.planalto.gov.br/ccivil_03/leis/L4504.htm).

In each case, the federal administrative competence is committed to technical and legal proceedings whether to dictate or not reports in favour of expropriation. So property titles, local visits and possession are commonly parts of the disputes in the cases we appreciated once the ownership faces the State as a pillager not authority. The issues related to environmental questions were also raised along the reading of the sentences, but for the purposes of our thesis were left apart.

With reference to urban disputes on property and housing issues, we have found that tensions are more connected to the payment of property taxes and few cases about norms for construction. Collective demands are frequently observed in the appeals analysed. The quantity of recourses for ordinary instances is rarely respected. Extraordinary pleas escalate till the Federal Supreme Court and the decisions are not sufficient in creating an automatic previous judicial review. In other words, the tribunal possibly offered the same legal reasoning to similar appeals for years before assuming a binding interpretation which is not a real decision in fact. The procedure of creating documents to orient lawyers, both private and State professionals, generates other issue of how far is the Federal Supreme Court of Brazil able to formulate “positive law”. The following scheme helps us apprehend the numerous sentences used in our research. We found just one case evolving empty housing units and squatters, *i.e.*, *usucapio*.

### **3.1. (A) Brazilian singularities on the mandado de segurança for the individual right to protection**

Along the present section, we point out the Brazilian particularities in the *mandado de segurança* appreciated by the Federal Supreme Court. There are twenty-two cases and the disputes around the property system started in the beginning of the 1990s. The subjects of law in the petitions are most of the time proprietors and State. There are few moments in which natives, landless rural labourers or possessors dating decades are plaintiffs of the *mandados de segurança*. On the one hand, owners are willing to prove the arbitrariness of the public acts, supposed unfair decrees of expropriation and failures in technical diligences against INCRA.<sup>393</sup> The *Mandado de*

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<sup>393</sup> Instituto Nacional de Colonização e Reforma Agrária or the National Institute of Colonisation and Agrarian Reform. Free translation by the author. See Appeal N. 183.188/1996, Mato Grosso do Sul, in

*Segurança* N. 21348-5/1993, Mato Grosso do Sul, was declared object of agrarian reform. The proprietor questioned the 1991 Decree based upon the 8.629/1993 Act and the 76/1993 Complementary Act. The expropriation was enacted not taking into consideration the size of the farm. Since the land had the limits of a middle size ownership and it was his only property, the plaintiff persuaded the tribunal and had a favourable result. The norms do not allow the act of expropriating small farms as well.

Another State Decree was considered null by the supreme court in the *Mandado de Segurança* N. 22164-0/1993, São Paulo, because the correct diligences were not taken by the INCRA. The proprietor was not notified by the institute as the Article 2 affirms in the paragraph 3, 8.269/1993 Act. So, the judges understood the due process was at risk as the 1978 Brazilian Constitution says in its Article 5, LIV. The sentence also declared that the rights of the first, second and third generations should be guaranteed. In case of expropriation, continued the sentence, it was expected to observe adjective law matters. An analogous situation was seen some years later in the *Mandado de Segurança* N. 24547-6/2003, Distrito Federal. Respecting the same legislation, the tribunal rejected the appearance or doubt of arbitrary procedures in setting the days for State officials' visit. The Decree of Expropriation was declared null. Nevertheless, abuses not only operated by the State against private owners. Some proprietors try to create the appearance of defenselessness affirming in a specific case that a land belonging to more than one person could not be the object of expropriation since just one of the proprietors were formally communicated by the INCRA. The *Mandado de Segurança* N. 24488-7/2005, Distrito Federal, is a crystal-clear example of how State officials may misconduct inspections. There are other proprietors that use incessantly the possibilities of recourses till the highest tribunal to impose a distorted idea of judicial review in constitutional diffuse control. The *Mandado de Segurança* N. 22285-9/1996, São Paulo, resulted in a victory for the Brazilian State when the proprietor questioned the technical measurement of his land and wanted the tribunal to declare whether other procedures were valid or not. The court did not enter into that debate once the 8.629/1993 Act, Article 2, paragraph 2; and Articles 6 and 9, explicitly delegated the plaintiff's doubt to the administrative competence. The Articles 185, II, and 186 of the 1988 Constitution of the Federative Republic of Brazil were mentioned

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which lands reserved for natives were object of quarrels. Fundação Nacional do Índio won the juridical battle against private proprietors.



as the legal apparatus that incumbent the federal power in the figure of INCRA to proceed to expropriation. If any doubt remained, the plaintiff should look for the ordinary instance and respect the steps of a formal controversy. The *Mandado de Segurança* N. 22302-2/1996, Paraná, was rejected by the same reason. However, in this case the court called the attention to the State Decrees 55.891/1965 and 56.792/1965 as a traditional normative framework in which the contestation shall be constructed. According to the magistrates, the INCRA pursued the Article 16, 4.504/1964; and the Article 45, III, of the same legislation. The federal competence was internally regulated by the 8/1994 Normative Rules. The magistrates denied in stating the annulment of the Decree of Expropriation/1995. The same legal reasoning was followed in the *Mandado de Segurança* N. 24503-4/2003, Distrito Federal. The plaintiff tried to impugn the 10.267/2001 Act and convince the court the diligences of the INCRA were illegal, because a proper register of the property was not taken for granted.

The *Mandado de Segurança* N. 22802-4/1997, Paraíba; N. 23312-9/1999, Paraná; and N. 23032-6/2001, Alagoas may be understood as examples of conflict between the extraordinary and ordinary justice. The Federal Supreme Court analysed strictly the fact that adjective law are matters for the first and second instances. Technical information on productivity, size of the farm and abuses against Civil Law are more appropriate to the administrative competences of INCRA. The Article 186 and the Article 5, LIV, 1988 Constitution of the Federative Republic of Brazil, define all the rites for a diffuse control and application of the constitutional remedies in ordinary instances. The judges also stressed the importance of limiting the content of what defines those petitions through a *mandado de segurança* after the lower courts dictating firm sentences. In these *mandados de segurança*, substantive due process of law might be evoked to guarantee that anyone would be prevented from life, property and liberty without a due process. Nonetheless, the opposite is also true for the tribunal since the law could not admit the claim of a remedy deriving from the possibility of errors or mistrust in legal proceedings. The 8.629/1993 Act, Article 2, paragraphs 2 and 3, reinforced the legal reasoning of the court in that sense. The *Mandados de Segurança* N. 23148-4/2002, Goiás, Santa Rosa Farm was declined by the magistrates for the same reason, but with the specificity of the Articles 6 and 7 of the same act, respectively, on the productivity of the area and the technical issues related to the implementation of

agricultural innovative projects that must be professionally oriented. The *Mandado de Segurança* N. 24494-1/2004, Distrito Federal, did not meet favourably the petition for the proprietor. In all these cases, the Federal Supreme Court affirmed that its constitutional body was not encumbered with the examination of the licences, diplomas of the workers able to develop the tasks *in locus* and other prerequisites.

Yet the legal proceedings were highlighted by the court, if there were abuses or actions contrary to the legal order, they were expected to be reviewed. In the *Mandado de Segurança* N. 23949-2/2002, Distrito Federal, the federal competence of INCRA sent a message of inspection the same day the invigilator was in the property. The Article 2, paragraph 2, 8.629/1993 Act, determines previous communication for the visit of State officials. The court understood the diligences of notifying the proprietors the same day of inspection reinforced illegality and the disrespect of time procedures. The legal order and formalities are not only in favour of proprietors among the cases we selected. The same happened to the *Mandado de Segurança* N. 2213-0/2002, Distrito Federal, presented by both the Labour Party and the National Confederation of the Labourers in Agriculture. After occupying an area, the two actors demanded that the Provisional Measures N. 2027-38/2000 and N. 2183-56/2001 were declared unconstitutional.<sup>394</sup> The principle of *periculum in mora* was evoked by the claimers, but the court took into account the *caput* of the Article 62, 1988 Constitution of the Federative Republic of Brazil, and other provisions in the infra-constitutional order such as the Article 95-A, 4.504/1964 Act to withhold the petition. The Article 5, item XXII, of the Magna Charter, was also stated to reassure the defense of the right to property. The Federal Supreme Court regarded the need for the accomplishment of substantive due process of law to expropriate. The *Mandado de Segurança* N. 23759-7/2002 shows us the pursuit of the right to property from the perspective of a private owner. He called the attention to illicit proceedings in the expropriation of his land and the court decision disapproved the land occupation. The judges nullified the State decree in which the property was condemned for public interest in agrarian reforms act. Even respecting the social function of property principle the court did not admit legal abuses by the INCRA.

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<sup>394</sup> Provisional measures in the Brazilian constitutional legal order are dictated by the president and shall be submitted to the parliament for their approval. The acts have to meet the principle of *periculum in mora* and urgent procedures to face any negative material contingency. They are usually a matter of dissent, because of their economic nature.

The *Mandado de Segurança* N. 23006-5/2003, Paraíba, entered into the due process matter again and the supreme tribunal confirmed that expropriation was predicted by constitutional provisions, however, the federal competence had to follow its diligences and make the social function of property explicit. The Article 184, 1988 Constitution of the Federative Republic of Brazil, *caput*, and the Provisional Measures N. 1577/1997 and 2183-56/2001 were coherent with that principle as well. There are cases in which both sides won. The *Mandado de Segurança* N. 24764-9/2005, Distrito Federal, proposed by a private owner was partially accepted by the court when it was proved the land could not be expropriated due to the fact social movements occupied the are to pressure the federal State. Such practice is not allowed by the legislation 8.629/1993 Act, Article 2, paragraph 6.

A polemic topic that evokes the prerogative of property internal limits is the one that came into light with the division of an inherited property. The federal competence is questioned by both sides, that is to say, the landless social movements interested in the expropriation of the ownership for agrarian reform and the proprietors against the presidential decree approving the expropriation. In the *Mandado de Segurança* N. 24573-5/2006, Distrito Federal, one of the owners defended the legal reasoning that his right to property was at risk, because his ownership was on the list of the INCRA's inspection affirming his land was unproductive – one of the criteria for expropriation.<sup>395</sup> He tried to impede the access of the federal officials to his land not cooperating with the appropriate procedures carried out by the Brazilian federal authority. The Federal Supreme Court declared that the Land Statute, 4.504/1964, Article 46, paragraph 6, regulated the actions of the competences with reference to productivity. Furthermore, it was not possible to reach a conclusion whether the visited area by the agents were inspected. The proprietor also showed the area had been parcelled in smaller plots and transformed into nine condominiums destined to residence not agricultural production. The understanding of the Federal Supreme Court was in favour of the agrarian reform and the petition for an immediate protection of a fundamental right not accepted in that case. Other judgment related to the internal limits was present in the *Mandado de Segurança* N. 25299-5/2006, Distrito Federal. The proprietors tried to change the criteria established by the interpretation of the tribunal in the Article 46, paragraph 6,

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<sup>395</sup> See the *Mandados de Segurança* N. 24307-4/2002, Distrito Federal; N. 26129-3/2007, Distrito Federal; N. 26192/2011, Paraíba; N. 25344/2014, Distrito Federal; N 26336/2014.

4.504/1964 Act. The owners wanted the justices declared the ideal fragment of the collective land as the object of measurement susceptible to the INCRA's diligences. If it were admitted, the land could not be considered the object of State expropriation since the area of each proprietor's unit did not meet the size criteria. The Federal Supreme Court rejected the *mandado de segurança* and mentioned that legal reasoning since the documents proved the separation of the land was registered after the 4.504/1964 Act. The Articles 1.784 and 1.791, Brazilian Civil Code, were also quoted to defend the indivisibility of the property. The judgment referred to an abundant number of cases and the tribunal made explicit the concepts we just presented in that part of our thesis in the *Mandados de Segurança* 25304/2004 and 25299/2005.

### **3.2. (B) Transcending the singularities and appeals against ordinary decisions<sup>396</sup>**

This section is devoted to the analysis of appeals that were presented to the Brazilian Federal Supreme Court with reference to the application of property taxes, municipal garbage taxes, construction and one case of *usucapio*. The following years of the 1988 Constitution of the Federative Republic of Brazil, the social function of property's principle was not immediately recognised as an instrument of correction. Neither proprietors nor local administrative authorities faced the urban ownership as a policy for surplus value distribution, tool against speculation and mechanism of property's control. The Civil Law traditions and emotional property right we mentioned in the first chapter of the present thesis have to do with the internal and external relations ownership evokes in contemporary life. In the case of Brazil, the social function of property during the constituent assembly was an object of a long debate between 1987 and 1988. Private perspective trespasses the boundaries of its internal legitimate rights questioning State taxes on ownership. Until the appearance of the Constitutional Amendment 29/2000 proprietors remained overprotected for two basic reasons. First, due to the fact that the local administrative competences did not make the

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<sup>396</sup> The appeals were translated from the Brazilian legal proceedings for extraordinary recourses. Due to numerous kinds of petitions, appeals and other instruments, we decided to simplify in just one term for a clearer text. So appeal is appropriate once it is more connected to those recourses in higher juridical instances. For the purposes of our research, we had in the section A "mandados de segurança" and in the section B "agravo regimental", "embargos declaratórios" and "recurso extraordinário".

social function of property explicit in documents passed by municipal parliaments. The Federal Supreme Court did not defend the application of these taxes if the legal tool to correct distortions on property matters in urban context were not legitimised by written law. Secondly, the motivation used by local acts with social taxes did not make explicit the property in certain urban contexts had more benefits than other zones since the investments in infrastructure are not equally distributed. Surplus value derived from ownership in upper middle class neighbourhoods, very high density in gated communities with skyscrapers and the number of private cars per property are still pending in the Brazilian constitutional dispute as a refined interpretation of the social impacts linked to the property system. Costs for the city in mid-long-term perspectives are not part of both the Brazilian and Spanish realities.

In the Appeal N. 153771-0/1996, Belo Horizonte Municipality versus private proprietor, the local competence was defeated for applying property tax. According to the Federal Supreme Court, relying on the Article 182, paragraph 2 and 4, item II, 1988 Constitution of the Federative Republic of Brazil, the use of extra fiscal tax might be specified in the municipal norms as an instrument derived from the social function of property. If it were not followed that legal reasoning, it was licit the pursuit for the impediment of the application of progressive taxes on property. Individual income should not be taken into consideration for the progressive tax legal basis on property regarding the Article 145, paragraph 1; and Article 156, paragraph 1, Brazilian Magna Charter. The same logic is present in the Appeals N. 167654-0/1997, Belo Horizonte Municipality; N. 189824-8/1997, São Paulo Municipality. We found the plaintiffs of these appeals claiming their rights in not being taxed using the social function of property once any of the extra fiscal monetary obligation should be based upon a social functionality. In other words, the contribution of a possible charge for the social interest was combated by the absence of the social concept in the municipal normative framework.

During the 1990s, the Santo André Municipality, Appeal N. 192737-2/1997, tried to impose taxes on property based upon the 6.747/1990 Act. The proprietor did not agree with the articles 2, 3 and 4 of the municipal legal document compelling him to pay extra fiscal taxes. He justified his petition stating all norms contrary to the Brazilian Constitution should be questioned as the Article 102, III, “a”, says. The supreme

tribunal understood the municipality abused of its competences in imposing progressiveness in urban taxes since the legal reasoning of the act was not regimented in the social function of property or even made explicit the concept as the Magna Charter defended. So the application of the municipal provisions impugned was declared unconstitutional by the magistrates.<sup>397</sup> The court also indicated the Article 97, paragraph 1, of the National Tax Code; the Articles 59, 61 and 69, 1988 Constitution of the Federative Republic of Brazil, to interpret favourably the cause to the plaintiff of the appeal. Similar cases like this mushroomed in a few time as the Appeals N. 191181-3/1997 and N. 194944-7/1997 show us. Both of these last two petitions occurred inside the São Paulo Municipality, the biggest and monstrous metropolitan area of Brazil. Till the present moment, all the extraordinary recourses appreciated in this section were decided pro-proprietors. Local competences did not use the constitutional prerogative of the social function to justify their interventions in urban taxes. The following cases we selected below composes a curated list of losers on the left *versus* winners on the right. They condense the idea of how social function is avoided, neglected and even forgotten by the local legislator just the moment after the promulgation of the 1988 Constitution of the Federative Republic of Brazil.<sup>398</sup>

#### **List of Appeals on Progressive Property Tax and Unconstitutionality**

Appeal N. 204666-3/1998, Santo André Municipality v. Private Proprietor  
Appeal N. 196337-9/1998, São Paulo Municipality v. Private Proprietor  
Appeal N. 230343-7/1998, São Paulo Municipality v. Private Proprietor  
Appeal N. 222172-2/1998, São Paulo Municipality v. Private Proprietor  
Appeal N. 199281-3/1998, São Paulo Municipality v. Federal Brazilian State  
Appeal N. 232063-1/1999, São Paulo Municipality v. Private Proprietor  
Appeal N. 229233-7/1999, São José do Rio Preto Municipality v. Private Proprietor  
Appeal N. 248892-5/1999, Rio de Janeiro Municipality v. Private Proprietor

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<sup>397</sup> See the Declaration of Unconstitutionality N. 2732/2015 proposed by a private author and the court rejected his thesis against the São Paulo Municipality.

<sup>398</sup> We showed along the Chapter II of our present thesis how social function of property was present much before the 1988 Constitution of the Federative Republic of Brazil. However, there are some considerations about the systemic contradictions of the social function evolving the political and juridical conflict through Niklas Luhmann's perspective. Read also Simioni, R. L. (2006). A sublimação jurídica da função social da propriedade. *Lua Nova*, 66(1), 109-137.

Appeal N. 229164-5/2001, Guarulhos Municipality v. Private Proprietor  
Appeal N. 423.678-7/2003, Ipatinga Municipality v. Private Proprietor  
Appeal N. 456513-1/2003, Diadema Municipality v. Private Proprietor  
Appeal N. 481031-1/2004, Rio de Janeiro Municipality v. Private Proprietor  
Appeal N. 463679-9/2004, Ipatinga Municipality v. Private Proprietor  
Appeal N. 468801-0/2004, Santos Municipality v. Private Proprietor  
Appeal N. 394010-4/2004, Porto Alegre Municipality v. Private Proprietor  
Appeal N. 470599-6/2004, Rio de Janeiro Municipality v. Private Proprietor  
Appeal N. 345416-1/2004, Rio de Janeiro Municipality v. Private Proprietor  
Appeal N. 430421-0/2004, Rio de Janeiro Municipality v. Private Proprietor  
Appeal N. 390688-2/2004, Rio de Janeiro Municipality v. Private Proprietor  
Appeal N. 482017-6/2005, Rio de Janeiro Municipality v. Private Proprietor  
Appeal N. 841221-3/2005, Private Proprietor v. Rio de Janeiro Municipality  
Appeal N. 403613-4/2005, Rio de Janeiro Municipality v. Private Proprietor  
Appeal N. 428675-1/2006, Curitiba Municipality v. Private Proprietor  
Appeal N. 417958-5/2006, Rio de Janeiro Municipality v. Private Proprietor  
Appeal N. 458404-2/2006, Rio de Janeiro Municipality v. Private Proprietor  
Appeal N. 516410-2/2006, Rio de Janeiro Municipality v. Private Proprietor  
Appeal N. 408062-0/2006, São Bernardo do Campo Municipality v. Private Proprietor  
Appeal N. 362570-5/2006, Rio de Janeiro Municipality v. Private Proprietor  
Appeal N. 486301-1/2006, Belo Horizonte Municipality v. Private Proprietor  
Appeal N. 392144-4/2007, Private Proprietor v. Rio de Janeiro Municipality  
Appeal N. 511572-1/2007, Rio de Janeiro Municipality v. Private Proprietor  
Appeal N. 478327-2/2007, Rio de Janeiro Municipality v. Private Proprietor  
Appeal N. 380427-8/2007, Rio de Janeiro Municipality v. Private Proprietor  
Appeal N. 646582-1/2007, Rio de Janeiro Municipality v. Private Proprietor  
Appeal N. 659918-9/2007, Rio de Janeiro Municipality v. Private Proprietor  
Appeal N. 478903-3/2008, Rio de Janeiro Municipality v. Private Proprietor  
Appeal N. 550848-9/2008, Rio de Janeiro Municipality v. Private Proprietor  
Appeal N. 518648-2/2008, Curitiba Municipality v. Private Proprietor  
Appeal N. 636315-3/2009, Private Proprietor v. Curitiba Municipality  
Appeal N. 727315-7/2009, Belo Horizonte Municipality v. Private Proprietor  
Appeal N. 583636/2010, Campo Grande Municipality v. Private Proprietor  
Appeal N. 437107/2010, Curitiba Municipality v. Private Proprietor

Appeal N. 607616/2010, Rio de Janeiro Municipality v. Private Proprietor  
Appeal N. 595080/2010, Private Proprietor v. Curitiba Municipality  
Appeal N. 423768/2010, Private Proprietor v. São Paulo Municipality  
Appeal N. 652935/2011, Gravataí Municipality v. Private Proprietor  
Appeal N. 466312/2011, Rio de Janeiro Municipality v. Private Proprietor  
Appeal N. 598218/2011, Rio de Janeiro Municipality v. Private Proprietor  
Appeal N. 586693/2011, Private Proprietor v. São Paulo Municipality  
Appeal N. 590360/2011, Vitoria Municipality v. Private Proprietor  
Appeal N. 752743/2011, Ipatinga Municipality v. Private Proprietor  
Appeal N. 568947/2011, Blumenau Municipality v. Private Proprietor  
Appeal N. 466400/2011, Private Proprietor v. Porto Alegre Municipality  
Appeal N. 742328/2012, Ipatinga Municipality v. Private Proprietor  
Appeal N. 399624/2012, Porto Alegre Municipality v. Private Proprietor  
Appeal N. 394011/2013, Private Proprietor v. Porto Alegre Municipality<sup>399</sup>  
Appeal N. 704846/2013, Londrina Municipality v. Private Proprietor  
Appeal N. 752117/2013, Belo Horizonte Municipality v. Private Proprietor  
Appeal N. 639632/2013, Private Proprietor v. Campo Grande Municipality  
Appeal N. 466400/2015, Private Proprietor v. Porto Alegre Municipality

After reading the appeals, there is a legal reasoning that must be mentioned.<sup>400</sup>  
A very important document was passed by the National Congress in form of amendment of the Magna Charter. So the Constitutional Amendment 29/2000 put an end in those interpretations that questioned the application of progressive taxes on property. The idea of charging ownerships were divided into two aspects. First, if proprietors are not responsible with the social use of their property along years, the local administrative competences are allowed to constitutionally constrain them to pay extra fiscal taxes. Secondly, if the property belongs to a zone where more public money was invested, the councils are able to create different property taxes among the zones. However, the constitutional prerogatives do not make explicit if these charges are allowed to be proportionally constructed and take back the advantages of the surplus value of the property.

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<sup>399</sup> Partially won.

<sup>400</sup> Emenda Constitucional 29/2000 and Súmula Vinculante 668/2003.



Other norm that makes more effective the legal reasoning previously referred is the Binding Decision N. 668/2003. The top-down juridical mechanism is a path to come to terms with a series of conflicts as we have showed. In other words, the document was elaborated by the Federal Supreme Court evoking the social function of property's principle recognised in the Articles 5, XXIII; and 182, paragraphs 2 and 4, 1988 Constitution of the Federative Republic of Brazil. The interpretation of the Article 145, item III, was prone to the idea that property taxes must include those municipal costs related to the betterment of public spaces. It was decided also the competence of the municipal power could apply property taxes relying on the Article 156, paragraph I. Therefore, the progressiveness in time and space of property taxes in the Brazilian constitutional system tried to establish a diffuse control of constitutionality. We can analyse also the Appeals N. 338859-2/2006 and N. 362578-1/2008, Rio de Janeiro Municipality, in which a hotel and a private proprietor had their petitions esteemed by the supreme court. According to the Constitutional Amendment 29/2000, the criteria of extra-fiscal tax and the principle of progressiveness were acceptable if the petitions did not date back to a previous time set by the act.

The Appeal N. 422349/2015 on *usucapio* conflict is more a tense relationship between the local legislation of Caxias do Sul Municipality and the 1988 Constitution of the Federative Republic of Brazil than a property conflict in itself. The possessor had an urban unit of 225 squared meters where he has lived pacifically dating the year of 1991. According to the Article 9, the Municipal Act N. 308/2008 predicts 360 squared meters for a minimum land parcel. So the first legal quarrel emerged from that dispute, because the municipal officials could not recognize technically an area inferior to 360 squared meters defined by the Municipal Act. The size of the possession was also understood as an impediment, because the Brazilian Constitution, Article 183, set the minimum of 250 squared meters for urban standard. Secondly, the proprietor registered in the notary public of Caxias do Sul Municipality was not found by the State officials to be notified and a third party appeared affirming he was a possessor too. On the first disagreement, the solution of the Brazilian Federal Supreme Court was based on the Article 183 of the Magna Charter. Yet the magistrates agreed the minimum was explicit as a constitutional parameter for an urban *usucapio* in 250 squared meters, they could not deny the right of the possessor. The court also mentioned the civil competence for

that was strictly given to the Federal State based upon the Statute of the City, Articles 9 to 14. Moreover, the judges added the property shall commit to its social function as the Article 39 of the same document says. The rigorous minimum land parcel could not be used an obstacle for the juridical title that guarantees a pacific possessor the right to property. The other issue evolving a co-possessor was not admitted since the 1988 Constitution of the Federative Republic of Brazil in the Article 183 established clearly the time of five years for any contestation and bar the usufruct of *usucapio*. The appeal was appreciated and the case classified as general interest. Brazil has more than 5,500 municipalities.<sup>401</sup>

### 3.3. Constitutional adequate judgments for the usufruct of the right to property

*Time changes and we are changing ourselves in it* says the Latin proverb.<sup>402</sup> In Brazil, the Article 5, LIV, 1988 Constitution of the Federative Republic of Brazil, is usually taken as a source of law to support the idea private owners have to comply with the social function when using their properties. A more attentive observer of the Brazilian scenario would agree with the current huge progress the country has made in urban questions, the application of taxes for subused propertie and even expropriation. Brazil has passed the Statute of the City in 2001, the Federal Act 10.257, as one of the pillars to enforce by law a social dimension linked to the general interest for property

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<sup>401</sup> Yet the case of usucapio evolving technical aspects for land occupation was decided favourably for the possessor, there are other cases in complete abuse by proprietors and possessors. The Appeal N. 140436-1/1999, São Paulo Municipality, was about proprietors constructing in an area environmentally protected. After being notified by the municipality, the authors sued the public administration saying they were victims of restrictions related to the usufruct of their titles. The Federal Supreme Court rejected the petition and quoted the Brazilian Civil Code, Article 572, calling the attention to those zones non *aedificandi*. In the Appeal N. 078836-4/1999, Ribeiro Preto Municipality, proprietor also wanted the permission to build extensively in his land. The court judged offensive the interpretation of an unlimited right. The social function of property, Article 5, XXIII, 1988 Constitution of the Federative Republic of Brazil; and the right to property in the item XXII, shall be in harmony with the municipal urban planning. Furthermore, the claim of authors disrespecting the non *aedificandi* areas confronted the principle of isonomy. These two appeals are very illustrative examples of external and internal limits of the right to property in the Brazilian constitutional system. The Appeals N. 226942-7/2008 and N. 387047-5/2008, Florianópolis Municipality, were cases related to the excess of constructed areas established by the local legislation. The owners did not want to pay an extra-fiscal tax on property. The Federal Supreme Court rejected the petition and reaffirmed the local competence to dictate local based upon the Statute of the City, Article 30. The proprietors' onus was a manner of compensating the zones in the city.

<sup>402</sup> Free translation from Latin proverb *Tempora mutantur, nos et mutamur in illis*.

and city including also housing issues. In the article 182 on urban policies, the *caput* poses as an objective the social function of the city as a general command to provide the well-being of the people who live in the cities: “A política de desenvolvimento urbano, executada pelo Poder Público municipal, conforme diretrizes gerais fixadas em lei, tem por objetivo ordenar o pleno desenvolvimento das funções sociais da cidade e garantir o bem-estar de seus habitantes”. In the same provision, the paragraph 1 refers to the constitutional mandate for municipalities in planning the urban development of territories with more than twenty thousand inhabitants. That legal prerogative is indispensable to the implement the social function of property and the mechanisms to enforce its application according to the constitutional charter. The paragraphs 2 and 3 introduce respectively the legal responsibility owners must comply with the social function of property and, in case of expropriation for general interest, a previous fair compensation. Finally, the paragraph 4 of the article 182 transfers to the municipal public power the competence to make the proprietors develop adequately their land plots or adapt their plans of construction to avoid subusing the property. If not observed the obligations, proprietors are obliged by the municipal public powers to subdivide or even develop their ownerships. Another competence of the city administration is the application of progressive taxes varying in price based upon the time the property is left unoccupied. The expropriation is the last remedy local governments may use for extreme situations in which the Brazilian Senate shall evaluate the case.

In Spain, the article 33.2 of the 1978 Spanish Constitution declares the right to property shall comply with the same principles of the social function of property. The competences for urban land planning, urban issues and housing are stated in the article 148.1.3 of the Magna Charter.<sup>403</sup> In addition, the 7/2015 Spanish Legislative Real Decree for territorial development and the sustainability of the urban areas affirms in the article 3.1 public administrations must use strategic measures to implement public policies on regulation for planning, occupying, changing and using the urban areas with due respect to the general interest. The article 3.2 says the public powers have to pursue

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<sup>403</sup> Read Doménech, I. P. (1997). El principio de proporcionalidad y la jurisprudencia constitucional. *Jueces para la Democracia*, 28(1), 70; Martens, P. (1992). L'irrestible ascension du principe de proportionnalité. In *Presence du droit public et des droits de l'homme: mélanges offerts à Jacques Velu* (pp. 49-68). Bruselas: Bruylant. And also Ferrer, J. C. (1985). Una aproximación al control de proporcionalidad del Consejo de Estado francés: el balance costes-beneficios en las declaraciones de utilidad pública de la expropiación forzosa. *Revista de Derecho Administrativo*, 45(1), 71-83

a complex legal framework backing the sustainable development principles in order to guarantee the rational use of the natural resources. The provision includes also the notion of land use in harmony with economic needs, employment, social cohesion, equal treatment and opportunities for people, health, safety and the protection of the environment. There is also the inclusion of legal matters related to flora and fauna, the protection of the cultural inheritance and landscape. Moreover, the rural zones' protection is lawfully in connection with the idea of urban development as it is seen in the letters "a", "b", "c" and "d" of the article 3.2 in which public powers have also the obligation to predict future problems in these matters.<sup>404</sup> The article 3.3, letters "a", "b" and "g", calls the attention of the public administrations to promote the residential use of the property to reinforce the housing matters in accordance to a more sustainable urban planning. There is a legal normative framework with reference to other rights ownership must realise as well. The socioeconomic dynamism is understood as a tool for adaptation, rehabilitation and occupation of empty housing units or those places not used. Therefore, the urban matrix shall commit with the residential function contributing to the equilibrium of city developments. Therefore, the: "equilibrio de las ciudades y de los núcleos residenciales, favoreciendo la diversidad de usos, la aproximación de los servicios, las dotaciones y los equipamientos a la comunidad residente, así como la cohesión y la integración social". Furthermore, the article 3.4 says the public powers have to create the conditions to support the rights and duties for citizens to guarantee the effectiveness of the present legislative decree. As it is explicitly mentioned in the 7/2015 Legislative Real Decree: "Los poderes públicos promoverán las condiciones para que los derechos y deberes de los ciudadanos establecidos en los artículos siguientes sean reales y efectivos, adoptando las medidas de ordenación territorial y urbanística que procedan para asegurar un resultado equilibrado, favoreciendo o conteniendo, según proceda, los procesos de ocupación y transformación del suelo". It is also extremely important the assertion that public

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<sup>404</sup> The *Real Decreto Legislativo 7/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley de Suelo y Rehabilitación Urbana*, is a very progressive document in those questions related to the use of commons as it is seen in the article 3. Water, air, soil, habitat and rural areas are conceived in connection to the Spanish cities development. We interpret that effort as the notion of the legislator in intuitively understanding the property in city context and urban lands as dependent on the use and protection of nature.

administrations are responsible for the concept of land intimately connected to the idea of the residential use of every ownership in urban planning and territorial issues.

According to the justice's opinion it is the principle of public powers in the exercise of their competences the body responsible for the effectiveness of an adequate and dignified housing: "El suelo vinculado a un uso residencial por la ordenación territorial y urbanística está al servicio de la efectividad del derecho a disfrutar de una vivienda digna y adecuada, en los términos que disponga la legislación en la materia". When we look at the contribution of private owners given to society, we have two intriguing models with two types of proprietors. The first one has to do with non-resident owners, such as financial institutions and international real estate business, and owners residing in the same zone. Investors pay less taxes than usually residents do from a historical perspective, but the former professionally exploit the land usufruct in rising prices and the latter do not. Therefore, the long run-public expenditure is an urban accumulated budget of which speculators take advantages without contributing. The second model refers to how equities rise for real estate markets based on the first model. Both of them are adjusted to imperfect economies as we posed along the Chapter I of the present thesis, although the first not so speculative as the second one. Brazilian and Spanish cities are mostly exposed to an unbalanced supply and demand market for properties. Cities that will certainly return the real estate investments to those countries abundant in capital factors at any moment. Moreover, the prices of equities tend to be inflated by the international capital in property and governments usually play the financial game of speculation in a short-run to attract assets through the public debt system.

This is why we called the attention to the tax payer money from the places where the capital factor is not sufficient and it eventually accumulated to serve as a commodity. The result is millions of vacant housing units that keep the prices higher than it should be. Furthermore, it is also territories where we find urban zones with extremely different levels of human capital along the city radius, that is to say, skilled and unskilled workers living an urban geography of centre and periphery. Furthermore, the construction of infrastructure, means of transportation and public services depend on long-term public budget which is not helped by speculators by definition. Safety, public areas, culture, leisure, universities, hospitals, parks, roads, energy distribution, water,

sewage and other city investments reflect more the social contribution of residents than real estate international capital. Therefore, we insist on the need for an updated formula in order to adequate judgments up to the point a constitutional thesis is reached. Every power emanates from the people, so the all powers of democratic state under that *motto* should comply with it. The 1978 Spanish Constitution, Article 1.2, says the national sovereignty emates from the Spanish people and from whom the powers of the State: “La soberanía nacional reside en el pueblo español, del que emanan los poderes del Estado”. In the 1988 Brazilian Constitution, Article 1 affirms that all power arises from the people and it is exercised through elected representatives or directly mandates: “Todo o poder emana do povo, que o exerce por meio de representantes eleitos ou diretamente, nos termos desta Constituição”. We hinge that principle of peoples’ sovereignty on a constitutional model we nominate compatible with the infra-constitutional legal reasoning.<sup>405</sup> The principle of popular representation is one of the cornerstones in more liberal, progressive and pluralistic societies. Popular sovereignty is one of the tools in transferring more legitimacy to the local sovereignty, yet not the community participation new in history. A political model that is not constrained by the international capital aggressiveness is indispensable to guarantee the right to an adequate and affordable place to live. However, norms are in their essence a social pact in which interests are negotiated: “Significa también que en ciertas esferas de intereses, nacionales, religiosos, económicos o morales, solo pueden dictarse normas con el asentimiento de una minoría cualificada y no contra su voluntad, es decir, que solamente son posibles mediante acuerdos entre mayoría y minoría”.<sup>406</sup> We add to the

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<sup>405</sup> Conflictual human experiences were harsh in all Africa mainly after post-colonial era with the disruption of local ethnically culture, power and society in contact with the colonisers. The Gacaca’s communities tribunals are illustrative in that sense of people’s sovereignty for the generous action of a huge civil reconciliation. At that time, penal matters and genocide should be part of a large discussion in community for the constrction of social peace. See Clark, P. (2010). Framing Gacaca: six transitional justice themes, In *The Gacaca’s courts, post-genocide and reconciliation in Rwanda: justice without lawyers* (pp. 29-46). Cambridge: Cambridge University Press. In Brazil, trials conducted by popular tribunals also incurred false use of popular sovereignty. Read Serrano, N. G. C. (1990). *Proporcionalidad y derechos fundamentales en el proceso penal*. Madrid: Colex. About the contradictions of popular sovereignty, see Mesquita, H. A. (2003). O conflito na fazenda Santa Elina/ o massacre de Corumbiara: a farsa do proceso judicial e do júri popular. *Revista Pegada*, 4(2), 33-52. For the debate related to governance and public administrations, look for the report edited by Anwar Shah *Participatory budgeting: public sector, governance and accountability series*. The document was published in 2003 with the help of the International Bank for Reconstruction and Development and The World Bank. Read Franck, T. M. (2008). On Proportionality of countermeasures in international law. *The American Journal of International Law*, 102(4), 715–767.

<sup>406</sup> Kelsen, H. (1934). El principio de la mayoría. In *Esencia y valor de la democracia* (p. 83). Barcelona:

Latin motto presented in the beginning of that section power emanating from collective actions as the “right to changing ourselves by changing the city”.<sup>407</sup>

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<sup>407</sup> Harvey, D. (2008). The right to the city. *New left review*, 53(1), 23-40.





CHAPTER V. FROM A PROTO-RIGHT TO THE RIGHT TO THE CITY: COUNTERARGUMENTS IN  
BRAZIL AND SPAIN



## 1. Housing in the context of the philosophical city debate for adequate judgments

The concept of the right to the city is mostly seen as a philosophical approach on city matters emerging at the very end of the 1960s. Henri Lefebvre was the philosopher that presented a critical theory on the urban debate while students showed their total dissatisfaction with the French way of life. In that context, the concept of city as a right was born to call the attention to the wealth generated through the development of the urbes as a global mission for the revival of a political transformation as well: “[...] la rencontre et le rassemblement de ce que existe aux alentours, dans ‘l’environnement’ (biens et produits, actes et activités, richesses) et par conséquent la société urbaine comme lieu socialement privilégié, comme sens des activités (productrices et consommatrices), comme rencontre de l’œuvre et du produit”.<sup>408</sup> Henri Lefebvre was prone to reallocate the making of politics for the construction of cities, but emphasising that neither the philosophical tradition nor the thinkers should lead that mission: “La *production industrielle* a bouleversé les notions concernant la capacité sociale d’agir, de créer du nouveau, de maîtriser la nature matérielle. La philosophie ne pouvait maintenir sa mission traditionnelle, ni le philosophe sa vocation: définir l’homme, l’humain, la société, le monde et du même coup prendre en charge la création de l’homme par son effort, son travail, sa volonté, sa lutte contre les déterminismes et les hasards”.<sup>409</sup>

It is important to notice Henri Lefebvre was taking into consideration the idea of sovereignty to make clear how urban transformation could be more humanised leaving behind the oppressive tradition on political power and space. As mentioned in the beginning of our thesis, the concept of city among the Romans and, consequently, how the modern State of Spain concentrated power to impose historical forms of domination over civilians. For the French philosopher, it is urgent that the political commands on life, space and social organisation represent the exercise of people’s demands. The sovereign does not have power on what is produced and generated since that entity of power is not the one who transforms things in order to create wealth. In other words, any kind of city surplus value only emanates from the economic relations of a legitimate

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<sup>408</sup> Lefebvre, H. (2009a). Sur la forme urbaine. In *Le droit à la ville* (p. 86). Paris: Economica.

<sup>409</sup> Lefebvre, H. (2009b). La réalisation de la philosophie. In *Le droit à la ville* (pp. 127-129). Paris: Economica.

body constituted by the working classes with a huge protagonism in that process. For Henri Lefebvre, if there is a sovereign State as a residual form of a modern inheritance, it is due to the use of force that was used to impel individuals and families: “Como ya sabemos, el concepto de Soberanía permite al Estado monárquico afirmarse contra la Iglesia y el Papado, contra los señores feudales. Ese concepto hace del Estado y de sus secuaces la ‘sociedad política’, dominante y trascendente de la sociedad civil, los grupos y las clases” [...] Ahora bien, Soberanía implica ‘espacio’, y además espacio sobre el que se ejerce una violencia (latente y manifiesta), esto es, un espacio establecido y constituido por la violencia”.<sup>410</sup>

Up to a certain extent, public space, social participation and the fight for more rights were part of a political demand from different collectives, but disposed of a critical rationality. Lefebvre uses the concept of the right to the city as more a social pact made by politics in which the experience of people is expected to be central. Moreover, the French thinker makes an effort to unveil the ideologies of surplus value, urban fetishisms and city reification behind the notion of a supposed science called urbanism. It is also an attitude that encourages individuals to assume the decision-making process once any change in urban context has to do with people’s lives. Nevertheless, the strategies to reach the city construction from a working class experience, knowledgeable and politically active, were not clear. Such abstraction exists partly because Henri Lefebvre did not believe in a doctined praxis for social transformation. The other reason is much related to the author’s belief as an intellectual close to Marxism to avoid any connection of his ideas with the totalitarian experiences.

With the intention of exploring more the idea of adequate judgments, which was aforementioned as not only the acts produced by the court’s or tribunal’s decisions, the present chapter will delineate the counterarguments on property, housing and urban transformation seen in international treaties, public administrations’ competences and the theories dedicated to the commons corroborate a myriad of demands from urban grassroots movements. However, in order to achieve the social protagonism referred by Henri Lefebvre’s ideas, all knowledge and legal framework produced have to change the object of its purpose, that is to say, give to people who live and work in cities the instruments to make them the end for the totality of urban benefits. The working class

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<sup>410</sup> Lefebvre, H. (2013). Del espacio absoluto al espacio abstracto. In *La producción del espacio* (p. 317). Madrid: Capitán Swing.

cannot be the main actor of that narrative if they are not democratically respected as a body able to create binding decisions on city issues. Among a myriad of topics we consider helpful for a dialectical synthesis, the housing issue is undoubtedly a legitimate agenda for Brazil and Spain to bridge theory and praxis in that sense. In both countries, for example, urban grassroots movements have shown how the economic reality and the property system have affected dramatically people's lives. Therefore, we introduce two important actors for housing demands, *Movimento dos Trabalhadores Sem-Teto* and the *Plataforma de Afectados por la Hipoteca*, but intimately connected to an umbrella of other rights in urban context. With reference to their challenges yet to be overcome, we point out their intellectual strength is not coordinated by the establishment, but the use critically the notions of the constitutional right to housing to put forward their demands. This is why we call the empowerment around their claim a proto-right which is action and discourse not connected to the core of how to use the wealth produced by a residual absolute notion of the right to property.

### **1.1. The international counterargument: land, housing and human rights for an adequate judgment**

The discussion about the usufruct of the right to property, housing issues and cities has showed how land planning is a complex object from which the presence of governments cannot be detached. Global speculative finances in real estate businesses are some of the aspects that have reinforced groups interested in *dominium* tradition, but not contributed to the social function of property.<sup>411</sup> Vacant houses and the distorted forms of the usufruct of ownership are also market strategies of banks or financial institutions to deceive public powers in the pursuit of a responsible use of the right to property.<sup>412</sup> We tried also to pose until here how the traditional elements of Civil Law mechanisms operate legal concepts of the right to property in order to keep its usufruct

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<sup>411</sup> “Despite the fact that housing was recognized as a human right in the International Covenant on Economic, Social and Cultural Rights, its separation from the right to life seemed to have severed it from core human rights values; there was a distinct contrast between the way deprivations of the right to housing were described by rights holders and the way they were discussed by government officials. At the international level, housing was more often associated with development and infrastructure programmes than with fundamental human rights”. See United Nations, General Assembly, Third Committee, Summary Record of the 30th Meeting, A/C.3/71/SR.30, 29 November 2016, 5.

<sup>412</sup> See the Chapter I

unchanged. The Roman notions of *dominium*, *imperium* and *locuples* for the modern land use are some of legal concepts the establishment of non-individual ownership has been based on to impede a significant transformation in property system.<sup>413</sup> Other characteristic of the modern property tradition is seen in the outmoded role that judges in Brazil and Spain have played and consequently left non-resident proprietors untouchable from their social responsibility in making effective the right to housing in an enormous quantity of empty housing units. Magistrates also have acted as if property should not be questioned from civil society once property is learnt as a sacred juridical category.<sup>414</sup> However, city development has globally imposed similar challenges for us. The social usufruct of the right to property, housing issues and urban planning may conform with a set of rights for a fairer attitude in city construction.<sup>415</sup>

We selected a series of counterarguments from which the inadequate use of the right to property can be faced. One of them has to do with the international perception of how cities matter and property is central in the debate. As “Today, 54 per cent of the world’s population lives in urban areas, a proportion that is expected to increase to 66 per cent by 2050”, the usufruct of the right to property is really essential for cities once demography demands public powers, proprietors and real estate market to give solutions to the human needs in urban context.<sup>416</sup> The concentration of people in cities is also connected to the way people live. According to the *2003 United Nations Human Settlement Programme*, the number of inadequate houses has really pressured the well-being of billions. Run-down urban areas, “favelas” or even the invisible poor conditions of places to live are some of the global constant similarities for cities. The case studies of Barcelona and São Paulo are very illustrative. As it says:

The district known as the Ciutat Vella, or old city, in Barcelona was the entire city until the mid 19th-century expansion. The old city had developed very high

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<sup>413</sup> See the Chapters II and III

<sup>414</sup> See the Chapter IV

<sup>415</sup> “In the absence of effective urban planning, the consequences of this rapid urbanization will be dramatic. In many places around the world, the effects can already be felt: lack of proper housing and growth of slums, inadequate and out-dated infrastructure – be it roads, public transport, water, sanitation, or electricity – escalating poverty and unemployment, safety and crime problems, pollution and health issues, as well as poorly managed natural or man-made disasters and other catastrophes due to the effects of climate change”. See *United Nations Habitat for a better future* [on-line]. UN-Habitat at a glance [Accessed on 17 January 2017]. Retrieved from <http://unhabitat.org/about-us/un-habitat-at-a-glance/>

<sup>416</sup> Retrieved from <http://www.un.org/en/development/desa/news/population/world-urbanization-prospects-2014.html>

housing densities and had associated problems of lack of light, air and open space. As the city expanded, the more well off population moved out. Slum conditions developed in various areas, and continue to the present day in several neighbourhoods, such as the Barri Gòtic, Santa Caterina and the Barceloneta. The highest concentration is found in the neighbourhood known as the Raval, and most specifically the Raval Sud, or Southern Raval. This area was traditionally known as the Barri Xino, or 'Chinatown', and, partly because of its proximity to the port, has been characterized by marginal activities and the highest levels of poverty in the city. It has also traditionally served as the gateway for new immigrants to the city, providing cheap lodging in very poor conditions, in the form of boarding houses, dormitories and subdivided apartments. The buildings in this area vary in age – some are several centuries old – and the existence of slum lodgings in the area can be traced back at least to the mid 19th century.

[...]

In São Paulo, cortiços (rented rooms in a subdivided inner-city tenement building) are the traditional form of central slum housing. Most corticos are located in the central districts of the city, in areas that are deteriorated but near the city's jobs and services. Sacrifices of cramped, unhealthy and expensive housing are compensated for by the proximity of work and public services. Favelas sprout everywhere: in wealthy areas, poor areas, in the central region or in the periphery, wherever there is an empty and unprotected lot. Their appearance during the 1970s and 1980s mixed up the pattern of centre-periphery segregation in São Paulo. Public authorities constantly repressed and removed favelas in the areas valued by the market. The action of private property owners in regaining possession, moreover, has driven favelas to the poorest, most peripheral and environmentally fragile regions. Few remain in well-served regions, although the largest two, Heliópolis and Paraisópolis, are located in these areas.<sup>417</sup>

Poverty, property and demands for the access to a dignified place to live in urban settlements persisted. The right to adequate housing connected all these demands for the Sixty-Seven Session of the General Assembly in United Nations in the year of 2012. That meeting resulted in the Resolution A/67/286 and showed the states

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<sup>417</sup> See *United Nations Habitat* [on-line]. *The Challenge of Slums*, Global Report on Human Settlements 2003, United Nations Human Settlement Programme, 80-89 [Accessed on 16 September 2016]. Retrieved from <https://unhabitat.org/books/the-challenge-of-slums-global-report-on-human-settlements-2003/>

preoccupation about how economic issues such as unemployment, individual debts and housing prices are one of the keys to understand problem: “The discrepancy between income levels and soaring housing and rental prices coupled with unemployment led to increased payment default, foreclosures and homelessness. These processes were exacerbated by the adoption of legal and institutional adjustments aimed at facilitating foreclosure, which have been promoted in recent years as ‘imperatives for developing a housing finance system’”. The international financial market in real estate investments also make difficult the access to the right to housing once individuals have their life expectations in having their own homes reduced to a mortgage speculative system offered by banks. It is also a de-regulated market in which loans are given in risky conditions: “The paradigm that promoted homeownership as the most secure form of tenure has been proven false, as increasing foreclosure rates have been one of the main results of the recent crises”. As a consequence, Spain had “more than 350,000 foreclosures have occurred since 2007 and in 2011, about 212 foreclosures and 159 evictions occurred daily. The crisis has disproportionately affected the poorest and most vulnerable, who were the ‘last’ to join the mortgage markets and the first to suffer the consequences of the crises owing to their low resilience to economic shocks and low repayment abilities. Recent research indicates that the majority (70 per cent) of defaults in Spain are related to the unemployment crisis and that 35 per cent of the foreclosed properties belong to migrants”.<sup>418</sup>

In Brazil, the level of indebtedness and massive housing construction relying on the property system have produced another urban issues: “Subsidy programmes in South Africa, Mexico and Brazil have also been criticized for replacing widespread informal housing with low-standard and stigmatized housing typologies concentrating low income families. The result is greater urban and social segregation, an increase in the disparity in access to urban services, a worsening of local living conditions, increased environmental damage and urban security problems”. Moreover, the access to the right to housing has been an object of financial investments in which the private interest with aggressive speculative practices have a triple trendline: “Three main

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<sup>418</sup> Resolution A/67/286, 2012, *Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms*. Raquel Rolnik, Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context, paragraph 29, p. 10



housing financing mechanisms (sub-prime mortgage loans, demand-side subsidies and housing microfinance) have been promoted to specifically facilitate the access of lower-income households to housing finance, promoting homeownership. These policies have been implemented in the context of a changing role of the State from supplier of affordable housing to enabler of housing and financial markets”.<sup>419</sup> Although the Spanish and Brazilian realities, the rapporteuse indicated also how these capital policies have spread a net of indebtedness worldwide incompatible with the international obligations of state parties in the United Nations system: “Having examined the impact of these policies in various regions of the world, it is the view of the Special Rapporteur that they have largely failed to promote access to adequate housing for the poor. Evidence indicates that housing policies based exclusively on facilitating access to credit for homeownership are incompatible with the full realization of the right to adequate housing of those living in poverty, failing to supply habitable, affordable and well-located housing solutions accessible to the poor”.<sup>420</sup>

In 2016, the *Preparatory Committee for the United Nations Conference, Habitat III, on Housing and Urban Sustainable Development*, has put forward some relevant guidelines the meeting.<sup>421</sup> The state parties have agreed in defining the right to the city as the fair distribution of spatial resources, normative action with social, economic and cultural diversity. The document A/CONF.226/PC.3/14 is a political effort relying on

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<sup>419</sup> Resolution A/67/286, 2012, *Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms*, p. 21. The United Nations General Assembly approved another Report elaborated by Leilani Farha on *Adequate housing as a component of the right to an adequate standard of living*. The document A/71/310 still confirms that in 2016: “Unregulated real estate and land speculation, predatory mortgage lending and deregulated global flows of capital have resulted in economic crises in countries around the world. The real estate “bubble” of the mid-1980s to 1990 in Japan, the financial crisis in Argentina in the 2000s and the 2007 mortgage crisis in many States, including the United States of America and several States in Western Europe, have all had devastating effects on low-income and poor households. Japan has yet to recover and continues to see ever-growing numbers of homeless people. Unemployment rates tripled in a 10-year period in Argentina, resulting in a large number of households being unable to pay their mortgages, rent or utility bills. In Spain, Ireland and Greece, thousands of low-income and poor individuals suffered foreclosures or debt-related evictions and were thus forced out of their homes into encampments or into overcrowded accommodation with relatives and friends, or were left homeless. In these circumstances, increased suicide rates are not uncommon. In the United States, suicides spurred by severe housing stress — evictions and foreclosures — doubled between 2005 and 2010. Europe also saw a 6.5 per cent increase in suicides between 2007 and 2011. In States where social programmes were made available to those affected, similar spikes in suicide rates were not seen. See the A/71/310 pp. 9-10.

<sup>420</sup> See the A/71/310 pp. 9-10.

<sup>421</sup> Read *Preparatory Committee for the United Nations Conference on Housing and Sustainable Urban Development (Habitat III), Third session, October, 2016, A/CONF.226/PC.3/14*, p. 7. For a definition on the concept, see “Right to the city = spatially just resource distribution + political agency + social, economic and cultural diversity”.

three pillars. The first one has to do with the land use for “housing and livelihoods, and the de-commodification of urban space; urban commons, public space, and biodiversity; access to basic services and infrastructure, and controlling pollution; unplanned and informal settlements habitation; resilience, climate change, disaster and risk management”. The second one is related to the “inclusive governance; inclusive urban planning; citizenship; enabling participation, transparency, and democratization”. The last one evolves the “recognition of social actors —including gender —for migration and refugees; embracing identity, cultural practice, diversity, and heritage; safer cities, livelihoods, well-being, and welfare; poverty risk and employment vulnerabilities; inclusive economy and solidarity economy”.<sup>422</sup> The three pillars resume the theoretical debate on property usufruct, the adequate right to housing and real estate finances in an intergovernmental document. The fragment of the first pillar, we can read:

Housing policy is largely concerned with numbers of units built, and mortgage finance rather than with housing and residential inequalities. Home ownership has been supported as the principal tenure through policies and private sector supply, to the exclusion of the urban poor. Rental housing must be a policy priority and recognize the value of popular investment in urban housing (e.g. in informal and unplanned settlements). A critical problem has been the marketization of urban space disregarding the social function of land and housing. There is thus an urgent need to: challenge land speculation linked to gentrification and economic growth, accommodate housing needs through diverse housing tenure choices, and ensure a continuum of affordable and adequate housing (including socially produced and community-led housing).<sup>423</sup>

We call the attention to the issue of land speculation that is intimately connected to the usufruct of the right to property. As seen before, the economic dimension imposes certain dynamics for cities once urban planning is usually captured by market needs that do not reflect citizenship.<sup>424</sup> This is why the *Preparatory Committee (Habitat III)* has

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<sup>422</sup> Read *Preparatory Committee for the United Nations Conference on Housing and Sustainable Urban Development (Habitat III), Third session*, October, 2016, A/CONF.226/PC.3/14, p. 2

<sup>423</sup> Read *Preparatory Committee for the United Nations Conference on Housing and Sustainable Urban Development (Habitat III), Third session*, October, 2016, A/CONF.226/PC.3/14, p. 9

<sup>424</sup> See Sassen, S. (2005). The global city: introducing a concept. *Brown Journal of World Affairs*, 11(2), 27-43. Read “Global capital and the new immigrant workforce are two major instances of

insisted governments should pursue principles harmonising city, rights and social function with the life of people: “The right to the city values the social function of land understood as the use and enjoyment of land by inhabitants to perform all the activities which are necessary to have a full and decent life, thereby prioritizing the human experience of land and habitation. It recognizes a legal form to protect the right of access to adequate housing, which, together with a reformed property rights system, aims to act as a legal barrier against forced evictions”.<sup>425</sup> Another key action yet in the first pillar for the right to the city and adequate housing says it is indispensable “To recognize the bundle of property rights, hence the need for the continuum of land ownership and occupancy rights in land policies and legislative frameworks” to avoid evictions. It is one of the most sensitive topics that worries cities all over the world. As we suggested before, the usufruct of the property has to be connected “To use urban planning mechanisms to capture increases in land value, redistribute this towards social housing and public space provision, and minimize vacant property rates”.<sup>426</sup>

The Resolution A/RES/71/256 in its point 165, which was adopted by the General Assembly on 23 December 2016, endorses a global view on the importance of “sustainable urbanization and human settlements, in collaboration with other United Nations system entities, recognizing the linkages between sustainable urbanization, and, inter alia, sustainable development, disaster risk reduction and climate change”. As a result of the United Nations Conference Habitat III, the document *Quito Declaration on Sustainable Cities and Human Settlements for All* declaring the relevance to implement the 2030 Agenda for Sustainable Development to make cities and human settlements more inclusive: “The implementation of the New Urban Agenda contributes to the implementation and localization of the 2030 Agenda for Sustainable Development in an integrated manner, and to the achievement of the Sustainable Development Goals and targets, including Goal 11 of making cities and human settlements inclusive, safe, resilient and sustainable”. A series of human and social rights are linked to the concept we called before the right to the city, but urbanisation and housing are central in that

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transnationalized actors that each have unifying properties across borders internally, and find themselves in contestation with each other inside global cities”, p. 39

<sup>425</sup> Read *Preparatory Committee for the United Nations Conference on Housing and Sustainable Urban Development (Habitat III), Third session, October, 2016, A/CONF.226/PC.3/14, p. 16*

<sup>426</sup> Read *Preparatory Committee for the United Nations Conference on Housing and Sustainable Urban Development (Habitat III), Third session, October, 2016, A/CONF.226/PC.3/14, pp. 16-17*

process. As a shared common view, point 11 of the document, it is said: “We share a vision of cities for all, referring to the equal use and enjoyment of cities and human settlements, seeking to promote inclusivity and ensure that all inhabitants, of present and future generations, without discrimination of any kind, are able to inhabit and produce just, safe, healthy, accessible, affordable, resilient and sustainable cities and human settlements to foster prosperity and quality of life for all. We note the efforts of some national and local governments to enshrine this vision, referred to as “right to the city” in their legislation, political declarations and charters”.

Such perception supports the notion of adequate judgments beyond what courts and tribunals decide, but stating a legal framework once the organisation understands its resolutions as a moral mandate. The letter “b” of the point 13 corroborates a political activism to promote an umbrella of rights through civil society participation. It is interesting the emphasis on the roles that can be played by communities, neighbourhoods and people in public spaces in cities where human settlements that are: “[...] participatory, promote civic engagement, engender a sense of belonging and ownership among all their inhabitants, prioritize safe, inclusive, accessible, green and quality public spaces that are friendly for families, enhance social and intergenerational interactions, cultural expressions and political participation, as appropriate, and foster social cohesion, inclusion and safety in peaceful and pluralistic societies, where the needs of all inhabitants are met, recognizing the specific needs of those in vulnerable situations”. *Quito Declaration on Sustainable Cities and Human Settlements for All* also approved a resilient agenda to combat what we previously conceptualised as *poor demography* in order to: “Achieve gender equality and empower all women and girls by ensuring women’s full and effective participation and equal rights in all fields and in leadership at all levels of decision-making, by ensuring decent work and equal pay for equal work, or work of equal value, for all women and by preventing and eliminating all forms of discrimination, violence and harassment against women and girls in private and public spaces”. The content of the Policy Paper 1 A/CONF.226/PC.3/14 on urban issues and decent work, which was part of the Third Session that happened in Surabaya, Indonesia, preparing Quito’s event, was also linked to property system, housing and the efforts all nations should make to avoid land speculation as it is seen in the point 14, letter “b”, in order to: “Ensure sustainable and inclusive urban economies by leveraging

the agglomeration benefits of well-planned urbanization, including high productivity, competitiveness and innovation, by promoting full and productive employment and decent work for all, by ensuring the creation of decent jobs and equal access for all to economic and productive resources and opportunities and by preventing land speculation, promoting secure land tenure and managing urban shrinking, where appropriate”. The point 111 reinforces the right to an urban environment where housing and work among other legal matters that can be used to prevent cities from vulnerable socioeconomic conditions: “We will promote the development of adequate and enforceable regulations in the housing sector, including, as applicable, resilient building codes, standards, development permits, land-use by-laws and ordinances, and planning regulations, combating and preventing speculation, displacement, homelessness and arbitrary forced evictions and ensuring sustainability, quality, affordability, health, safety, accessibility, energy and resource efficiency, and resilience”.<sup>427</sup>

## **1.2. From the international counterargument to regional and local city level**

References linked to the right to adequate housing and public administration are strongly recommended in supranational realms as well. Not only does the matter seem to be a legislative task, but also a question of administrative power. It is important to emphasise public administrations in Europe have all incentives to be more prominent in making adequate decisions on property issues observing, for example, legal tools to put in practice: “the principle of equality before the law by avoiding unfair discrimination”. In that context, the accumulation of properties by banks, real estate firms and agencies must comply with administrative judgments based upon the general interest. Moreover, it is recognised by the institution that the discretionary power can act diligently with “a proper balance between any adverse effects which its decision may have on the rights, liberties or interests of persons and the purpose which it pursue”.<sup>428</sup> As a historical evolution of the organisation, it is also understood public administrations shall lead the

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<sup>427</sup> *United Nations. United Nations Habitat III Programme on Housing and Sustainable Urban Development Conference* [on-line]. A/RES/71/256. Resolution adopted by the General Assembly on 23 December 2016, Seventy-first Session [Accessed on 29 May 2017]. Retrieved from <http://habitat3.org/the-new-urban-agenda/>

<sup>428</sup> *Council of Europe. Committee of Ministers* [on-line]. Recommendation N° R(80)2 of the Committee of Ministers concerning the exercise of discretionary powers by administrative authorities [Accessed on 17 December 2016]. Retrieved from <https://rm.coe.int/16804f22ae>

protection of the rights, liberties and interests in their administrative acts according to the Recommendation R(87)16, Scope and Definitions, letter “c”, making protagonists the collective interests: “[...] a large number of persons who, according to national law, have the right to claim a specific collective interest that is liable to be affected by the administrative act [...]”.<sup>429</sup> The task of the Committee of Ministers in the Council of Europe made a huge progress under the auspices of the good administration concept. The CM/Rec(2007)7 affirms that private persons have the right to be included in specific non-regulatory decisions. In its article 15.1, it is said: “If a public authority proposes to take a non-regulatory decision that may affect an indeterminate number of people, it shall set out procedures allowing for their participation in the decision-making process, such as written observations, hearings, representation in an advisory body of the competent authority, consultations and public enquiries”.<sup>430</sup> In the following section, we will present the concept of good administration and how it can be used in Europe to favour more adequate judgments on the right to property and, consequently, its social function. From an international perspective, the concepts related to the right to housing for both Brazil and Spain are initially defined with the Committee general comments No. 4 (1991) on adequate housing and the No. 7 (1997) on forced evictions. These two documents were elaborated by the United Nations Committee on Economic, Social and Cultural Rights under the auspices of the article 11 (1) on adequate housing from the *International Covenant of the Economic, Social and Cultural Rights* (1966).<sup>431</sup> They also put forward the efforts made by the United Nations to harmonise States’ obligations with the international law in those issues related to human rights. At that time, the right to housing had already been thought as a legal instrument to question the speculative capital in city context putting at risk human lives in forced dislodgements of communities.<sup>432</sup> The topic gained a large-scale complexity in the following years.<sup>433</sup>

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<sup>429</sup> *Council of Europe. Committee of Ministers* [on-line]. Recommendation N° R(87)16 of the Committee of Ministers on administrative procedures affecting a large number of persons [Accessed on 17 December 2016]. Retrieved from <https://rm.coe.int/16804eaa5c>

<sup>430</sup> *Council of Europe. Committee of Ministers* [on-line]. Recommendation CM/Rec(2007)7 of the Committee of Ministers to Member States on good administration [Accessed on 17 December 2016]. Retrieved from [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805d5bb1](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d5bb1)

<sup>431</sup> *United Nations Committee on Economic, Social and Cultural Rights* [on-line]. Committee General Comment No. 4 on Adequate Housing [Accessed on 17 December 2016]. Retrieved from [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f4759&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f4759&Lang=en)

<sup>432</sup> *United Nations Committee on Economic, Social and Cultural Rights* [on-line]. Committee General Comment No. 7 on Adequate Housing [Accessed on 17 December 2016]. Retrieved from

The *European Charter for the Safeguarding of Human Rights in the City* (2000) recognises the importance of the principles defended in the *Universal Declaration of Human Rights* (1948) and the *European Convention on Human Rights* (1950), but a set of commitments the States left behind not enforcing them in their domestic dimension in order to avoid unequal models of development in urban spaces. The article 1.1 of the document elaborated in Saint Denis made a huge progress with reference to the subject of rights including a definition of what city is. The legal matters in the document are far beyond the functional notion for cities. It corroborates innovative possibilities for the decision-making process, collective values and environmental issues. Moreover, rights in city context are understood for those who live in it not restricted to citizenship or legal residence for foreigners. As it is said: “The city is a collective space belonging to all who live in it. These have the right to conditions which allow their own political, social and ecological development but at the same time accepting a commitment to solidarity”. Having in mind the need for effective measures as an institutional tool for city changes, the article 1.2. connects the previous provision to the role of local public administrations: “The municipal authorities encourage, by all available means, respect for the dignity of all and quality of life of the inhabitants”. The content of a legitimate cause on the right to the city is not restricted to a national centralised legal apparatus or even based upon the restrictive field of parliamentary action by the State. Municipalities have played an important role composing international agendas and constructing plural meanings of citizenship. Moreover, numerous municipal governments have been prone to create an umbrella of connected rights guaranteeing a minimum and dignified net of social, political and cultural integration.<sup>434</sup>

Other avant-garde normative framework that was expected to be expressive by the municipal initiatives refers to the concept of housing for the protection of private and family life. The article 10.2 affirms it is indispensable the action of municipal

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[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f6430&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f6430&Lang=en)

<sup>433</sup> See also the *United Nations Habitat*. [on-line]. Office of the United Nations High Commissioner for Human Rights. Fact Sheet No. 21/Rev.1, The Right to Adequate Housing [Accessed on 16 May 2016]. Retrieved from [http://www.ohchr.org/Documents/Publications/FS21\\_rev\\_1\\_Housing\\_en.pdf](http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf)

<sup>434</sup> Read the opinion of the Supreme Tribunal of Spain about one of the concepts of the right to the city and the role of public administrations in implementing urban policies observing as plural intense connection of rights. See Sánchez-Cruzat, J. M. B. (2014). El derecho a la ciudad. *Cuadernos de Derecho Local*, 35(1), 97-103. For the link between public international law and constitutional matters, read Escobar Roca, G. (2012). Indivisibilidad y derechos sociales: de la Declaración Universal a la constitución. *Revista Jurídica de los Derechos Sociales Lex Social*, 1(2), 48-61.

authorities to: “protect the family unit from its foundation, without interference in its internal running. The authorities particularly provide assistance in housing issues. Low income families receive financial support, and structures and services are put into place to help children and old people”. As we exposed before, the economic criterion is essential to meet the needs of those people we defined vulnerable through the concept of *poor demography*. The level of income and employment, specially for those people working but their salaries falling in real terms, is central to face the challenges imposed by city transformation in Europe. Financial support for vulnerable families is essential to avoid the vulnerability of children and elderly people as well. So, the safeguarding of people living in urban context depends on a set of human rights, but strategically put in practice a decentralised plan of action providing more resources for municipal public administrations. We mention also the importance of the *Barcelona Agreement* (1998), after the meeting “City for Human Rights” as a foundational pillar for the *European Charter for the Safeguarding of Human Rights in the City*. Taking into consideration the immense effort made by mayors, civil society representatives and experts to create new paradigms, the charter was a positive response to the aggressive and excluding urban development process in Europe. It is also important to mention the encounter of public powers established a challenging compromise out of the European Union organisation and other state-regional agreements.

### **1.3. Transparent and participative public administrations as a counterargument: cities and local powers for an effective right to housing in Brazil and Spain**

Property is one of the pre-requisites for the market production. The owners tend to use it for the primitive accumulation money and the production of goods. There is a value in itself that is hardly depreciated in the long-run compared to other things. In other words, a place not used for living purposes has been much more a commodity overvalued in a historical perspective full of ideological free-market conditions than a basic human right. As we saw in the first chapter, Brazil and Spain have considerable number of housing units that confirm that rationale. The number of evictions connected to proprietors’ search for monetary results is another fact that subsumes the human



rights for an adequate place to live.<sup>435</sup> The system of property has caused more inequity and made vulnerable numerous families proving real estate investments use housing as a commodity. We have tried to say that it is not the house in itself the point, but how human dignity and individual protection are not part of private-public entrepreneurial activities for housing issues. One of the instruments to make evident such problem and overcome it in a more adequate manner relies on the access to information. Transparent and participative practices in public administrations are quintessential for city demands and making effective the right to housing.<sup>436</sup>

Transparency is essential to back a solid construction of a counterargument. It is much more than the logic of checks and balances on the current work of public administrations or even an amount of data and graphics. The concept is understood as a strategy for transformation if the information is close to individuals. So, if the decision-making process does not meet the general interest in social representative councils, groups of interest in city development connected to real estate investments take advantage of the legal establishment to impose a economic plans in their own benefit. For us, transparency means a legitimate effort of public administrations in order to share power in consultancy, binding decision-making processes and responsibility. Moreover, it serves to make effective the right to participation based upon a conception in which public resources, urban planning and administrative measures belong to all. So, a diligent use of the public budget for the common good, the contribution of proprietors to society to retribute tax payers' money through the social function of property and the city are practices that must be linked to transparency. Public funds destined to urban infrastructure and public-private contracts are another topic in order to achieve a

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<sup>435</sup> *United Nations Habitat*. [on-line]. Office of the United Nations High Commissioner for Human Rights. Resolution 1993/77, Fact Sheet No. 25, Forced Evictions and Human Rights [Accessed on 17 June 2016]. Retrieved from <http://www.ohchr.org/Documents/Publications/FactSheet25en.pdf>. It says: "Some have labelled the era in which we live as 'the century of displacement'. Recent history has seen hundreds of millions of persons being forcibly evicted from their homes, lands and communities due to a variety of causes. Every year at least 10 million people are forcibly evicted, over and above the dramatically high numbers of people moved from their places of origin as a consequence of internal displacement, ethnic cleansing, refugee flows or other manifestations of coerced population movements". Retrieved from <http://www.ohchr.org/Documents/Publications/FactSheet25en.pdf>.

<sup>436</sup> We use the concept of transparency far beyond the idea of checks and balances offered by public administrations as legal obligations devoted to accountability. It includes also the participation of civil society, urban grassroots movements and representative city councils for the making of urban governments. The effects of such bottom-up emphasis reveals the production of knowledge in the public opinion on public debt, budgetary issues and the decision-making process construction. Private company lobbyists tend to vindicate exclusive access to nets of influence in public administration at first, but soon after have their expectations moderated by the legal and constitutional matters voiced by social demands.

diaphanous concept of public administration. The effect of such method for more transparent local power actions is one of the vital transformations for cities civil society demands have indicated lately. In part because civil activists noticed municipalities operate the public interest with zero-sum game logic, that is to say, one necessarily loses and the other wins. The other half of the story is explained by the manner State administrators learnt how to conduct the public thing.

Lobbyists from real estate markets are illustrative of that traditional private-public interests in the decision-making process. However, it is in fact an asymmetrical game in which the wealthy groups compress the general interest in local governments or even pressure State employees favouring crony sectors through administrative actions.<sup>437</sup> The defence of public administrations as a non-ideological arena technically forces the municipal governments to put into practice what the law says, but it is well-known private sectors need a different velocity and criteria to run their business. From a legal perspective, it is apparently licit to use public administrations to find a solution for the economic lobbies. It is also that interference legitimised by the public “common-sense” since productive agendas are understood as value for the public interest survival through employment, taxes and, at the end of the structure, the public budget in itself.<sup>438</sup> It is a curious absolution from the public realm when lobbyists are seen as an irremovable fact of the economic reality while it is condemnable if the attempt of influence comes from more social representative forms of organisation without economic purposes. Therefore, the system of property is central for the construction of influence in urban development by affluent sectors of the economy specially when the accumulation of wealth is clearly concentrated in real property titles in times of capitalist crisis.<sup>439</sup> Beyond that, the

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<sup>437</sup> We have in mind the economic power interfering in politics as a practice very intimately connected to one of the capitalist mechanisms to generate wealth. See Kuhner, T. K. (2007). The separation of business and state. *California Law Review*, 95 (6), 2353-2391.

<sup>438</sup> The idea of public interest through “public administrative” priorities for some sectors is in itself a moral construct. Construction markets and public services, for instance, in order to achieve benefits for all citizens, are taken for granted as a contribution in which the taxpayer money collected in the end of the process justifies the original sin or the privilege. See Murphy, L. & Nagel, T. (2005). Os bens públicos. In *O mito da propriedade* (pp. 62-65). São Paulo: Martins Fontes.

<sup>439</sup> In Brazil, the National Housing System of Social Interest Act 11.124/2005 provides for the construction of units for those individuals and families considered in vulnerable conditions. The Articles 10 to 12 create the advisory board and the foundation responsible for the decision-making process about investments, coordination of projects and urbanistic legal matters. Despite that urban policy may impact positively in the reality of many poor families, the Articles 2, items II and III; and 4, item II “a” and “h”, is not clear with reference to which urban zones the housing units are expected to be constructed. Those families from lower income *strata* of the population end up on the outskirts of the Brazilian cities. The

demand for more transparency is essentially questioning the vague frontier between public and private relations with only a few groups taking advantage of the representative nuclei of decision-making process on urban issues. Social demands averse to profits concentrated on urban oligopolies of property market are immediately marginalised, segregated and excluded from the decision-making process with the excuse of anti-economic claims yet legal. The phenomenon of segregated city zones and gentrification creating ghettos in big cities are very argumentative of the zero-sum logic, which is a construct inverting the rationale of the general interest that should theoretically favour those who produce and work in the city, to benefit entrepreneurial activities.<sup>440</sup>

The case of Catalonia is emblematic. People exclusion, difficult access to public services and other urban facilities are some of the consequences nurtured by wealthy private sectors as pointed out by more representative institutions. However, the work of public administrations is counterbalanced by the figure of the *Sindic de Greuges*. The person is elected by resident voters of a municipality older than 16 years old and the elections conducted on internet. Once in charge of the mandate, the *sindic* must ensure the proper exercise the public administrators based upon transparent actions, access of information for citizens and inclusive policies for good governance. Matters related to the individual rights, liberties and protection of minorities are also the responsibility of the *sindic*. Therefore, the elected representative acts as a supervisor and collaborator of public administrations backing the general interests of people in municipal and regional administrations. It is a very important body working for citizenship to counterbalance

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effect of that huge massive plan of housing construction passed by the Brazilian National Congress are still conservative in the sense that stigmatised individuals are object of urban gentrification, racial questions and socioeconomic segregation. Yet the legal document in the Article 11, § 2 imposes for the company in charge of housing construction some urban planning criteria, property system and land law still present us some challenges. The new zones deepen the logic of ghettos and keep the historical spatial pattern of anomie. We have a different opinion from Ngai Pindell's argumentation about "favelas". For us, informal settlements are not created by the action of individuals in dispute involving proprietors. They are political and socioeconomic results and reactions of a historical culture of segregation in Brazil. These communities do not deliberately decide to live under deplorable levels of sanitary conditions, irregular architectural building standards, criminally oppressed and lacking even the most basic social services. They are expelled from the formal city and arrange themselves as they can. See Pindel, N. (2006) Finding a right to the city: exploring property and community in Brazil and in the United States. *Vanderbilt Journal, Transnational Law*, 39(1), 435-479

<sup>440</sup> Saüc, J. P. (2000) ¿Si están formando escuelas ghetto en Ciutat Vella? In *Espacios y territorios: miradas antropológicas* (pp. 23-34). Barcelona: Universitat Autònoma de Barcelona. See also Frúgoli, H. (2005). O urbano em questão na antropologia: interfaces com a sociologia. *Revista de Antropologia*, 48(1), 148.

the economic power of private companies, for example, that provide services such as electricity, water, gas, telecommunication and so on. In 2012, a report produced to represent all *síndics* in Catalonia pointed out the need of less omission in the housing sector recommending actions that should be taken like more investments for social housing to face the effects of the 2008 economic crisis.<sup>441</sup> That document corroborates the statistics of what we called before as *poor demography*. The prices of the rents, for example, increased more 8,7% in real values in the capital of Catalanian metropolitan area in a long-term period.<sup>442</sup> Moreover, vulnerable areas in certain zones of Ripoll and Besòs still persist in symbolic programmes for people's inclusion even under high levels of unemployment for the young and middle-aged.<sup>443</sup> In 2016, the Mayor of Barcelona City mentioned the local government wanted an urban policy looking to these zones with more attention. Ada Colau also supported the idea of re-industrialising these areas with specific programmes to meet the right to live and work in these areas that have been disconnected from the old centre.<sup>444</sup> A study on city health made by the Agència de Salut Pública, Consorci Sanitari de Barcelona, has indicated people in the peripheral zone of Torra Baró live eleven years less than the noble neighbourhood of Pedralbes.<sup>445</sup> In São Paulo, the life expectancy of a person living in a more central zone like Alto de Pinheiros reaches twenty-five years more than those individuals in the Cidade Tiradentes.<sup>446</sup> With reference to geographic dislocation, from the centre of São Paulo to the region of Cidade Tiradentes, Parelheiros and Jardim Butantã, for example, the commuting time may vary hours. The respective distance from the central area of the city to zones aforementioned are around 30, 36 and 13 kilometres. The average for

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<sup>441</sup> Retrieved from <http://www.sindic.cat/site/unitFiles/3469/memoria%20sindic%20castella%2012.pdf>.

<sup>442</sup> Retrieved from <http://apcebcn.cat/web2015/wp-content/uploads/2016/02/expansion-130216-hab-radiografia-de-la-vivienda-en-las-grandes-ciudades.pdf>

<sup>443</sup> Retrieved from <http://w110.bcn.cat/fitxers/consellmunbenestarsocial/cmbsinforme20102011.973.pdf>

<sup>444</sup> “Los territorios alrededor del río Besòs y Ripoll son el principal eje de concentración de personas en riesgo de exclusión social, por eso ha sido conocido como el eje de la pobreza, y yo añadiría que el eje de la vergüenza”, ha dicho la alcaldesa [...] Ha asegurado que es el eje para la reindustrialización que ve necesaria para la ciudad de Barcelona”. França, J. (2016, January 13). Ada Colau quiere una Barcelona que mire al río Besòs para romper con las desigualdade. *El diario.es*. Retrieved from [http://www.eldiario.es/catalunya/barcelona/Ada-Colau-Barcelona-Besos-desigualdades\\_0\\_473153637.html](http://www.eldiario.es/catalunya/barcelona/Ada-Colau-Barcelona-Besos-desigualdades_0_473153637.html)

<sup>445</sup> *Agència de Salut Pública, Consorci Sanitari de Barcelona* [on-line]. La Salut de Barcelona 2015 [Accessed on 17 december 2017]. Retrieved from <http://www.aspb.cat/>

<sup>446</sup> *Mapa da Desiguladade 2016* [on-line]. Organização Rede Nossa São Paulo [Accessed on 17 December 2016]. Retrieved from <http://www.nossasaopaulo.org.br/arqs/mapa-da-desigualdade-completo-2016.pdf>

the city is one hour and forty-four minutes.<sup>447</sup> What is more, the time spent in public means of transportation for people living in the periphery of São Paulo may exceed that arithmetic mean. Therefore, the commute, the time evolved and the price of rents for those housing units closer to points of work vary exponentially.<sup>448</sup>

It is also necessary to expose, propose and politicize the right to the city as a key element to favour the “demand [that] comes from those directly in want, directly oppressed, those for whom even their most immediate needs are not fulfilled: the homeless, the hungry, the imprisoned, the persecuted on gender, religious and radical grounds”.<sup>449</sup> Related to material urban questions, the politically philosophical thought may promote a more critical consciousness about city problems and reveal how marginalized the working class is in housing matters. At the same time, city issues are able to make more sensible the skilled and less marginal labourers about housing problems and how small commerce, craftsmen and entrepreneurs were affected by housing market crisis after 2008. A considerable part of the gentry, the real estate market investors and the urban *intelligentsia* use the means of communication, academic studies and the tradition on property to recreate a scenario in which the attack of rights in city context is a natural consequence of urban development. Giant cities such as São Paulo and Barcelona are very illustrative in how economic crises have affected the rights of many.

Extra-fiscal taxes, like the surplus value calculus or the sanctions for unoccupied places, seem to be very useful, adequate and proportional. The reasons for them are many since the economic forces point out salary losses in real values, unemployment and the reduction of social investments in housing programmes. Another factor very useful for more transparency is the application of coercive measures in which popular

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<sup>447</sup> IBOPE [on-line]. 9a Pesquisa sobre Mobilidade Urbana. Semana da Mobilidade 2015 [Accessed on 17 November 2016]. Retrieved from [http://www.ibope.com.br/pt-br/noticias/Documents/Apresenta%C3%A7%C3%A3o%20DMSC%20-%202015\\_Evento\\_v5%20%282%29.pdf](http://www.ibope.com.br/pt-br/noticias/Documents/Apresenta%C3%A7%C3%A3o%20DMSC%20-%202015_Evento_v5%20%282%29.pdf)

<sup>448</sup> “Segundo especialistas e integrantes de movimentos sociais, o fato de um benefício temporário ter se tornado algo permanente para muitos dos beneficiados acabou inflacionando o aluguel nas áreas periféricas, mas sem tirar essa população de uma situação de moradia precária”. Retrieved from <http://www1.folha.uol.com.br/cotidiano/2015/09/1682252-moradia-popular-patina-e-gasto-de-bolsa-aluguel-sobe-44-com-haddad.shtml>. The Instrução Normativa SEHAB-G nº 01, de 19 de fevereiro de 2004 – regulates the criterion of the *Programa Bolsa Aluguel*. Retrieved from <http://www.prefeitura.sp.gov.br/cidade/secretarias/habitacao/organizacao/cmh/index.php?p=1826>

<sup>449</sup> Marcuse, P. (2012). Whose right(s) to what city. In *Cities for people, not for profit: critical urban city and the right to the city* (pp. 30-31). New York: Routledge. And Purcell, M. (2002). Excavating Lefebvre: the right to the city and its urban politics of the inhabitant. *GeoJournal*, 58(1), 99-108.

boards take part. Such practice in public administrations nurtures legitimate decisions in urban disputes against the lobbies from real estate investors or giant constructors not observing the social function of property. If connected to local powers, the principle of property usufruct internalised by society solidifies the dimension of responsibility for proprietors. The more open and pondered the municipal measures on irresponsible proprietors, the less the political and social discredit.<sup>450</sup> Besides, civil participation for more transparency in public administrations is also plausible for zero cost initiatives. Local powers can use technologies in social medias with numerical data bases protecting identities to help citizenship monitor the taxes on properties. Debts that owners should pay, abandoned private lands, technical irregularities like constructions in protected zones for environmental issues and projects inadequately approved in historical centres. Both the *Movimento dos Trabalhadores Sem-Teto* and the *Plataforma de Afectados por la Hipoteca* in Catalonia and São Paulo have proved it is possible to map unoccupied housing units. Actions to make closer other irregularities in property system to people may result in more access to information. So, it is important that city councils trust in collectives and non-governmental initiatives to expand such initiatives.

Property system and cities have been more and more a financial topic. From the perspective of the capital, transparency is mostly classified as a State intervention in the economic fields which is evaluated by real estate firms as negative. However, ownership usufruct, land issues and housing are intimately connected to the general interest and does not mean public power impediments. If we observe the economic interests in urban context, we can have some hints. One of them is related to the multilevel practice explicitly posed by the good administration principle in order to map up to a certain extent cities are object of the financial capital. Other one is how local, State and supranational governments tend to be committed to the values of participative decision-making process with the idea of making city accountability a more transparent object. In that sense, executive powers must also be attentive to the relation budget-public debt in real proportions in order to avoid insolvency since they do not have to spend more than it is collected from taxes. We illustrate that point with the level of public indebtedness in some cities. The City of São Paulo has recently contracted an international agency to evaluate the municipal accounts. According to the Fitch Ratings, the municipality is

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<sup>450</sup> The notion of sanction here is based upon two definitions. Punishment for irresponsible proprietors and premium for the responsible ones.

awarded with AA+ in national level and BBB- in global scale for what is commonly said “the *status* of good payer”.<sup>451</sup> What does that mean? Low credit risk and high financial responsibility in the public fiscal accounts for future investors, but companies merely speculating in urban development policies. So, the tax payer money is dedicated to an activity that is by the logic of market a commodity to honour the public debts. The case of Barcelona shows us also the need for a more transparent administration and a critical analysis of how private sectors understand the city. As we can see in Moody’s Report: “The Baa2 rating reflects the city's good budgetary management and solid financial fundamentals in recent years, which have ensured a high self-financing capacity and, as a result, a limited debt burden. This is mainly reflected in high gross operating balances (20% of operating revenue on average for 2010-14) and moderate debt levels (41% of operating revenue in 2014). The rating also reflects Barcelona's good liquidity position, with abundant cash on hand and limited debt obligations”.<sup>452</sup> One of the possible solutions in which society can be initially invited to participate is in Warsaw, Poland. A public debt clock was intalled in the public eye with the intention of making less opaque the financial balances of the local administration. In this electronic board, every person is able to follow the “green” and “red” numbers that is present in the city.<sup>453</sup>

## **2. Local public administrations and the actors for transparent participative practices**

The 16.050/2014 São Paulo Urban Planning Act is a refined and advanced norm devoted to the principles we pointed out before as a multilevel transparent tool. It is a legal apparatus with a broad range of matters such as environment, urban planning, housing and other issues. For example, the Article 290 of the norm defends the refinement of public mechanisms and comptrollers about the use of natural resources. That provision is inserted in the urban planning act as a manner to defend environment

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<sup>451</sup> Retrieved from <http://www.capital.sp.gov.br/portal/noticia/7250#ad-image-0>

<sup>452</sup> See also the complete report at [https://www.moodys.com/research/Moodys-changes-outlook-on-ratings-of-14-Spanish-sub-sovereigns--PR\\_343979](https://www.moodys.com/research/Moodys-changes-outlook-on-ratings-of-14-Spanish-sub-sovereigns--PR_343979)

<sup>453</sup> Migliari, W. (2016). São Paulo, Warsaw and landlocked areas: from functionality to proto-right to the city. *Studia Iuridica*, 63(1), 175-194. Read about a taxpayer clock and other strategies for public debt control in Warsaw. Retrieved from <http://www.dlugpubliczny.org.pl/2016/02/12/public-debt-clocks-keep-taxpayers-informed-in-poland-croatia/>.

and green areas as a matter of public interest. The Article 390 says strategic actions and democratic management are needed for social policies in municipal jurisdiction. Then the Part I affirms the idea of fortifying participative practices in the administration and enhance civil society control on public policies for social assistance. Municipal boards divided into sectors such as the defense of children and adolescents. Elderly people and organisations for a better quality of life are some of the other topics that convoke boards with civil participation and authorities. Part II makes explicit the need for transparency and citizens' assemblies as two mechanisms for managing the monetary funds. The Article 317 uses the same formula about control, participation and transparency in urban land of cultural interest and landscape. The Part II of that provision avers boards in these matters shall be created based upon the principle of equity with public power and civil society representation. The idea is to follow, assess and pass plans, policies and studies related to the topics of the *caput*. The § 1 defends also public audits with social participation from representative groups of society.

So, why are these practices prone to good administration than good governance? Mainly because they make plural the actors that will control public policies, the power of police and access to information. Citizenship, non-governmental organisations and collectives are the social nuclei we can count on in that sense. It is important to say that intereaction with civil society invite public employees to develop also skills of mediators during the periods of consultancy for example. Available information, the executive responsibility in making transparent the data beforehand and full access of information for individuals conform the constructs of a democratic public administration. The Article 322 of the 16.050/2014 São Paulo Urban Planning Act corroborates transparency in local level when urban policies started being object of constant consultancy with civil society.<sup>454</sup> Much before the approval of the norm in question, the municipality incentivised civil society to be part of public hearings.<sup>455</sup> During the year of 2014 there were 12 events between June-July. Local openness in the public administration has been important also to influence the decision-making process

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<sup>454</sup> Civil society participation was formalised by the Planning Act on the 30 of June 2014 when the Municipal Parliament passed the norm. It started being valid on the 31 of July 2014. However, there were meetings happening before August.

<sup>455</sup> We understand public hearings as meetings, election for representatives of any kind and debates of any topic not necessarily a decision-making assembly.



in the municipal level with less opaqueness.<sup>456</sup> The topics of these hearings were many. Sports, housing, health, infrastructure, social assistance and urban mobility.<sup>457</sup>

In the case of Barcelona, the administration can use initially three documents in which transparency leads to participative administration. The city is historically known as a progressive administration in which citizenship has some possibilities to be part of the public matters. So, the document known *Normes Reguladores de Participació Ciutadana de 2002* is a clear example of that.<sup>458</sup> In its article 4 it is affirmed that the citizenship has the right to be informed about the way city is managed. The article 5 makes explicit the right to participation either directly or using non-governmental organisations. With reference to the article 7, the right to citizenry participation permit popular initiatives if the projects have the support of 1% from the people living in the city. The article 8 guarantees financial support for citizens' associations if they are committed to projects of general interest. The provision 12 defends civil associations, foundations and non-governmental initiatives are able to manage public facilities once their activities are not linked to profitable ends. In order to deepen the citizenship participation, the article 14 provides the legal basis for councils forged by citizens, yet their encounters cannot create binding decisions. The Article 26 is about the need for the public hearings and the Articles 22 to 25 establish all the rules for the assemblies.<sup>459</sup> Conflicts will count on community cooperation in order to be solved relying on the Article 31. The *Normes Reguladores del Funcionament dels Districtes de 2009* is another legal text convoking citizens to be part of the public issues. It refers specifically to the functioning of the Barcelona districts. The article 1 says municipal districts shall pursue the principle of participative citizenship as a tool to correct unbalanced policies. This provision has been very important to correct the excessive distortions of public investments in some urban zones in detriment of others and, consequently, generating unbalanced urban development. The article 4 highlights the importance of competences

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<sup>456</sup> There were 1 meeting in March 2014, 1 in April, 4 in June 2014, 1 in July 2014, 5 others in August 2014, 1 more in October 2014, 1 meeting in December 2014, 1 meeting in February 2015 and the last one in April 2015. Retrieved from <http://planejasampa.prefeitura.sp.gov.br/biblioteca/atas/>.

<sup>457</sup> Retrieved from <http://planejasampa.prefeitura.sp.gov.br/biblioteca/atas/>

<sup>458</sup> The Catalan act is a secondary norm derived from the principles and rights affirmed by *European Charter for the Safeguarding of Human Rights in the City* in Saint Denis, France, 2000. During the 1990s, European cities have felt the need for deepening the debate on the right to the city, human rights and participative citizenship in public administrations. That normative body is not part of the constitutive treaties of the European Union.

<sup>459</sup> Retrieved from [http://governobert.bcn.cat/sites/default/files/norm\\_reg\\_part.pdf](http://governobert.bcn.cat/sites/default/files/norm_reg_part.pdf)

for participative citizenship creating strong relations between public administrations and citizens, transparency and access to information, the collective groups or individuals subject to effects of the decision-making process. The article 13.8 insists on an agenda in which the president of the District Board is closer to citizenship while the provisions 17.6 and 25.1, letter “n”, defend open dialogue with all actors. The article 10.6, letter “f”, affirms the District Board shall emit an informative bulletin on any petition from individual or collective demands. The article 32.1 predicts the creation of commissions for consultancy with the help of citizenship and all Government Commissions must be open to citizens as it says in the article 33.5. The provision 34.1 avers that ordinary work of the District Board and its intentions for plans of actions shall not affect the interests of the citizenship. All sessions are open to people as seen in the article 35.2 and all citizens are allowed to intervene in the meetings based upon the article 38. According to the article 39.3, public hearings are part of a participative citizenship. The article 40 says Citizenry District Board is the maximum representative organism for the scope of the document in which entities and associations are also included.<sup>460</sup>

## **2.1. Local powers, rights and the innovative concept of the good administration**

The concept of “good” may sound excessively abstract at first sight. However, academic reviewers in sociology and politics have suggested a more objective debate around it. Some of the definitions for what means “good” in public administrations are related to coherent management and the utility.<sup>461</sup> Under the umbrella of these two aspects it is possible to address positive expectations to the practice of governance. However, we still face the apparent vagueness of the concept when we have the tension

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<sup>460</sup> The Preamble of the Catalan Housing Act 18/2007 says “También destaca el establecimiento de una serie de directrices para el planeamiento urbanístico que, en la línea de los artículos 3 y 9 del texto refundido de la Ley de urbanismo, aprobado por el Decreto legislativo 1/2005, desarrollan los aspectos vinculados a las viviendas. Se trata de directrices en gran parte ya incorporadas a la legislación vigente en Cataluña y desarrolladas por numerosos municipios catalanes que se han comprometido desde hace años en su aplicación, como el caso de la Carta de salvaguardia de derechos humanos en la ciudad, u otros que introducen la posibilidad de controlar el crecimiento urbano en función de criterios de medio ambiente, de acuerdo con el contenido de algunas sentencias del Tribunal de Justicia de la Unión Europea en este sentido”.

<sup>461</sup> Gerring, J. (1999). What makes a concept good? A criterial framework for understanding concept formation in social sciences. *Polity*, 31(1), 357-393

related to economic growth of public administrations and inequalities. Numbers may be in favour of investors and capital, but not necessarily helping people.<sup>462</sup> Therefore, it is important to understand “good” with more participative, inclusive and transparent goals in which the principal actors represent the ones who live in the cities respecting their historical backgrounds. This is why the relevance of community is crucial to unveil the phenomenon of urbanism made for few and promote transparency in public affairs. It can also be translated into what Henri Lefebvre called *sciences parcellaires* for those fragmented, ideological and private languages coopting what belongs to people using the juridical jargon.<sup>463</sup> In other words, the opacity in general interest themes creates a community of urban speculators inside the possibilities of more socialised communities.

Sometimes the idea of “good” in public administrations is measured with the binary criteria fast-slow. What is rapidly solved is assumed as “good” and slowness is necessarily a negative aspect. Health system is a practical example on how people are usually led by marketeers in order to make them believe efficiency depends on fast medical procedures.<sup>464</sup> The apparent condition about the health conditions of all is immediately transformed into a secondary issue and the “good” becomes a question of time. So, the concept of “good” jumps the medical barrier and gets the political field.<sup>465</sup> It is exactly in this interval that the capital gains terrain and excludes more participative practices for health. Transparency is essential and: “To achieve this all the policies aim to improve transparency and accountability in some way. In healthcare, transparency involves the public availability of information such as health budgets, performance indicators and the prices of medicines. Accountability requires individuals and

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<sup>462</sup> Statistical measures of governance may be biased, controversial and distort reality. See Kurtz, J. M. & Schrank, A. (2007). Growth and Governance: Models, Measures, and Mechanisms. *The Journal of Politics*, 69(1), 538-554.

<sup>463</sup> Agamben, G. (2007). *The coming community*. Minneapolis: Minnesota University Press. Regarding the difference between *being* and *being-called* in language, we point out the discussion of Giorgio Agamben about the words in a community. A concept is always a contingent matter whatever in law or language in general. The entry “tree” is always a reduction of all trees and *being-called* as it does not make sure of its stability. If it is not preceded by a definite article, the word “tree” cannot be specified. It is a constant linguistic exercise over the object and this is why the community is one of the external elements to repeat or echo the sounds designated to nouns. We may extend the relation observed between language and object to law and, precisely, to the right to property. It seems to be clear that exogenous acts are incessantly being reproduced among individuals, institutions and governments to reassure what the *being-called* concept of property is supposed to be.

<sup>464</sup> Burleson, E. (2010). Non-State actor access and influence in international legal and policy negotiations. *Fordham Environmental Law Review*, 21(1), 193-208.

<sup>465</sup> Hamilton, K. & Brückner, G. (2010). Good governance for early detection and rapid response. *Avian diseases*, 54(1), 384-386.

institutions to answer to those who will be affected by decisions or actions taken by them such as internally to specific agencies or publicly to communities”.<sup>466</sup> In that context of despair, public and private institutions are strongly recommended to rely on communities to combat corruption, “bad” governance and possibly reduce the cost of opportunity.

As the Transparency International Organization shows, regardless of being developed or developing countries, it is undeniable “good” governance in the sense of public scrutiny can strengthen the access to long-term results. The notion of “good” policies and regulations is also a task for governments that are expected to put public health goals as a priority: “Strengthening national leadership for anti-corruption efforts will have the most impact in reducing corruption vulnerabilities and ensure long-term sustainability. Research has shown that anticorruption efforts led by aid agencies are often ineffective when the national political context is not favourable. It is up to governments to oversee industry and prioritise public health objectives by setting and enforcing good regulations and policies”.<sup>467</sup> At the same time, executive power bodies, political parties, experts and private highly-selected entrepreneurs working for public administrations seem to be unable to deal with inefficiency in public services and opaqueness of the governmental accounts.<sup>468</sup> One of the reasons, it is the tradition of open public administration to civil society movements. The other one has to do with the private-public boundaries in which public needs that should constitute state sovereignty

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<sup>466</sup> *Corruption in the Pharmaceutical Sector: diagnosing the challenges* 2016 [on-line]. Report made by the Pharmaceuticals & Healthcare Programme, Transparency International Organization [Accessed on 4 July 2016]. Retrieved from <https://www.transparency.cz/wp-content/uploads/Corruption-in-the-Pharma-Sector.pdf>

Frey, B. S. & Benz, M. (2005). Can private learn from public governance?. *The Economic Journal*, 115 (1), 377-396.

<sup>467</sup> See *Corruption in the Pharmaceutical Sector: diagnosing the challenges* 2016, Report made by the Pharmaceuticals & Healthcare Programme, Transparency International Organization. p. 34. Retrieved from <https://www.transparency.cz/wp-content/uploads/Corruption-in-the-Pharma-Sector.pdf>. On the topic of corruption, see International Transparency. Retrieved from <http://www.transparency.org/cpi2015>. Other global organisms may help us understand the attempt to communicate and share a common agenda about transnational topics. Data from the World Health Organisation (WHO). Retrieved from <http://www.who.int/en/>. The United Nations Habitat (UN-Habitat) on mobility. Retrieved from <http://unhabitat.org/urban-themes/mobility/>. Read the *Sustainable Development Goals*, especially the number 11 on Sustainable Cities and Communities and also on universal primary education, hunger, poverty, gender questions, the combat of diseases, environmental issues and reduction of child mortality among others.

<sup>468</sup> We must be careful about privatising public inefficiency in order to provide good services. Inefficiency is either abundant in private or public management. See Moore, Mark H. (2002). Privatizing public management. In Donahue, J. D. & Nye, Joseph S. (Eds.). *Market-Based Governance Supply Side, Demand Side, Upside, and Downside* (pp. 296-322). Massachusetts: Brookings Institution Press.

based upon rights are converted in a political battle of parties. Another explanation for persistent corruptive practices in public administrations is the decision-making far from the eyes of the citizenship. Participative budgeting and the sessions of public consultancy as a daily life experience may serve adequately to the good administration principle.<sup>469</sup> The following section we try to use the concept of “good” administration as a transparent, participative and inclusive apparatus for the construction of adequate judgements beyond tribunals’ decision.

## **2.2. International aspects for Spain and Brazil in multilevel transparent practices**

A soft law initiative against corruption and opaqueness in public administrations had already been forged in the *White Paper for European Governance*, Section II, in 2001. The European bottom-up demand pointed out the urgent need for transparent and participative practices from civil society in public administrations inside the European Union. It was an effort also claiming the need of non-institutionalised actions from civil society.<sup>470</sup> Along the document, public hearings with citizens, consultancy with elected authorities and the scrutiny of non-governmental organisations are some of the tools expected to be used with the intention of combating corruption. The idea is the creation of a minimum agenda to tackle action and reduce the endemic *modus operandi* of fraud in public contracts that affect deeply general interest. It is a relevant initiative once it sets a political stage for countries with different schemes of fraud, levels of corruption and problems in various thematic issues. Other advantage of a soft law measure like that has to do with the asymmetry of information. A simple debate on public matters in which society is invited to take part of can change the customary views on corruption.

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<sup>469</sup> The crisis of governance also leads governments to opt for other practices with reference to the general interest. The notion of the common goods is more and more referred in the public eye. See Herrera, I. T. (2014). Crisis de la gobernanza urbana y gestión de los comunes. *Revista de Investigaciones Políticas y Sociológicas*, 13(1), 33-47.

<sup>470</sup> The notion of an organic evolvement of people in public administration is explicitly defined in the *White Paper for European Governance*: “Such consultation helps the Commission and the other Institutions to arbitrate between competing claims and priorities and assists in developing a longer term policy perspective. Participation is not about institutionalising protest. It is about more effective policy shaping based on early consultation and past experience”. Retrieved from [http://europa.eu/rapid/press-release\\_DOC-01-10\\_en.htm](http://europa.eu/rapid/press-release_DOC-01-10_en.htm)

<sup>471</sup> Some years later of the *White Paper for European Governance*, the Recommendation CM/Rec(2007)7 materialised by the Council of Europe came back to the topic on good administration as a tool to combat opaqueness. It suggests that Spain and the European countries based upon the Articles 8 and 10, respectively, shall respect the participation of citizenship in public decisions and be in accordance with transparent procedures in public administrations. <sup>472</sup>

Other important document on good administration for more transparency is the *European Charter of Fundamental Rights* (2007) as a legal apparatus to enforce more open initiatives specially coming from civil society. The Article 41 mentions in concrete the right to good administration and brings also other citizens' rights. In order to undo the notion of slowness in public matters, the same Article, point 1, affirms procedures in public administrations must be handled in a reasonable time which refers to a limit of days for the ordinary expedients. The letters "a", "b" and "c" of Article 41 defend that every individual, respectively, has the right to be heard, to have access to personal files and demand the reasons of the public responses. The Article 42 reinforces the right of access to documents from public administrations and the provision 44 refers to the right of petition to the European Parliament. In another constitutive agreement, the *Treaty on the Functioning of the European Union* (2007), Article 6, letter "g", mentions the need for administrative cooperation. The Article 15.1 affirms that "In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible". The same article in its point 3 says: "Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph". The Provision 63, letter "b", says: "to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and

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<sup>471</sup> Labour unions may be part of that process as it is pointed out by some researchers. Read Lee, C. S. (2007). Labor Unions and Good Governance: A Cross-National, Comparative Analysis. *American Sociological Review*, 72(1), 585-609

<sup>472</sup> Ponce Solé, J. (2011). EU law, global law and the right to good administration. In Chiti, E. & Matarella, B. G. (Eds.). *Global administrative law and EU administrative law. Relationships, legal issues and comparisons* (pp. 133-145). Berlín: Springer. See also the jurisprudence of the Court of Justice of the European Union (CJEU) about a European ombudsman that failed in observing the due care and time in a citizen's demand that resulted in a condemnation of the public servant. Case *European Ombudsman v. Claire Staelen*, C-337/15 P.

the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security”.<sup>473</sup> The Article 74 highlights the need for administrative cooperation in freedom, security and justice matters among State Members of the European Union. Once more, citizenship is in the core of what is defined by us as a multilevel transparent practice and necessarily linked to less opaque public expedients since policies shall be oriented by the defense of fundamental rights.

The legal arrangement for the Brazilian reality is defined regionally during the 1990s.<sup>474</sup> Yet the concept of good administration is not explicit as it is in the European Union, there are certain legal parameters similar to the European experience to improve the work of public administrations with a participative society. In that sense, the effort to harmonise regional legislation based upon democratic clauses is predicted by the *Tratado de Asunción* (1991) in its Article 1. The *Protocol of Ouro Preto* (1994) in its Articles 28, 29 and 30 advanced in normative matters to deepen representation for civil demands. Yet a non-binding procedure, the voice of citizenship could be directed to the organism of MERCOSUR. Democratic principles were reassured by the *Protocol of Ushuaia* (1998) in its Article 1 and other provisions.<sup>475</sup> But the civil participation and practices close to transparent governments started being institutionalised by the MERCOSUR’s meetings in the *Protocolo Constitutivo del Parlamento de MERCOSUR* in 2005. The Article 2.4 affirms the right to civil participation and representation in the South-American market. In the point 5 of the same provision, values related to citizenship and collective consciousness are part of the principles to construction a

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<sup>473</sup> Retrieved from <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>

<sup>474</sup> Article 4, unique paragraph, 1988 Constitution of the Federative Republic of Brazil, affirms the Brazilian society assumes Latin-American integration as a value and corroborates the idea of solid bonds among South-Americans.

<sup>475</sup> Retrieved from <http://www.mercosur.int/innovaportal/v/4054/2/innova.front/textos-fundacionales>. The Nations of Argentina, Paraguay and Uruguay are part of the origins in the regional agreement in question. Bolivia and Venezuela are State-observers. Yet there is a democratic binding notion to guarantee the good functioning of the public administrations in MERCOSUR, the South-American reality still suffers from instability. In 2012, the President elected Fernando Lugo was taken office by Senate votes after a countryside confront in which some people died. Lugo’ support for the land cause in his biography was considered a real motif for his removal. The President elected Dilma Rousseff in 2014 for a second-round mandate suffered a process of impeachment for misbalancing public budget. The doubt persisted in a fragile accusation of the executive Brazilian representative based upon the 1950 Act for Government Budget Equilibrium and the Article 37, paragraph 4, 1988 Constitution of the Federative Republic of Brazil.

bridge between civil society and governments. The Article 3.2 says the principle of transparency is important as a right of access to information and the decision-making process. Confidence and citizenry action are two important guidelines to make stronger transparent practices among Member States. According to the Article 4.9, the MERCOSUR Parliament is in charge of organising public meetings, but that competence implies also the obligation of assembling civil society for those themes that affect people. With the intention of avoiding conflicts among public competences, the Article 4.14 affirms there must be the harmonisation of national and regional legal design for the pursuance of parliamentary tasks. That aspect is similar to the multilevel European model as we presented along the good administration debate in the region. The MERCOSUR's agenda seems to be aware of the tensions created by hierarchical and top-down institutional models of governance. The Parliament's activities tend to be more open and democratic, but mainly central as a political basis for the administrative task. It does have to do with the political debate and citizenship participation for a sophisticated legal design in which the values agreed in citizenry forums in different levels will require the adequation of public administrations for all members of the MERCOSUR. The Article 19 is a real guarantee for the qualified and ample participative model for parliamentary acts since that political body is able to enact studies on specific topics, projects and anti-projects for norms, declarations and recommendations among others.

Brazil and Spain are also signatories of the United Nations Convention against Corruption of 2003. In its Article 5 it is affirmed all State parties shall make domestic efforts in their legal systems to promote anti-corruption policies and practices: "Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability".<sup>476</sup> The Article 7, 1 (a), defends transparency as a principle that must be applied to public sectors as well. The point 3 of the same provision calls the attention to the importance of non-opaqueness also during the legislative process: "Each State Party shall also consider taking appropriate legislative and administrative measures,

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<sup>476</sup> *United Nations* [on-line]. Convention Against Corruption [Accessed on 17 May 2016]. Retrieved from [https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf)



consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties”. There seems to be a sort of connection between public issues and the political design avoiding only top-down decisions for the administrative matters. The Articles 9, 10 and 12.2, letter “a”, refer respectively to transparency in public finances, the need for public reports and the cooperative link between private entities and law enforcement agencies. Furthermore, the Article 13.1 calls the attention to citizenry participation and non-governmental organisations as some of the key-actors for anti-corruption practices: “promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption”.<sup>477</sup>

In 2006, the *Centro Latinoamericano de Administración para el Desarrollo* (CLAD), including Brazil, Spain and other Latin-American countries, agreed in making a code for public administrations based upon common principles, democratic binding rules for democratic practices, standards of ethics in governments and provide the means for the implementation of the *Iberoamerican Code of Good Government*. With reference to the mandatory criteria for public governance, the point 25 of the document affirms that the member States must support the participation of citizenship and peoples to formulate, adopt and evaluate public policies: “Fomentarán la participación de los ciudadanos y los pueblos en la formulación, implantación y evaluación de las políticas públicas, en condiciones de igualdad y razonabilidad”. Among the values and principles public administrations are committed to and oriented by the concept of good governance, we find impartiality, transparency and gender among many others: “Los valores que guiarán la acción del buen gobierno son, especialmente: Objetividad, tolerancia, integridad, responsabilidad, credibilidad, imparcialidad, dedicación al servicio, transparencia, ejemplaridad, austeridad, accesibilidad, eficacia, igualdad de género y protección de la diversidad étnica y cultural, así como del medio ambiente”. Furthermore, if there is any suspicion of preferential treatment affecting the general

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<sup>477</sup> *United Nations* [on-line]. Convention Against Corruption [Accessed on 17 May 2016]. Retrieved from [https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf)

interest promoted by private clients, the executive power is expected to be away from personal, familiar, corporative, clientelist or any other spurious relation against citizenship: “Perseguirá siempre la satisfacción de los intereses generales de los ciudadanos y los pueblos, y sus decisiones y actuaciones se fundamentarán en consideraciones objetivas orientadas hacia el interés común, al margen de cualquier otro factor que exprese posiciones personales, familiares, corporativas, clientelares o cualesquiera otras que puedan colisionar con este principio”. It is also a relevant information that the Preamble of the *Código Iberoamericano de Buen Gobierno* conceives principles and practices aforementioned relying on governmental mandates in which the public scrutiny in their actions are easily publicised: “Un Gobierno que dificulte el escrutinio público sobre su toma de decisiones”.<sup>478</sup>

### **2.3. Different levels of good administration: transparency as a legal norm in favour of citizenship**

#### ***São Paulo***

The Municipality of São Paulo is a curious case of progressive and conservative transparent practices. The 16.050 São Paulo Urban Planning Act presents in its Article 5, VII, §7, collective participation of different representative demands from the municipality. The Article 48 says popular initiative and civil society participation, for example, shall be in the debate for the creation of Special Zones for Social Interest (ZEIS). It is an urban norm for city planning in those matters related to the settlements of neighbourhoods and zones for people from low-income social classes. Although the civil society presence in the councils in charge of housing issues, binding decisions are yet concentrated in the institutional realm and controlled by the administrative municipal competences. As the Article 50 says the executive municipal power assumes the formulation of the urban planning with the participation of the population, but it does not oblige the local power to implement social counterarguments, statistics or legal

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<sup>478</sup> *Centro Latinoamericano de Administración para el Desarrollo* [on-line]. Código Iberoamericano de Buen Gobierno. Establece las obligaciones y principios que se tomaron mediante el consenso de Montevideo, de fecha de junio de 2006 en el que se detallan las reglas vinculadas: a) a la naturaleza del gobierno; b) a la ética gubernamental; y c) a la gestión pública. [Accessed on 29 May 2017]. Retrieved from <http://unpan1.un.org/intradoc/groups/public/documents/ICAP/UNPAN027945.pdf>

demands. The §1, the same provision, affirms the local community may present suggestions, but the council is responsible for its approval. Article 141, part XIV, predicts a specific board with equal representation in those urban policies in which the municipal power acts with the support of other federal entities. In order to suggest some alternatives to deal with the challenges that still impede civil society participation in Brazil, we cover the federal and constitutional norms to make evident the need for bottom-up actions in urban matters. The Urban Planning Act 16.050/2014, article 327, paragraph I, item II, letter “b”. The Article 5, item V, São Paulo Urban Planning Act 1.6050/2014, makes explicit the right to the city as a principle that commands urban policies.<sup>479</sup>

In the Brazilian Statute of the City, Federal Law 10.257/2001, section on the Democratic Administration of the City, the Article 45 states that public competences are obliged to include popular and civil participation as an instrument to exercise citizenship rights and promote transparency. Moreover, Article 45 says it is urgent to guarantee the immediate action of public organisms in metropolitan areas with dense urban agglomerations. Article 43 of the City Statute governs the participation of the social segments that are allowed to take part in advisory commissions. There must be a) collegial organs of public policy in national, state and municipal competences; b) debates, public consultation and government hearings; c) conferences about the topic of democratic public urban management; d) popular legislative initiative to elaborate law projects and planning models, programmes and technical charts on urban development. Although the collective forces have been included in the document, they cannot participate of the decision-making process. Civil society voices are not allowed to elaborate binding legal clauses and direct them to the legislative power. A referendum would be a possibility for urban questions about to affect basic social rights, at the time the City Statute was voted in the Brazilian federal parliament, but the fifth number in Article 43 responsible for this social participative mechanism was vetoed by the ex-President in office, Fernando Henrique Cardoso.

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<sup>479</sup> The act defends in the Section Municipal Council for Urban Policies that social movements shall be part of the board: “representantes dos movimentos de moradia”. City Council Legislation. Retrieved from [http://www.prefeitura.sp.gov.br/cidade/secretarias/desenvolvimento\\_urbano/legislacao/plano\\_diretor/index.php?p=1386](http://www.prefeitura.sp.gov.br/cidade/secretarias/desenvolvimento_urbano/legislacao/plano_diretor/index.php?p=1386)

Yet about the Brazilian experience on transparency, the notion of accountability tends to put in practice more the power of police in higher institutions than the notion of a multilevel transparency in which citizenship participation should be the main important value.<sup>480</sup> That top-down relation is tense once the Federal Government is constitutionally able to intervene in states' and Municipal's administrations. The Article 34 of the 1988 Constitution of the Federative Republic of Brazil, VII, letter "d", obliges lower federal entities in explaining how monetary funds are used. Up to a certain extent, it may seem an effective measure pro-transparency, however, the true effect is a massive concentration of numbers and data in few hands. So, opacity gains exponentially the terrain of secrecy. The Fiscal Responsibility Act N° 101/2000, Articles 1 and 48, did not include citizenship for the control of public administrative actions and transparency. After Luiz Ignacio Lula da Silva's election for presidency that non-participative agenda changed radically with the Capiberibe Act N° 131/2009 in which forms of popular participation, open-government principles and public hearings were included in the new text. Any citizen, political party, association or union may evoke the principle of transparency to demand public accountability using the webpage "Portal da Transparência".<sup>481</sup> Reading the Provisions 48-A, 73-A and 73-B of the Capiberibe Act N° 131/2009 it is notable positive effects that promoted low-cost checks and balances, accessible means of communication for public opinion follow-ups and individual controllers of the Brazilian public administrations. That legal apparatus puts forward a more transversal system of law in which the right to access of information and practices of good administration are present.

However, all these gains in terms of citizenship participation and more collective forms of public administrative control are at risk. After Dilma Rousseff's process of impeachment initiated, a series of attacks proceeded against open-government principles. The interim government of Michel Temer, who was in the position of Vice-President, assumed the control of the Brazilian Federation with the

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<sup>480</sup> The principle of transparency is only referred explicitly in its Article 216-A, IX, but curiously in matters evolving culture. The Constitutional Amendment N° 71, 2012, reinforces the vote of the constituency during the 1980s. Transparency and the obligation of sharing information are the two tasks expected to be conducted by the public federal powers in the National System of Culture. Rouanet 8.313 Act, Article 4, § 1, National Programme for Culture Support, says the Ministry of Culture shall control the funds for artistic projects, but there are not tools of citizenship participation nor transparent agendas imposed for the highest board in the matter.

<sup>481</sup> Retrieved from <http://www.transparencia.sp.gov.br/>

impediment of Dilma Rousseff's mandate, extinguishing the body that controlled the abuses against the Brazilian State executive power.<sup>482</sup> Public hearings, audits and policy accountabilities under the responsibility of the Comptroller General's Office ceased with the signature of the Provisional Measure 726/2016, Article 1, III. The same text created in its Article 3, I, the Ministry of Transparency, Monitoring and Control. Many of the ministers indicated are evolved in cases of corruption, public-private frauds in contracts and traffic of influence. The Transparency International Organisation showed its preoccupation with these events and claimed Brazil had to face a deep political reform to get back civil society's confidence specially in those cases related to giant enterprises of construction.<sup>483</sup> During the first two weeks of the new government, a ministry was discovered in a secret audio conspiring against the anti-corruption operation called "Car Wash".<sup>484</sup> His voice was recorded by a politician who is under the accusation of trying to block justice investigation the names evolved in Petrobras scandal. The 8.429/1992 Act, Article 12, I-III, mentions the types of sanctions a federal agent would suffer if any illicit enrichment were detected, but just after a long exhausting due process of law. Society needs rapid rule of law operation for corrupted political systems. The Code of Conduct for Top Administrative Employees, Article 1, affirms the need for integrity in high public administrative positions and in its Article 17 of the text sanctions in case a public agent is not committed to good practices. Nonetheless, the penalties do not lead impugned actors to a penal treatment, but ethical censorship and warnings.<sup>485</sup> The notion of open-government as a principle of publicity is also present in the federal administrative procedures that are regulated by the 9.784/1999 Act. However, public consultation is predicted in the Articles 31, 32 and 34 as long as the third part under the general interest principle is permitted by competent governmental organism. Again, the State power of police is a top-down control and exclude citizenship of part in possible negative externalities.

Yet a legal document of good governance in the Brazilian public administrations has been recently approved, in which any citizen is able to report illegalities, the

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<sup>482</sup> Read Souza, J. (2015). *A tolice da inteligência brasileira*. São Paulo: Leya.

<sup>483</sup> Retrieved from [http://www.transparency.org/news/feature/brazils\\_corruption\\_clean\\_up](http://www.transparency.org/news/feature/brazils_corruption_clean_up)

<sup>484</sup> The ex-Minister Fabiano Silveira criticised the Operação Lava-Jato and resigned after a massive demand for more coherence by the Brazilian society in the supposed new government against corruption.

<sup>485</sup> Good practices follow the same logic of good governance. Non-multilevel agendas, yet open-government and coherence are expected to be part of the public employee in high positions of the Brazilian State.

13.303/2016 Governance Act does not include civil society in the decision-making process as we have in some cities like the on-line platform for voting on participatory budgeting promoted by the City of Paris.<sup>486</sup> According to the articles 18 and 19 of the that legal document, the Administrative Council is the only entity able to debate, approve and monitor the public contracts observing other federal legal instruments, for instance, the 12.527/2011 Transparency Act. When we peruse the article 01, parts I and II, of the Transparency Act it is found that all federative competences must check public-private companies or contracts. In addition, private actors have the right to access the State competences, although they are expected to be subject to the scrutiny of the public powers as it is stated in the article 2. The article 3 of the Transparency Act, parts I and II, mentions the principle of publicity as a protocol except the pieces of information that are classified for security reasons. The part IV of the same article, on social control in public instances, may be used to impugn public contracts, but as the 13.330/2016 Act predicts not to decide on investments.<sup>487</sup> The federal act on

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<sup>486</sup> Retrieved from <https://budgetparticipatif.paris.fr/bp/>

<sup>487</sup> The Complementary Act N° 846/1998 regulates transparency in specific areas. Health, culture, sports, observation and rights of the physically and mentally disabled, children and adolescent's rights, environmental issues and financial investments, competition and development. Three hot topics about São Paulo State must be commented. The first one is about a case of corruption related to buy-sell food contracts for state schools. Some politicians produced the appearance of free competition among food suppliers, but in fact members of the Paulista government took part of a fraud in which they agreed bribes with the private Company Cooperative Orgânica Familiar (COAF). The other one refers to a giant infrastructure project called Rodoanel. The investment was defended to promote the integration of the massive highways from different parts of Brazil surrounding the Paulista metropolitan area to alleviate traffic jam. It would generate the increase of the volume of business since the lack of infrastructure is one of the market failures in Brazil. Both scandals are not subject to preventive actions such as public hearings, participative audits, open-governments practices, accessible contracts data on internet and an efficient criminal justice in cases of corruptions in public administrations. The last one is about a penitentiary system for adolescents who are seriously evolved in criminal offenses. Billionaire contracts and non-transparent administrative practices. Retrieved from <https://www4.tce.sp.gov.br/6524-conjurcom-oab-sp-diz-ser-urgente-criacao-cpi-para-investigar-escandalo-merenda> and, about the second case involving road construction and lack of transparency, read the documents published by the Brazilian federal government. Retrieved from [http://portal3.tcu.gov.br/portal/page/portal/TCU/imprensa/noticias/repositorio\\_noticias/Acordo%20com%20Minist%C3%A9rio%20P%C3%ABlico%20para%20obras%20no%20rodoanel%20de%20S](http://portal3.tcu.gov.br/portal/page/portal/TCU/imprensa/noticias/repositorio_noticias/Acordo%20com%20Minist%C3%A9rio%20P%C3%ABlico%20para%20obras%20no%20rodoanel%20de%20S). The third one, see <http://www.conjur.com.br/2015-jan-12/perspectiva-caixa-preta-fundacao-casa>. On environmental disasters, the Brazilian courts and administrative competences tend to diminish the international responsibility to investigate the negligence and lack of commitment of the mining companies, for example. The tragedy of Rio Doce, Minas Gerais is one of the examples of how environmental legislation in the country is not applied in connection to other rights such as the right to housing, safety and sanitary conditions since the families affected by the disaster are still waiting for the law enforcement to be restituted in their dignity. About the importance of incorporating international agreements through the constitutional matters, read Peñalver i Cabré, A. (2014). El derecho humano al medio ambiente y su protección efectiva. *Revista Vasca de Administración Pública*, 1(99-100), 2333-2357. Another legal text, which is the 911/2002 Complementary Act, concentrates the power of investigation in cases of irregularity. Although published much before the 12.527/2011 Federal Act for Transparency, the

transparency talks also about the right to information and makes clear publicity do not need to be motivated as we see in the articles 7 and 8. The § 2 of the article 8 of the Transparency Act obliges all actors of the federation use internet to make available all numbers, data and contracts. Once more, public affairs and competences shall be committed to an agenda based on top-down control of information. Excess of formalities and few actors make more difficult collective synergies to invigilate public money, State power and responsibilities.<sup>488</sup> The article 10, *caput* and § 1, demands the identification of the citizen or the company in those administrative petitions generated by the lack of confidence. An abstract criterion that personifies irregularities potentially causing intangible externalities. Information regarding fundamental rights cannot be denied as the article 21 defends. The responsibilities predicted in the article 32 include licit conduct of the public employee and good faith in all procedures described by the Federal Transparency Act. If any fault or fraud is detected, the official or public agent will face administrative process as it is expressed in the article 33. Only military servants are subject to penal sanctions, the other offenders suffer from warnings, fines, anti-ethical declarations or even interdiction.<sup>489</sup> It is mandatory to make available the access to information through clear and objective language according to the Article 5: “É dever do Estado garantir o direito de acesso à informação, que será franqueada, mediante procedimentos objetivos e ágeis, de forma transparente, clara e em linguagem de fácil compreensão”.<sup>490</sup> In Brazil, Odebrecht, OAS, Andrade Gutierrez and UTC are

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legislation enacted after the federal document was the 34/2012 São Paulo State Constitutional Amendment. It is not allowed to assume any position in public administration the ineligible the candidate if the electoral competences for any circumstance decide so after a diligent due procedure of law.

<sup>488</sup> In cases related to federal public administration, the Article 20 of the Federal Act for Transparency says the principle of subsidiarity shall be used relying on the 9.784/1999 Act.

<sup>489</sup> The Article 32, § 1, Part I.

<sup>490</sup> The Complementary Act N° 846/1998 regulates transparency in specific areas. Health, culture, sports, observation and rights of the physically and mentally disabled, children and adolescent's rights, environmental issues and financial investments, competition and development. Three hot topics about São Paulo State must be commented. The first one is about a case of corruption related to buy-sell food contracts for state schools. Some politicians produced the appearance of free competition among food suppliers, but in fact members of the Paulista government took part of a fraud in which they agreed bribes with the private Company Cooperative Orgânica Familiar (COAF). The other one refers to a giant infrastructure project called Rodoanel. The investment was defended as a way to promote the integration of the massive highways from different parts of Brazil surrounding the Paulista metropolitan area to alleviate traffic jam. It would generate the increase of the volume of business since the lack of infrastructure is one of the market failures in Brazil. Both scandals are not subject to preventive actions such as public hearings, participative audits, open-governments practices, accessible contracts data on internet and an efficient criminal justice in cases of corruptions in public administrations. The last one is about a penitentiary system for adolescents who are seriously evolved in criminal offenses. Billionaire contracts and non-transparent administrative practices oscillate between deplorable management of the

of the constructors involved in scandals of corruption with politicians financing their campaigns to pass federal acts in the National Congress. The companies have also implemented in their departments special sectors to adjust their accountabilities to systems of bribery. Their corruptive actions affect city interests and international investments forging also an oligopolistic construction market with overvalued public contracts.

### ***Barcelona***

The Directive Municipal Planning of Barcelona for Participative Citizenship 2013-2016 recognises the collective and individual participation as a goal. Different from the São Paulo Urban Planning, it is a charter of principles and concepts to put forward the main tools to evolve citizens in the decision-making process. Participation is considered a transversal value as it is said along the section “The Need for Strategic Focuses”.<sup>491</sup> The board does not have competence for binding decisions as it is seen in the Articles 41 and 42. Suggestions and consultancy are predicted in the legal text, but the binding decisions still concentrated in the deliberative institutional arrangement. The Article 43.2, letter “b”, determines 17 citizens representing civil society and the final composition of the District Board must have 1/3 of its representatives of citizens as both the Articles 43.2, letter “c”, and 48.3, letter “d”, affirm. The Article 44 obliges the body assembling once twice a year. With communicative goals, the District Board must assemble the minimum of two times every two months. The Article 46 confirms the openness of the District Board for citizenry, but again participation is not authorised to

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public resources and corruption. About the first scandal, the fiscal information from the responsible competence. Retrieved from <https://www4.tce.sp.gov.br/6524-conjurcom-oab-sp-diz-ser-urgente-criacao-cpi-para-investigar-escandalo-merenda>. On the second case, Tribunal de Contas da União. Retrieved from [http://portal3.tcu.gov.br/portal/page/portal/TCU/imprensa/noticias/repositorio\\_noticias/Acordo%20com%20Minist%C3%A9rio%20P%C3%ABlico%20para%20obras%20no%20rodoanel%20de%20S](http://portal3.tcu.gov.br/portal/page/portal/TCU/imprensa/noticias/repositorio_noticias/Acordo%20com%20Minist%C3%A9rio%20P%C3%ABlico%20para%20obras%20no%20rodoanel%20de%20S). The third one, see <http://www.conjur.com.br/2015-jan-12/perspectiva-caixa-preta-fundacao-casa>. Another legal text, which is the 911/2002 Complementary Act, concentrates the power of investigation in cases of irregularity. Although published much before the 12.527/2011 Federal Act for Transparency, the legislation enacted after the federal document was the 34/2012 São Paulo State Constitutional Amendment. It is not allowed to assume any position in public administration the ineligible the candidate if the electoral competences for any circumstance decide so after a diligent due procedure of law.

<sup>491</sup> *Ajuntament de Barcelona* [on-line]. Pla Director de Cooperació al Desenvolupament, Solidaritat i Pau de l’Ajuntament de Barcelona 2013-2016 [Accessed on 17 January 2016]. Retrieved from <http://ajuntament.barcelona.cat/relacionsinternacionalsicooperacio/sites/default/files/pla-director-13-16.pdf>, pages 51-52.



intervene in the decision-making process. Collectives and individuals is expected to be part of the commissions and workshops, but they are restricted to observation as we see in the Article 47.4.<sup>492</sup> In that sense, it is quite similar to what happens in the 16.050 São Paulo Urban Planning Act

Although we understand the principle of good administration as a more effective tool compared to the good government practices, there are still challenges in all levels of public administration yet to be overcome. Along the present chapter, we pointed out legal designs for more open-government in different levels of public administrations with more participative citizenship, but it is undeniable the inexistence of legal norms giving deliberative competences to public hearings and creating a binding decision-making process for the assemblies, civil society meetings and popular councils. Private-public partnerships, privatisation of government responsibilities and the logic of reducing the costs in short-term periods have not been resulted necessarily in more transparent practices. Among thousands of private contracts for urban infrastructure agreed with public administrations in Spain, seven out of ten euros ended up in the hands of ten companies of construction.<sup>493</sup> The groups of ACS, ACCIONA Servicios Urbanos, FCC, FERROVIAL and SACYR were the biggest companies contracted by public administrations for urban services, city projects and means of transportation. The Fundación Civio has announced how opaque is the control of these private agents once the Uniones Temporales de Empresas play non-transparent roles with reference to the general interest.<sup>494</sup> Civil society must have power and mechanisms as a counterpower to impede abuses of elected governments while running the general interest.<sup>495</sup>

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<sup>492</sup> Retrieved from [http://governobert.bcn.cat/sites/default/files/norm\\_reg\\_dist.pdf](http://governobert.bcn.cat/sites/default/files/norm_reg_dist.pdf)

<sup>493</sup> See the Spanish Official Gazette, «BOE» núm. 89, de 13 de abril de 2010, páginas 38932 a 38932 (1 pág.), about contracts, prices and public money in “Acuerdo de la Dirección General de la Sociedad Estatal de Infraestructuras del Transporte Terrestre, Sociedad Anónima (SEITT) por la que se hace pública información relativa a diversos contratos de obra licitados por la Sociedad; «BOE» núm. 44, de 20 de febrero de 2003, páginas 1349 a 1350 (2 págs), Resolución del Ayuntamiento de Las Rozas de Madrid por la que se hace público las adjudicaciones efectuadas en el año 2001; «BOE» núm. 267, de 4 de noviembre de 2016, páginas 67621 a 67622 (2 págs), Anuncio del Ayuntamiento de Madrid por el que se hace pública la formalización del contrato de gestión del servicio público, modalidad concesión, de contenerización, recogida y transporte de residuos en la ciudad de Madrid.

<sup>494</sup> *Fundación Civio* [on-line]. ¿Quién cobra la obra? [Accessed on 17 January 2016]. Retrieved from [http://www.civio.es/dev/wp-content/uploads/2016/11/NP\\_QuienCobraLaObra\\_20161116.pdf](http://www.civio.es/dev/wp-content/uploads/2016/11/NP_QuienCobraLaObra_20161116.pdf)

<sup>495</sup> About the Brazilian case, read Holanda. Sérgio Buarque. 2010. Capítulos da história do império. São Paulo: Companhia das Letras. There is an interesting debate of the Spanish democracy since the end of Francisco Francos’ Military Regime (1939-1975) in Ramírez, M. (2003). *España de cerca: reflexiones sobre veinticinco años de democracia*. Madrid: Trotta. Read also Navarro, A. J. S. (1998). *La transición española en sus documentos*. Madrid: Centro de Estudios Políticos y Constitucionales.

The 1978 Spanish Constitution says in its Article 9.2 public powers shall remove all obstacles that impede the exercise of citizenship and its participation in social, political and economic issues. The Provision 105 of the constitutional diploma affirms a Spanish Act should regulate public hearings and the access to documents except those ones considered under the scrutiny of State security. More than three decades after the approval of the magna charter, the 19/2013 Spanish Act on Transparency and Good Government (SATGG) appeared to guarantee and regulate open access to public information. Among the traditional forms of publicity, technologies were included as one of the tool to promote transparency as it is seen in the article 10 of the infra-constitutional diploma. Control of public administrations' practices, statistics, public budget, juridical processes and other issues evolving institutional organisation of domestic actors are some of the topics under the umbrella of a concept called active publicity.<sup>496</sup> Apart some exceptions based upon the principle of national security and military defense provided for the article 14, we find constitutional mechanisms in the article 12 such as participative citizenship and "open-archive" with strategic legal policies and democratic inspiration: "Todas las personas tienen derecho a acceder a la información pública, en los términos previstos en el artículo 105.b) de la Constitución Española, desarrollados por esta Ley". Principles for good government are enunciated in the article 26 in which transparency should regulate the acts of elected representatives of the political scene or those public positions appointed under the prerogative of confidence for the General Administration of the State. Sanctions and disciplinary measures against illegal benefits from public funds and economic crimes are in the articles 29 and 30. In addition, the notion of public interest combined with the opinion of the citizenship comes into sight as a tool to combat illegalities: "En la graduación de las sanciones se valorará la existencia de perjuicios para el interés público, la repercusión de la conducta en los ciudadanos, y, en su caso, la percepción indebida de cantidades por el desempeño de actividades públicas incompatibles".<sup>497</sup>

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<sup>496</sup> The Article 5 of the Act sets the stage for the making of publicity practices. It opens the Chapter offering a corollary of principles that converge expectations of good administration on international grounds. The Articles 6 to 9 bring details to a myriad of possibilities in making less opaque administrative life.

<sup>497</sup> Yet the citizenship perception of an economic crime against public treasury may stumble in defining an evident offense as a crime, we believe it is very positive the Spanish legal design to start the debate of

One of the challenges yet to be overcome by good government's idea in Spain, similar to the construct of good administration, is again the concentration of power. As we see in the Article 36.2, the 19/2013 SATGG, the Commission for Transparency and Good Government predicts just one representative called "people's defender" or ombudsman. Although the name, all participants in these nuclei are institutionalised by indirect citizenship exercise once most of them come from the Spanish electoral system.<sup>498</sup> Another hard question is about the self-referential *modus operandi* for the running of public issues related to transparency. According to the Article 39.1, all the legal apparatus that may complement and guide the 19/2013 SATGG does not include transversal participation of civil society.<sup>499</sup> It is a domestic top-top relation in cases of public interest if there are evidences of illegal procedures in public administrations. So, expedients of any supposed malfunction shall be diligently conducted by relative secrecy meeting other principles such as the presumption of innocence, *in dubio pro reo* and non-arbitrariness. Although democratic institutions have to pursue open legitimate right to the individual defense, the normative is far from the notion of criminal organisations for urban matters. Cities are mostly the objects of corruptive practices and part of the public administrations coopted by the economic power.<sup>500</sup> Other theme is how the financial market is regulated for real estate investments. The Article 53.2, letter "b" of the 39/2015 Act on the Juridical Regime for Public Administrations, which is mentioned by the Article 39.1 of the 19/2013 SATGG, defends the procedures related to sanctions will respect the presumption of no administrative responsibility till it is

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how criminals against the public interest should be treated.

<sup>498</sup> The president of the Commission is designated by Royal Decree, *i.e.*, the executive power in office. One senator and one parliamentary representative meet political reasons that are not necessarily the interests of a general citizenship over a specific political agenda of one party.

<sup>499</sup> The article received a complex set of enacted legislation against corruption or "bad" government. See the following letters from the Article 39.1, SATGG: "a) Las disposiciones de la Ley 47/2003, de 26 de noviembre, General Presupuestaria, que le sean de aplicación. Anualmente elaborará un anteproyecto de presupuesto con la estructura que establezca el Ministerio de Hacienda y Administraciones Públicas para su elevación al Gobierno y su posterior integración en los Presupuestos Generales del Estado. b) El Real Decreto Legislativo 3/2011, de 14 de noviembre, por el que se aprueba el Texto Refundido de la Ley de Contratos del Sector Público. c) La Ley 33/2003, de 3 de noviembre, del Patrimonio de las Administraciones Públicas, y, en lo no previsto en ella, por el Derecho privado en sus adquisiciones patrimoniales. d) La Ley 7/2007, de 12 de abril, del Estatuto Básico del Empleado Público, y las demás normas aplicables al personal funcionario de la Administración General del Estado, en materia de medios personales. e) La Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común, y por la normativa que le sea de aplicación, en lo no dispuesto por esta Ley, cuando desarrolle sus funciones públicas".

<sup>500</sup> Capdeferro, Oscar (2016). *El derecho administrativo y la prevención de la corrupción urbanística*. Barcelona: Madrid, 2016.

proved the opposite. The historical and institutional ambiguities of what we put in perspective from good governance actions may be a very useful tool to trace traditional oligopolies.<sup>501</sup> Although the tendency of a top-top logic in public-private contracts, local acts seem to be more effective against corruptors if good governance principle is used as an instrument for more multilevel transparent practices. It seems reasonable the inclusion of citizenship as a way to make public administrations more susceptible to control, but not denying the dynamics of prompt answers for people's demand.

The article 2 of the 19/2014 Catalanian Act for Transparency presents a series of principles that must be embodied by the exercise of public administrations. In its letter "a", for instance, the concept of transparency is associated to the notion of reasonable production of information in way the public opinion can fully understand the content of the legal formalities used by administrative actions. The letters "d" and "e" of the same provision refer, respectively, to the ideas of good and open government. The article 58 is incisive in connecting people to the access and use of public services based upon high standards through the principle of good administration. Information about costs, profit rates and the beneficiaries are supposed to comply with the general interest. The article 65 of the same act, in its letter "c", citizens are invited to cooperate on those policies that affect them in the future both in general and sectorial areas. Letter "d" of the same provision evokes transparency and access to public information as a manner to make effective more open governments. It is definitely a refined horizontal legal design in which participation tends to attract not only people interested in private-public contracts, but also individuals with high expertise in urban issues. Technologies, social media networks and citizens engaged in translating urban issues into digestible pieces of information create positive nets of checks and balances. In that sense, the Article 65.2 gives the legal support for these virtual mechanisms and also incentivises a non-institutional control with outsiders watching the tower. The Article 66, in its points 3 and 4, respectively, indicates the need for making data available on internet and makes responsible the public powers to teach citizens how to use new technologies. In the Article 66.1 of the same Catalanian act, collectives and individuals are welcome to intervene in public policies through representative entities. Cooperation and participative culture are predicted in the same provision, point 2. The Article 67.1

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<sup>501</sup> Salido, H. & Carmo, M. (2014). La fórmula in dubio en la jurisprudencia actual. *Revista de Llengua i Dret*, 62(1), 5-22.

covers completely the notion of an open access and does not block citizens to the core of the decision-making process in public policies. In the point 3 “d”, the principle of giving reasons to any question answered is mentioned and helps civil society understand the public administration rationale.<sup>502</sup> The procedures considered appropriate for that practice with reference to citizenship participation is found in the Article 68. Since the beginning of administrative process for the normative elaboration, publication and the use of an internet page “Portal de la Transparència” are predicted in the Article 69 points 1, 2 and 3 respectively. An agenda for public hearings and public information as seen in others enacted legislations is affirmed in the point 4. All these legal tools corroborate citizenship participation for the elaboration of derivated norms. The power of being part in a “legislative” process is important to mobilise actors in society in order to putting forward fast-track regulations. The innovative, transparent and open practices de-construct the vertical *modus operandi* of elected representatives acting in parliaments with party agendas only. Popular legislative initiatives as a right to present norms has its origins in more transversal demands. Most of the time overlapping ideological spectra assume the public debate putting apart political tensions. The articles 70.1 and 70.2 about the right to suggest policies of the 19/2014 Catalanian Act for Transparency can be used as legal tools to motivate the popular participation providing public administrations the legitimate power to question private economic powers. Finally, the details about the quantity of signatures for the acceptance of suggested documents, time, communication on the status of the proposition and motions are described from the points 3 to 6 of the same article 70.

### **3. The evolution of counterarguments: city, commons and housing rights: the right to the city as the first philosophical counterargument**

Another counterargument in order to achieve an adequate judgement beyond the exercise of the judiciary power is the philosophical thought on the right to the city

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<sup>502</sup> The Article 67.4 says emergent situations and security are excluded from open government practices: “Resten excloses de l'àmbit d'aplicació dels apartats 2 i 3 les actuacions següents: a) Les que es tramiten o s'aproven amb caràcter d'urgència. [...] b) Les que tenen com a únic objectiu la seguretat pública. [...] c) Les que poden donar lloc a l'aplicació dels límits d'accés a la informació pública establerts per aquesta llei”.

introduced by Henri Lefebvre in the end of the 1960s.<sup>503</sup> His inquietudes about urban questions can be really illustrative once the French thinker seems to form a very broadly concept to analyse the convulsive social rage that happened in France. His effort is not dedicated to a restrictive dogmatism nor an institutional entry about cities reduced by law or political parties, but a philosophical proposition and why not a provocation on how individuals have to be the subjects of the urban transformation not the object. Nowadays, that critique may go further and question including the social function of property once the State or private owners should not count only on property system to solve urban challenges. The right to the city reflection shows us an opportunity to unveil the ideological forces that have made the urban spaces of fulfillment just for few. For Henri Lefebvre, the space is a political, philosophical and social arena led by the labour forces that construct the city.<sup>504</sup>

The right to housing has positively supported numerous social matters since the 1945 post-war period ended up with human rights conventions and the constitutions of re-democratised countries. Brazilian and Spanish societies have witnessed an increasing quantity of conflicts involving proprietor's duties, social function of property and changes in the history of land access. In urban contexts, the right to housing has been increasingly discussed in order to turn Henri Lefebvre's categories, such as the right to the city, urban revolution into reality. In Sweden, the housing cooperatives represent around fifty per cent of multi-familiar buildings and the system of property is vested with technical information to run including financial issues. Normally, the prices of each dwelling unit is more accessible than other markets. Although there are certain challenges for this type of communal form of ownership, such as innovative forms of organisation in order to make the cooperatives survive in a long-term period, they are

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<sup>503</sup> From an international perspective, there are some documents that point out rights as matters above what governments do using political systems. *Bill of Rights* (1689), the *Declaration of the Rights of Man and of Citizens* (1789), the *Universal Declaration of Human Rights* (1948), the *International Covenant of Economic, Social and Cultural Rights* and its *Protocols* (1966) are some of them. For regional treaties, see the *Charter of Fundamental Rights of the European Union* (2000) and *Pact of San José, Costa Rica, the American Convention on Human Rights* (1969).

<sup>504</sup> Lefebvre, H. (2013). El espacio social. In *La producción del espacio* (pp. 125-216). Madrid: Capitán Swing. See "The Brazilian case deserves to be better known internationally not only because it provides sound bases for the further development of international law in the area of urban law, but also because it provides strong elements to make the development of a Lefebvrian theory of rights possible, in which the 'right to the city' is to be understood not only as a social political and/or philosophical value, but also as a legal right". According to Fernandes, E. (2007). Constructing the right to the city. *Social & legal studies*, 16(1), 202.

quite successful in promoting the socioeconomic inclusion of families and individuals making effective other rights in urban context.<sup>505</sup> The right to the city was presented by Henri Lefebvre's book during the very end of the 1960s and the French philosopher idealised the concept evolving urban matters under the umbrella of the decision-making process idea and how collectives could take part of the public spaces. It was a period when Marxist reviewers debated original routes to overcome politically the revivals around city protagonism. However, Henri Lefebvre had clear that urban inquiries could only lead a human transformation of the space if collectives could participate as a central actor the city development. He pointed out the public space as an arena of political and economic disputes involving construction sectors, speculative urban planning and the prominence of the working class. The right to the city was a vision of a totality on which the philosophical principles to put people in the core of the political urban life should be founded.<sup>506</sup>

Henri Lefebvre points out that most of the 1950s and 1960s movements in urban context were not so clear in France, but especially students noticed the discontinuity of capitalist practices with reference to rights. The fragmentation of thoughts and science was part of material ideology in which human contentment was limited by the means of production. According to the French thinker, such rationality dominated all forms of urban knowledge and life being clearly recognised of what he calls the *sciences parcellaires*. The French philosopher was interested in avoiding the labour division and segregation of the working class perception. For Henri Lefebvre, another critical point was also that the urban *intelligentsia* tends to be a body of synthesis that leads a false representation of cities.<sup>507</sup> Nowadays, the phenomenon of discontinuity is more evident

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<sup>505</sup> Vogel, J. A.; Lind, H. & Lundqvist, P. (2016). Who is governing the commons: studying Swedish housing cooperatives. *Housing, theory and society*, 33(4), 424-444.

<sup>506</sup> Lefebvre, H. (2009). Industrialisation et urbanisation. In *Le droit à la ville* (pp. 13-14). Paris: Economica. Read "Il est à noter que Haussmann n'a pas atteint son but. Un des sens de la Commune de Paris (1871), c'est le retour en force vers le centre urbain des ouvriers rejetés vers le fauborgs et les périphéries, leur reconquête de la ville, ce bien entre les biens, cette valeur, cette oeuvre, qui leur avaient été arrachés".

<sup>507</sup> "En regardant de près, on s'aperçoit que les spécialistes qui ont étudié la réalité urbaine ont presque toujours (sauf dans le cas d'un positivisme logiquement extrémiste) introduit une représentation globale. Ils ne peuvent guère se passer d'une synthèse, en se contentant d'une somme de connaissances, de découpages et montages de la réalité urbaine. Ils prétendent alors, en tant que spécialistes, aller légitimement de leurs analyses à la synthèse finale dont ils empruntent le principe à leur spécialité. Ils se veulent "hommes de synthèse" par le chemin d'une discipline ou d'une tentative interdisciplinaire. Le plus souvent, ils conçoivent la ville (et la société) comme un organisme. Les historiens ont fréquemment rattaché à une 'évolution' ou à un 'développement historique', ces entités: les villes. Les sociologues les

in how the production of legal knowledge still remains fragmented.<sup>508</sup> Nevertheless, it is also true that lawful mechanisms devoted to human needs in urban context has been a powerful tool to compel states diminish the numerous inequalities, thus establishing a starting point of an international consciousness about the importance of the matter. The right to housing is one of the possibilities we see to recompose Henri Lefebvre's notion of totality in city issues.

In Brazil, the number of slums has doubled in twenty years. In 1990, the occupations known as "favelas" were exactly 3,183 and, in 2010, 6,329. Not only is the "favelas" sub-system of dwelling an evidence of failure in housing matters, but also proof of an urban development based on under-standards of infrastructure. Precarious houses, poor means of transportation and no basic sanitary services are part of a development system that drain the resources to what is called the formal city. The place where the investors go to run their businesses in housing construction and building market. This is the way the Brazilian economy model generated the financial conditions to promote the urban capital. The inadequate right to housing or its nonexistence in peripheral neighbourhoods nourishes the central urban planning once space is connected to labour force. It is possible to pay for the technologies of construction and re-building areas with plans of gentrification since underpaid labourers are hired for that engineering. The expertise devoted to this kind of modernisation, which is supported by mono or oligopolistic structures of production, selects the geography, the socioeconomic strata and the level of salaries. The renewal of central areas means the deprivation of many social rights for those who cannot afford modernised areas. Urban capitals are deeply related to their geographic fringes. However, as defended by Henri

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ont conçues: même un 'être collectif', comme un 'organisme social'. Organicisme, évolutionnisme, continuisme ont donc dominé les représentations de la ville élaborées par des spécialistes qui se croyaient savants et seulement savants. Philophes sans le savoir, ils sautaient du partiel au global et aussi du fait au droit, sans légitimer leurs démarches". See Lefebvre, H. (2009). *Les sciences parcellaire et la réalité urbaine*. In *Le droit à la ville* (pp. 36-37). Paris: Economica.

<sup>508</sup> Jean-Bernard Auby suggests that the difference between *droit de la ville* and *droit à la ville* in the legal studies are very illustrative of a continuous discontinuity. For him, law is a product of fragmented system of learnings in which professionals understand cities as fragments. Professionals of administrative law, for example, tend to see the city as divided in legal texts with specific competences. See Auby, J. B. (2013). *Droit de la ville*. Paris: LexisNexis. For Henri Lefebvre, as a Marxist philosopher critical to the 1960s leftism, the fragmentation of the urban totality reflects the concept of commodity fetishism. It is intimately connected the loss of human perception in how things in a capitalist society come into light. The emphasis of that phenomenon relies on the relationships among men and goods, money and things; not social relations.



Lefebvre's ideas, the plurality of urban social movements may unveil the construction of a social space free from those interests connected to speculative construction.<sup>509</sup>

Global knowledge for Henri Lefebvre was a composite of elements that have been intimately linked to a totality, but systematically contrasted to the sciences of the social reality. The parts of a supposed urbanism expertise are ambiguous since the act of knowing the city has been losing the aspect of the whole. The urban place exists in correlation. We may add that the urban life was set by a mode of production with the power of dictating time and space for humans without discarding the urban aspect. This is why an analytical effort should be made in order to reveal the ideological forces transforming the public realm in a place where all social conflicts should remain invisible. Therefore, the action of noticing the city as a fragmented matter would give back individuals the political consciousness for recovering the notion of public space for the collective use. According to Henri Lefebvre the urbanistic ideology, which is represented in city experts and urbanists, promotes the continuous construction and deconstruction of the city space as a long-term project to reinvent the urban capital. Possible definitions for the right to the city take into consideration transformative spaces in projection, the encounter of different ardent desires and the coexistence of human patterns as the intrinsic features for the urban collective construction.<sup>510</sup> The working class in its complexity is the only force that may put forward a project to reconstruct a city model in which the centre of decision related to the urban surplus value belongs to labour force.<sup>511</sup>

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<sup>509</sup> Lefebvre, H. (2013). El espacio social. In *La producción del espacio* (pp. 141-142). Madrid: Capitán Swing.

<sup>510</sup> Lefebvre, H. (2008). Para uma estratégia urbana. In *A revolução urbana* (pp. 134-135). São Paulo: Humanitas.

<sup>511</sup> “La stratégie urbaine fondée sur la science de la ville a besoin d’un support social et de forces politiques pour devenir agissante. Elle n’agit pas par elle-même. Elle ne peut pas ne pas s’appuyer sur la présence et l’action de la classe ouvrière, seule capable de mettre fin à une ségrégation dirigée essentiellement contre elle. Seule cette classe, entant que classe, peut décisivement contribuer à la reconstruction de la centralité détruite par la stratégie de ségrégation et retrouvée dans la forme menaçante des ‘centre de décision’ [...] Cela veut dire qu’il convient d’élaborer deux séries de propositions. A) Un programme politique de réforme urbaine [...] Il sera établi pour être proposé aux force politiques, c’est-à-dire aux partis [...] Il aura un caractère spécifique, celui qui vient de la connaissance [...] B) Des projets urbanistiques très poussés des ‘modèles’, des formes d’espace et de temps urbains, sans se préoccuper de leur caractère actuellement réalisable ou non, utopique ou non (c’est-à-dire lucidement ‘utopiens’) [...] Les formes de temps et d’espace seront, sauf expérience contraire, inventées et proposées à la praxis”. See Lefebvre, H. (2009). *Le droit à la ville* (pp. 103-104). Paris: Economica.

Many authors inspired by the historical materialism have posed the question of the right to the city from diverse perspectives. Some of them started the debate of Henri Lefebvre's ideas based on geographic urban inquiries like Harvey, Purcell, De Souza, Mitchell; others from public administrative and urban law analyses Ponce, Fernandes, Zamora, Jacquot & Priet, Enterría & Alfonso, not few using human rights like Estapà and Kenna; and a myriad of studies involving urbanists discussing forms of State violence and segregation such as Friendly, Marcuse and AlKhalili.<sup>512</sup> As we can see, many thinkers have set the stage for the ongoing discussion about the right to the city, although the debate about Henri Lefebvre's concept is also enriched with the right to housing aspect.<sup>513</sup> Therefore, our interest is to show how the praxis of such matter can

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<sup>512</sup> We listed numerous references that we are using in many different chapters of the present thesis. See Harvey, D. (2013). *Rebel cities: from the right to the city to the urban revolution*. New York: Verso, 2013; and Harvey, D. (2008). The right to the city. *New left review*, 53(1), 23-40. Purcell, M. (2002). Excavating Lefebvre: the right to the city and its urban politics of the inhabitant. *GeoJournal*, 58(1), 99-108. De Souza, M. L. (2010). Which right to which city?. In defence of political-strategic clarity. *Interface: a journal for and about social movements*, 1(2), 315-333. Mitchell, D. (1995). The End of Public Space? People's Park, Definitions of the Public, and Democracy. *Annals of the Association of American Geographers*, 85(1), 108-133. Ponce Solé, J. (2013). Políticas públicas para afrontar la regeneración urbana de barrios degradados. Una visión integrada desde el Derecho. *Revista Aragonesa de Administración Pública*, 41-42(1), 11-70. Fernandes, E. (2007). Constructing the right to the city. *Social & legal studies*, 16(1), 201-219. Zamora, E. C. (2002). Las urbanizaciones cerradas de lujo en Madrid: una nueva fórmula de propiedad y de organización territorial. *Ciudad y Territorio. Estudios Territoriales*, 133-134(1), 545-564. Jacquot, H. & Priet, F. (2004). *Droit de l'urbanisme* Dalloz: Paris. Alfonso, L. P. & Enterría, E. G. (1981). *Lecciones de Derecho Urbanístico* Civitas: Madrid. Estapà, J. S. La exigibilidad jurídica de los derechos humanos: especial referencia a los derechos económicos, sociales y culturales (DESC). In Pérez, J. B. & Estapà, J. S. (Eds). *El derecho internacional de los derechos humanos en periodos de crisis* (pp. 53-70). Marcial Pons, Barcelona. Friendly, A. (2013). The right to the city: theory and practice in Brazil. *Planning theory & practice*, 14(2), 158-179. Marcuse, P. (2009). From critical urban theory to the right the city. *City*, 2-3(13), 185-196. Alkhalili, N., Dajani, M. & De Leo, D. (2014). Shifting realities: Dislocating Palestinian Jerusalemites from the capital to the edge. *International Journal of Housing Policy*, 14(3), 257-267.

<sup>513</sup> Aalbers, M. B. & Gibb, K. (2014). Housing and the right to the city: introduction to the special issue. *International Journal of Housing Policy*, 3(14), 207-213; Read "This approach is only possible because the notion of the human right to adequate housing is not restricted to the access of the house itself, that is, it does not refer only to a roof and four walls. Understood as a human right and this is the perspective I have been defending for over six years as United Nations Special Rapporteur on the Right to Adequate Housing the right to housing has to be apprehended in a much broader context in order to encompass the security of all forms of tenure and the protection against forced evictions; access to basic services, including health care, education, potable water, food, electricity, sanitation, waste disposal, transport, leisure, green spaces and a healthy environment; the right to use appropriate and adequate materials ensuring habitability, including adequate space and effective protection against natural threats to health and life; affordability of, and access to means of subsistence, including access to land, infrastructure, natural and environmental resources, and sources of livelihood and work; the right of participation in all stages and processes of decision-making related to housing; and the prioritisation of the needs of vulnerable and historically marginalised minorities (see the International Covenant on Economic, Social and Cultural Rights, 1976 and UN E/1992/23, Annex III at 114, the Committee's General Comment no. 4 on the right to adequate housing). In this sense the right to adequate housing stands for much more than property rights over a house". See Rolnik, R. (2014). Afterword – Place, inhabitation and citizenship: the right to housing and the right to the city in the contemporary urban world. *International Journal of*

be epitomised by the urban social movements while it may be attacked by legislative power. The experience in the City of Mexico is very eloquent. The legal prerogative of the social function of the city and the property was crystallised into the point 3.1.2 of the *2011 Carta de la Ciudad de México por el Derecho a la Ciudad*, however, yet to be thought for all cities in the country. In 2017, a Constitution for the City of Mexico was approved including the right to a good administration as a principle for those policies designed in city context in its article 3.3. The article 17 of the same document affirms the right to the city as an umbrella for other legal provisions: “El derecho a la ciudad es un derecho colectivo que garantiza el ejercicio pleno de los derechos humanos, la función social de la ciudad, su gestión democrática y asegura la justicia territorial, la inclusión social y la distribución equitativa de bienes públicos con la participación de la ciudadanía”. The article 20.c, clause 2, reinforces the social function of property as a legal figure for the Federal District of the urban planning. The article 21.c, clause I, connects the provision to the constitutional parameters to pass the local legislative act: “Esta Constitución reconoce la función social del suelo y de la propiedad pública, privada y social, en los términos de la Constitución Política de los Estados Unidos Mexicanos. El gobierno de la ciudad es responsable de administrar y gestionar el suelo para garantizar la distribución equitativa de las cargas y los beneficios del desarrollo urbano, el desarrollo incluyente y equilibrado, así como el ordenamiento sustentable del territorio de la ciudad y, en forma concurrente, del entorno regional, considerando la eficiencia territorial y la minimización de la huella ecológica”.<sup>514</sup>

The right to the city is neither conceived in just one terrain of knowledge nor a matter lacking a praxis dimension. The path dependency for the realisation of Henri Lefebvre’s concept in the legal realm is extremely important, but increased evidences have shown other possibilities. Adequate housing, for example, is intimately connected to human rights matter in urban contexts and may be seen as a gateway to other rights. It is also a legitimate demand for the construction of an urban space collectiveness. At

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*Housing Policy*, 3(14), 293-300. Again we call the attention to the Resolution 1/XI, 2015, independent process of Catalonia and the defence of social rights to protect basic public services, energy, heating, education and health care. The Act 24/2015 is also an important legal binding document, although the central government of Spain has used the judicial tools in the highest courts to bar civil society movements in forms of law.

<sup>514</sup> The City of Mexico is an interesting study on the uneven forces of constitutional prerogatives led by the capital, but not necessarily implemented in all country. See *Asamblea Constituyente de la Ciudad de México* [on-line]. Constitución Política de la Ciudad de México [Accessed on 29 May 2017]. Retrieved from <http://gaceta.diputados.gob.mx/ACCM/GP/20170130-AA.pdf>. Read pages 295-296.

this point, the historical materialism must be reinvented. The ideological and economic forces of the property system,<sup>515</sup> which have colonised the concept of a dignified place to live, are unconsciously noticed by urban social movements. Grassroots are aware of numbers and administrative competences, but they do not rely on State institutions, political parties and official advisory boards to interpret all this apparent logical set of information.

The meaning of social, popular and civil society movements should be re-conceptualised and pluralised in a very responsible fashion. The urban social movements cannot be criminalised once they comply with legal procedures to set their agendas. Moreover, the urban platforms discussed here are committed to international treaties, constitutional framework and municipal normative frameworks. It is important to emphasise an extra-national territoriality criterion, once the urban social demands can be framed in non-specific geographies. They may pop up anytime in the future. So, our initial reflection is about political conflict and its connections to social housing questions to demand other rights which are not necessarily within national jurisdiction.<sup>516</sup> Some comments about the urban dilemmas are relevant as a bridge to a past not so far from today during the 1945 post-war period in France. During the very end of the 1960s, Henri Lefebvre also refers to the dialectical method of knowing the urban dilemmas as a rationality in which contradictory forces are present or the desire for transformation and the conformed establishment. We may add that the revolutionary aspiration for urban renewal is born in the class consciousness of how to change the city by constantly changing the individuals inside civil society movements. Reforms are successful if the political element inside non-institutional organisations empower ordinary individuals. There is a concept for the French thinker called transduction in which the reality should be interpreted with information that permits constant feedback. So, it is indispensable for our purposes an analysis that considers the possibility of incessant metamorphosis in the way the urban issue is treated. Theory and praxis in housing questions should not close the possibilities of altering and diversifying things including the property system.

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<sup>515</sup> Collado, P. E. (1979). *La propiedad privada urbana*. Madrid: Montecorvo.

<sup>516</sup> McAdam, D., Tarrow, S. & Tilly, C. (2009). Para mapear o confronto político. *Lua Nova*, 76(1), 11-48.

The principle of transparency is one of the cornerstones in good administration debates. It orients creditable practices for the making of public policies drawing citizens' attention to a wider debate in social matters. However, open governments without common multilevel goals tend to nurture the conflict of competences resulting the opposite of an active citizenship. The aim of supporting the idea of transparency locally and participative for civil society had to do with the innovative principle of good administration in a comparative perspective to reinforce the binding legal matters in property, housing and urban issues. In addition, it seems to be a mechanism of a more transversal and democratic arrangement of political power. The Directive Municipal Planning of Barcelona for Participative Citizenship 2013-2016 and the 16.050/2014 São Paulo Urban Planning Act are clear documents designed to avoid simple rigid top-down constructs that usually generate juridical battles among powers, yet there are still opaque agendas and restrictions for the decision-making process when the concept of good administration is put in practice.

### **3.1. The commons as the second philosophical counterargument**

We understand the right to housing as part of Henri Lefebvre's philosophical debate on cities, but not very precise in what way the working class people should act to convert the urban surplus value produced socially into reality. It is clear for the French thinker that an organised labour force relying on a binding decision making-process can put in the centre of city life individuals not economic *res*. However, the legal dimension for his reflection, which is also a relevant counterargument for a democratic construction of the *droit à la ville*, is left open by the author. For Lefebvre, the concept of right refers to people's engagement in city issues and how these individuals are politically committed to promote more transformative spaces in urban context. A myriad of emands such as housing, land, drinkable water, environment questions, civil rights, public spaces, the right to assembly, demonstration, land and all possibilities for the expansion of human knowledge on urban life are also undefined by him. In that sense, a more philosophical approach known as *commons* has supplemented Henri Lefebvre's theory through praxes in which concepts are translated into action.<sup>517</sup>

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<sup>517</sup> The social approach on property issues evolving economy and governing the commons as collective

Christian Laval and Pierre Dardot have recently presented a counterargument in which there is an accurate analysis of the classical controversy about the tragedy of commons defended by Garritt Hardin in 1968.<sup>518</sup> They show that demography and open access to nature do not lead the humanity to a collective suicide as Hardin foresaw, but the manner services and consumerism have been globally spread.<sup>519</sup> As showed by Laval and Dardot, the fatal destiny for humnaity has depended more on agricultural industrial processes for seeds, pesticides, land use contaminating the soil and water than the basic humanity needs. In other words, urban life have produced more negative externalities than the positive usufruct of private property engulfing natural resources. Laval and Dardot also mention how *res* has been the legal parameter used by global capital on the usufruct of the property.<sup>520</sup> Therefore, it is not the increase of the world population that has pressured the limits of our planet or our subsistence, but the opposite with models of a standardised view of things based excessively upon “my”, “mine” and “I”.<sup>521</sup>

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actions can be inspired in two seminal texts. The first is related to governing the commons by Elinor Ostrom, specially from the first to the fifth design principle about what she nominates “rules, sanctions and impartiality”; the other article is *To map contentious politics* by Doug McAdam, Sidney Tarrow and James Taylor. See Ostrom, E. (2000). Collective actions and the evolution of social norms. *Journal of Economic Perspectives*, 14(3), 137-158; McAdam, D., Tarrow, S. & Tilly, C. (2009). Para mapear o confronto político. *Lua Nova*, 76(1), 11-48.

<sup>518</sup> Laval, C. & Dardot, P. (2015). *Común: ensayo sobre la revolución en el siglo XXI*. Barcelona: Editorial Gedisa.

<sup>519</sup> “Even worse, patently good solutions at one scale (the ‘local’, say) do not necessarily aggregate up (or cascade down) to make for good solutions at another scale (the global, for example). This is why Hardin’s metaphor is so misleading: he uses a small-scale example, as if there is no problem whatsoever in shifting scales”. See Harvey, D. (2013). The creation of the urban commons. In *Rebel cities: from the right to the city to the urban revolution* (pp. 71-70). Verson: London.

<sup>520</sup> “An alternative to the commons need not be perfectly just to be preferable. With real estate and other material goods, the alternative we have chosen is the institution of private property coupled with legal inheritance. Is this system perfectly just? As a genetically trained biologist I deny that it is. It seems to me that, if there are to be differences in individual inheritance, legal possession should be perfectly correlated with biological inheritance—that those who are biologically more fit to be the custodians of property and power should legally inherit more. But genetic recombination continually makes a mockery of the doctrine of ‘like father, like son’ implicit in our laws of legal inheritance. An idiot can inherit millions, and a trust fund can keep his estate intact. We must admit that our legal system of private property plus inheritance is unjust – but we put up with it because we are not convinced, at the moment, that anyone has invented a better system. The alternative of the commons is too horrifying to contemplate. Injustice is preferable to total ruin”. Hardin, G. (1968). The tragedy of the commons. *Science, New Series*, 162(3859), 1243-1248. We shall disagree with the perspective assumed by Garrett Hardin in the dispute of property. Different from a genetic or a biologic system, in which feedback mechanisms, mutability, compensation, adaptation etc are susceptible to exist among equals in the same species, or in the middle of differences in the animal chain as an intrinsic logic for its own survival based on equilibrium, the system of property is not the same *in natura*. For an irresponsible citizen or incompetent administrator, the property can finance its own subsistence by the best defenders of it in law, jurisprudence, society, economy, philosophy and history.

<sup>521</sup> The concept of common may vary according to the theoretical approach. Marie-Alice Chardeaux

Numbers have corroborated Laval and Dardot's theory making evident how few owners with a massive economic capacity are able to dictate social, pecuniary and political behaviours for the rest. What is more, private property has been confirmed by history as a real legal and economic apparatus for very restricted groups: "The global inequality crisis is reaching new extremes. The richest 1% now have more wealth than the rest of the world combined. Power and privilege is being used to skew the economic system to increase the gap between the richest and the rest. A global network of tax havens further enables the richest individuals to hide \$7.6 trillion. The fight against poverty will not be won until the inequality crisis is tackled".<sup>522</sup> So, property usufruct became a concret right to enterprises and an abstract juridical category for people who are more exposed in fact to the access of *res*. Such perception denotes that ownership is a mirage for individuals that end up copying the mentality of the wealthy to reproduce the capital speculative accumulation. In this regard, it has recently emerged the notion for *possessio* not for one thing, but an atomised *dominium* known as a bundle of rights: "Convertida hoy día en el paradigma dominante en el derecho de los Estados Unidos, esta doctrina desplaza el acento desde el dominio exclusivo ejercido sobre una cosa por su propietario hacia la diversidad de los poseedores de títulos y la pluralidad de derechos sobre la misma cosa, planteando así las reglas y restricciones impuestas al propietario 'a título principal'".<sup>523</sup>

Mortgage system is an example of that fragmentation for the access of housing in which the proprietor is still the real *dominus*. Between 2007 and 2012, the Spanish society witnessed more than 416,000 foreclosures. In Catalonia, there are more than 448,000 empty-unoccupied. In the 2001 census, the National Institute of Statistics pointed out there were 283,155 empty housing units of a total of 2.6 million houses in Barcelona. The richest city in Catalonia had more than 10% of its houses empty and under speculation. On the outskirts of Barcelona, Lleida, the number of vacant housing units increased from 29,626 in 2001 to 37,165 in 2011.<sup>524</sup> As J. P. Solé commented, the

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elaborated a thesis in Private International Law in which the idea of the common things is linked to the right to property usufruct. In a certain way, it belongs to proprietor to make use of it. See Chardeaux, M. A. (2006). *Les chose communes*. Paris: LGD.

<sup>522</sup> 210 OXFAM Briefing Paper 18, *An economy for the 1%. How privilege and power in the economy drive extreme inequality and how this can be stopped*, January 2016.

<sup>523</sup> Laval, C. & Dardot, P. (2015). Propuesta política 2: hay que oponer el derecho de uso a la propiedad. In *Común: ensayo sobre la revolución en el siglo XXI* (pp. 534-537). Barcelona: Editorial Gedisa.

<sup>524</sup> Instituto Nacional de Estadística [on-line]. *Censos de Población y Vivienda 2011: una nueva etapa en*

right to housing in the 21<sup>st</sup> century, the public administrative intervention should be oriented by the general interest and be preoccupied with the correction of market failures.<sup>525</sup> In Spain, 3.4 million empty housing units and most of them constructed or administrated with public funds coming from taxes and till the present moment belonging to banks. In absolute numbers for the Brazilian case, there are 7.2 million units non-occupied and 72.7% of them in urban areas, the others in the countryside. Only in São Paulo, 1.3 million vacant houses. The housing deficit in Brazil was 5.4 million 2011 as pointed out by IPEA (Instituto de Pesquisa Econômica Aplicada)<sup>526</sup> In Brazil, the number of slums has doubled in twenty years. In 1990, the number of non-property system of occupation was exactly 3,183 and, in 2010, 6,329.<sup>527</sup>

However, how could the usufruct of property be translated into a co-obligation in which individuals, society and State promote positively the use of a right for all? We refer to the case of *allemansrätten* in Sweden to construct parallels between the right to enjoying property usufruct and nature. *Allemansrätten* means literally “the everyman's right” in Swedish. It is the social value of freedom to go through nature defended by the Constitution of Sweden. Many Swedish people consider this to be a form of natural legacy or human right. Thus to put up a “no trespassing” sign would be considered a violation. Although the right to own property, “every men shall have *access* to nature in accordance with *allemansrätten*”. The 1994 Instrument of Government crystallised into the notion of nature use for all based upon a long tradition in Sweden. Yet not part of the Swedish supreme charters, but a right mentioned in infra-constitutional legislation. However, in practice, *allemansrätten* can be interpreted as a responsible usufruct of nature as commons. It co-obliges and co-guarantees the protection, preservation and use of the natural resources as a common right for the present and future generations. I it is implicit in *allemansrätten* the right to walk with an equal emphasis being placed upon

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*la estadística demográfica* [Accessed on 17 June 2016]. Retrieved from <http://www.ine.es/>

<sup>525</sup> Ponce Solé, J. (2008). Prólogo. In *El derecho a la vivienda en el siglo XXI: sus relaciones con la ordenación del territorio y el urbanismo* (pp. 9-13) Barcelona: Marcial Pons.

<sup>526</sup> *Ministério das Cidades* [on-line]. Déficit Habitacional no Brasil 2008 [Accessed on 16 May 2016]. Retrieved from [http://www.cidades.gov.br/images/stories/ArquivosSNH/ArquivosPDF/DHB\\_2008\\_Final\\_2011.pdf](http://www.cidades.gov.br/images/stories/ArquivosSNH/ArquivosPDF/DHB_2008_Final_2011.pdf)

Consult also *Instituto de Pesquisa Econômica Aplicada* [on-line]. Nota técnica estima o déficit habitacional brasileiro [Accessed on 19 January 2016]. Retrieved from [http://www.ipea.gov.br/portal/index.php?option=com\\_content&view=article&id=18179](http://www.ipea.gov.br/portal/index.php?option=com_content&view=article&id=18179)

<sup>527</sup> *Instituto Brasileiro de Geografia e Estatística* [on-line]. Table 01, Tabelas de resultados segundo as grandes regiões, as unidades da federação e os municípios [Accessed on 10 March 2016]. Retrieved from [http://biblioteca.ibge.gov.br/visualizacao/periodicos/92/cd\\_2010\\_aglomerados\\_subnormais.pdf](http://biblioteca.ibge.gov.br/visualizacao/periodicos/92/cd_2010_aglomerados_subnormais.pdf).



the responsibility to look after what is for men not citizen or national only. The rationale “do not disturb, do not damage” is an essential part of the co-duties for all. *Allemansrätten* gives everyone the right to access, stroll, ride bicycles, ski, camp on any land — with the exception of private gardens, the immediate vicinity of a dwelling house, land being cultivated or the few exceptions from historical private rights to property usufruct. Strict restrictions apply for nature reserves and other protected areas, but in general nature belongs to every man. *Allemansrätten* also gives the right to pick wild flowers, mushrooms and wood fruits, but not to hunt in any way. Visit beaches, swim, boat and walk by the seashore is permitted as well as long as it is not a part of a garden or within the immediate vicinity of a residence or *hemfridszon*. The *hemfridszon* varies, but can be as large as 70 metres from a housing unit. Fishing is essentially private except the biggest five lakes of the country and along the coast of the Sound, Baltic Sea, Skagerrak and Kattegat. Small camp fires are usually permitted, but in some periods not allowed by local authorities due to wild fire risk. Putting up a tent on any uncultivated land for a couple of days is permitted. The exercise of the rights is overseen by the administrative courts, not by penal jurisdiction. Local administrative powers can force the removal of a fence if it blocks the access to areas that are important to the *Allemansrätt*.

The usufruct of property does not have necessarily a connection with justice or injustice, inheritance or accumulation of money, but it is intimately connected to the survival every man. Even for anthropologists that study human life in community, any biological or physical human life cannot subsist without a proper place to stay in. The standards may vary in different eras, however, the organisation of societies in general assumes private and public spaces as an inherent phenomenon.<sup>528</sup> Protection, privacy and human self-maintenance depend on many things, but it is elementary a dignified place to live to guarantee such preservation and intimacy. Similar to *Allemansrätten*, the Norwegian entry *friluftsliv* means “free air life”: “The cultural roots of *friluftsliv* in Scandinavia come from the self-image of Scandinavians as a nature loving people [...] This image is partly based on these countries’ unpopulated landscape, where even urban people have free nature very close by for recreation. This selfimage is also reflected by the unwritten law of ‘*Allemansrätten*’ (‘everyones-right’) in Sweden and Norway that

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<sup>528</sup> Childe, V. G. (1950). The urban revolution. *The Town Planning Review*, 21(1), 3-17.

allows everyone access to the land, even private property. The image has its historical origin in the long history of living in this cold Ultima Thule where skies were already used for hunting 5200 years ago'.<sup>529</sup> It does not only mean a normative assertion in the form of the law, but nature as a social value in which the private owner must be aware of. Therese Bjärstig and Emma Kvastegård showed in a recent research that proprietors in Sweden committed to the property social values, but are poorly informed about their rights and duties. They also look for a more protagonist position in order to coordinate public policies instead of being mere collaborators.<sup>530</sup> That predisposition in society is quintessential for the *commons* once nature, environmental issues and property evoke matters of sovereignty in the sense ownership has its social limits as a fundamental law.

The turning point of the commons is how the right to property concept does not remain static to a pure right of *dominium*. It is mostly a matter of usufruct in which law is one of the elements among others able to compound it. The philosophy of commons is a prodigious complement for the debate initiated by Henri Lefebvre about the right to the city. *Allemansrätten* and *friluftsliv* are some eloquent examples of how land use can proportionate a less abstract notion on the access of rights with the implication of all. As we have mentioned before, the surplus value derivated from the public investments can be transformed into social use. The meaning of ownership can also be understood from a perspective in which governing property is in fact what sovereign States do, that is to say, govern public issues. Therefore, the notions of access, usufruct and co-obligation based upon rights evolve every man and they seem to result in public powers diligence with participative civil society.

### **3.2. Housing as a counterargument: urban grassroots and a proto-right to the city**

Discrediting political mainstreams, the *Movimento dos Trabalhadores Sem-Teto* (MTST) has shown its commitment to the constitutional claim of an effective right to housing. The difference of this social demand from other civil society movements lies

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<sup>529</sup> Gelter, H. (2000). Friluftsliv: the Scandinavian philosophy of outdoor life. *Canadian Journal of Environmental Education*, 1(5), 79.

<sup>530</sup> Bjärstig, T. & Kvastegård, E. (2016). Forest social values in a Swedish rural context: The private forest owners' perspective. *Forest Policy and Economics*, 65(1), 17-24.

in the way its members organise themselves, their origins and the relation they have with city problems. The MTST has its members observing topics involving legislation on property, investments for housing plans, private constructors, state budget and the statistics of services such as water, mobile communication and public safety. The exercise of empowerment through the urban issues teaches themselves to see the urban space as an extension of what is produced and how unequally the urban wealth is distributed, that is to say, the distortions of the city surplus value. They are aware of the geographical issues such as the zones with more and less infrastructure, quality of life and segregation. The MTST was born in the 1990s with a clear agenda of promoting a dignified place to live for all, but its international dimension has recently been formed with the effects of the 2008 global crisis. Organizing their agenda in assemblies, studies on the city, being aware of statistics and juridical consultation, they tend to promote an open debate on how the Brazilian public debt and construction market are intimately connected with the logic of foreign investments in the country. Once the Brazilian State has remunerated foreign investors and bankers, they understand the use of that surplus coined to pay speculative capital cannot affect social areas such as housing and city infrastructure. The MTST has used the same transversal rationality to explain in what ways the global economy strikes local realities as we saw in the PAH's movement. There is a reasonable quantity of hours they also employ to form their commissions and strategies. The grassroots movement has also protocols decided in assemblies to enter private-public properties respecting a list of criteria such as abandoned lands with proprietors owing taxes to the city, vacant buildings in urban zones left by owners and the ineffectiveness of the social function of property defended by the 1988 Brazilian Constitution. The social usufruct of private ownership as it is affirmed in the constitution, the expansion of housing programmes with low interest rates for mortgagors and the inclusion of the working class in sustainable policies for the access of city facilities. The MTST have also an editorial board engaged in publishing documents, opinions, essays and other intellectual productions on urban matters.<sup>531</sup>

Based on the Federal Act 8.245/1991, the Brazilian grassroots movement have asked also for the effectiveness on the control of the rent prices as an important legal instrument to avoid the process of gentrification in urban areas all over the country.

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<sup>531</sup> See the various editions entitled *Territórios Transversais*. Retrieved from <http://mtst.org/territorios/>

With reference to infra-constitutional norms, the Act 11.124 on the National Housing System of Social Interest is one of the documents that supports the efforts of the movement as a legal claim. The Statute of the City, Act 10.257, is another. Moreover, the MTST use the city statistics about the police presence in the periphery of São Paulo to make society aware of violence, searches and arbitrary procedures under the State's excuse of legitimate use of force. Furthermore, the right to housing includes other rights in order to compose a minimum of net of individual and collective protection. Not only have the movement fought for a more dignified place to live while people are part of the city, but also debated means of transportation, gender questions and the refugee crisis in 2016 from Syria. Urban social movements actions are in accordance with constitutional law once labour and social housing are parts of the 1988 Constituency. The article 6 of the Brazilian Constitution connects work and a dignified place to live as a social right. The Brazilian Magna Charter also in its Article 5, paragraph 2, affirms that principles and rights of the domestic legislation do not exclude the ones in which Brazil is part in international treaties, assemblies and organisations. Such constitutional prerogative under the umbrella of the first counterargument we posed in the present chapter. Cases of corruption in the State were another theme of the MTST agenda. The movement used to question the massive plans of construction including stadiums all over the country during the 2014 World Cup without transparency. We apprehend that vindication as the second counterargument to make more evident the spurious relation between public and private interests.<sup>532</sup>

The housing deficit analysis in the country is evident in cases of co-habitation, over-crowding and precarious conditions of the housing units. According to the João Pinheiro Foundation, the sum of these three categories accounted for more than 54% of the 5.7 million houses in the country. The other half excludes those individuals with a rent contract. To make matters worse, the irresponsibility of private owners complicates the scenario. Nowadays, most of the debtors in property urban tax in the city of São Paulo are clubs, shopping malls, private hospitals and private educational institutions. The arrears of these irresponsible owners came to 650 million reais, (or about 300 U.S. million dollars) in 2013 just in the metropolitan area of São Paulo. In Araraquara,

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<sup>532</sup> The notion of housing as a social right was included in the Brazilian Constitution by an amendment in 2000. Read Bonduki, N. (2000). *Moradia como direito social*. In *Habitar São Paulo: reflexões sobre a gestão urbana* (pp. 163-164). São Paulo: Estação Liberdade.

another Brazilian city in the State of São Paulo, the public administration should have received 20 million reais in taxes from just 30 affluent families. That amount represents 30% of the municipal budget which would be collected to cover the local public services. There are over five thousand municipalities across the country and most of them face the same situation. The occupy incursions in problematic properties by the MTST serve to make crystal clear the unpaid property taxes or the attack of the social function of property. In both cases, there bring negative effects for the government budget, the city infrastructure and the surrounding zone of these areas. This is another set of information that could be used as a counterargument making evident what Henri Lefebvre mentioned as the production of the space.

The housing construction with social interest in a regime of co-work between the low-income families and the administration of São Paulo City was implemented for the first time by the mayor Luiza Erundina (1989-1993). The land was the responsibility of the public power and the project executed by the future residents that could not pay for a dignified place to live through a mortgage system. Moreover, engineers, architects and technicians from universities and various institutes cooperated with the project once the idea was the reduction of costs for those people without a shelter. In Portuguese, the programme called “mutirão” demanded the action of the city in supervising the legal and technical aspects to guarantee a minimum of quality for the housing construction.<sup>533</sup> The working class families that proved their economic limitations could list their interest in being part of the project. They donated one or two days per week and a bank of points started being calculated. The process helped the public power regulate the use of land giving to those zones a proper usufruct of the property. Furthermore, the social function could be understood for the first time as an effective dimension for those who needed a residence. Fazenda da Juta is an example of that experience taking about eight years from the arrival of the families to construct the housing units until the programme

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<sup>533</sup> “Não se trata, portanto, simplesmente de um mutirão, trabalho gratuito promovido pelo Estado para a construção, onde cada morador ‘se vira’ individualmente para levantar um abrigo. É o mutirão autogerido, organização autônoma da sociedade civil que, com o apoio e financiamento do poder público, equaciona a produção de moradias com a participação dos moradores e introdução de avanços tecnológicos e sociais que só o trabalho coletivo pode proporcionar”. See Bonduki, N. (2000). Autogestão na produção de habitação: um programa de qualidade e baixo custo. In *Habitar São Paulo: reflexões sobre a gestão urbana* (p. 36). São Paulo: Estação Liberdade.

ends.<sup>534</sup> The “mutirão” shows the involvement of builder-residents can diminish surplus value and create a residential area with social identification.

Furthermore, the question of gender is another aspect that the construction of social houses helps the participants understand as an important issue. Women carrying bricks, building massive walls and filling the structure of the apartments with cement are some examples of an equal distribution of duties and rights. It is important to say that most of the families in the “mutirões” are headed by women. The contribution of collective groups organised in the neighbourhood is another advantage once people they know each other and rapidly organise themselves in tasks they do better. There is also a process of learning and sharing knowledge, because everyone is supposed to understand the work of all. In that sense, the builders are positive invigilators reducing the risk of accidents and taking care of each other. Water, food and time to rest are also organised by them to keep the rhythm of the project. The assemblies decide on those topics considered a problem, challenge or even the interruption of the construction.

Nevertheless, the programmes of “mutirões” are not a flag for the São Paulo administration anymore. Although there is a social and political stigma on families that take part in these programmes, the most expensive thing and obstacle in cities is still the price of the land. Low-income workers cannot pay for a single parcel and to have access to social housing programmes putting pressure on local powers, they decide for the incursion of state and private areas not accomplishing with the social function of the property. This is one of the practices of the MTST and other grassroots movements. The case of Pinheirinho in São José dos Campos City, State of São Paulo, is illustrative. Once the areas are abandoned, proprietors in debt with the public administrations and the administrative power inactive, they squat in the area to accelerate a proper answer from the city council. The urban collective actions take place in other parts of Brazil as well.

On 6 and 7 February 2015, the MTST occupied six different regions in Brasília, the political capital of Brazil, at the same time. Brazlândia, Ceilândia, Planaltina, Recanto das Emas, Samambaia and Taguatinga are areas administrated by the State Company Terracap, which is a real estate agency created by the 5.861 Act in 1972. The MTST calculated the housing deficit to be in the region of 350 thousand units and

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<sup>534</sup> Miagusko, E. (2012). Primeira aproximação: a Juta vista de cima. In *Movimentos de moradia e sem-teto em São Paulo* (p. 110). São Paulo: Alameda.

demanded a fast-track action once the public funds were present in many of Terracap projects. They pointed out that massive investments had been conceived by the State entrepreneurship for the middle classes not for the poorest of the Brazilian population. Vila Nova Palestina, Copa do Povo and Ocupação Carlos Marighela are some other examples in the periphery of São Paulo where the MTST has acted condemning the same logic of consumerism, speculation and segregation of those who cannot afford a proper house. Not only have these collective actions highlighted the negligence of private proprietors in following the social function of property legislation, but they have also influenced the inclusion of more participative nuclei of the society denouncing the international highly speculative funds from foreign direct investments.<sup>535</sup> Discrediting political mainstreams, the *Movimento dos Trabalhadores Sem-Teto* (MTST) has shown its commitment to the constitutional claim of an effective right to housing. The difference of this social demand from other grassroots movements lies in the way its members organise themselves, their origins and the manner they report city problems. The MTST has its members observing topics involving legislation on property, investments for housing plans, private constructors, state budget and the statistics of services such as water, mobile communication and public safety. The exercise of empowerment through the urban issues teaches themselves to see the urban space as an extension of what is produced and how unequally the urban wealth is distributed, that is to say, the distortions of the city surplus value. They are also aware of the geographical limitations, for instance, the zones with more and less infrastructure, quality of life and segregation.

However, the settlements are not a bed of roses. The squatters have a series of problems. They have to improvise tents with pieces of woods, canvas and corrugated boxes. To meet their basic physiological needs, they have to share toilets, showers and a communitarian kitchen. Common protocols for the gender violence, consumption of alcohol, robberies, thefts and the safety of the children are decided in the assemblies. They cannot count on the police presence in the settlement once the presence of the State is an excuse for other types of aggression. Most people leave their shelters to work early in the morning and just come back late night. The adults that stay in the settlement must look after the young and the elderly. Usually, there is not a hospital or a school

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<sup>535</sup> Retrieved from <http://www.terracap.df.gov.br/internet/arquivos/0005101857.doc>

nearby. The garbage collection and the sanitary conditions have to be highly organised to avoid serious problems. The access to drinkable water, electricity and cylinders of butane are other challenges as well. Means of transportation another issue to be solved.

If the land incursion ends up in a positive agreement with the local powers, the families have access to lines of credit and the technical support of the state from lines of credit from municipal, regional and federal resources. In other words, the right to housing is just part of a minimum in which the families rapidly notice other rights must be guaranteed by the state. As a consequence of an ineffective net of constitutional prerogatives to be followed by the public powers, the initial settlement is converted into a precarious zone of houses. Units constructed with all the urban deficits such as poor means of transportation, lack of basic sanitation and green zones, not enough or non-existent public and private facilities among many other services. To make matters worse, the inadequate right to housing becomes soon in a peripheral neighbourhood with a stock of labour force that usually look for job opportunities in the centre of the city. The environmental questions are another theme once the absence of urban planning in these areas will not be a priority. In few years, these nuclei will probably become the new “favelas” or the poor neighbourhoods geographically apart from the city fabric.<sup>536</sup> Our rationale is based on the idea of promoting a housing right in connection with other legal demands, but showing the anti-party wish for alliances. Such behaviour implies another plan of action using the competences and the civil platforms, compared to what Manuel Castells has also observed in urban movements.<sup>537</sup> The political aspect guiding the ideological formation of working class demands currently tend to disappear to make

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<sup>536</sup> The 6.938/1981 Act affirms a set of rights connected to environmental issues that we associate with the housing matter in the discussion of the right to the city. For example, the safety of the public health, the assertion of the Brazilian population dignity through sanitary matters and clean atmosphere are defended in its Article 3, item III, letters “a” and “d”. Different ministries are supposed to be in the environment advisory board in order to helping federal competences elaborate symbiotic plans of actions as the 7.804/1989 Act affirms in its Article 7, § 2. It is extremely important regulate economic activities and apply fines to polluters that affect protected green countryside areas, urban rivers and sanitary conditions of individuals with chemical industries. However, the law does not provide for plans of research nor strategies obliging factories include in their costs environmentally possible damages. Not even the decision-making process tackling the negative impact generated by producers in inhabited areas is shared among citizens. See the 10.165/2000 Act that modifies the 6.938/1981 Act about tax matters. The case of Spain for environmental questions is mainly regulated by the Directive 2011/92/UE, in the introduction of the legal text, number 18, as it says “La Comunidad Europea firmó el Convenio de la CEPE de la ONU sobre el acceso a la información, la participación del público en la toma de decisiones y el acceso a la justicia en materia de medio ambiente («Convenio de Aarhus») el 25 de junio de 1998 y lo ratificó el 17 de febrero de 2005”.

<sup>537</sup> Castells, M. (1983). *The city and the grassroots*. Berkeley: California University Press.



room for a political rationality of the law, but neither accepting market values nor the hierarchy of governmental institutions while organizing their networks.<sup>538</sup> Like some studies linked to a more worldwide demand, housing issues must be understood also as those principles subject to enforceability, human rights and constitutional parameters.<sup>539</sup> In the end, it is the criterion of profitable markets that essentially explains the urban socioeconomic differences in city construction. So, a minimum of human and social rights is reduced to capital matters.<sup>540</sup>

In Spain, the grassroots movement known as the *Plataforma de Afectados por la Hipoteca* (PAH) has suggested an agenda to face the Spanish crisis after the 2008 global crack of the property market. At first, they see the right to housing guaranteed by the 1978 Spanish Constitution in its article 47 connected to the speculative international system not close to transparent practices. However, it is the local tragedy of evictions and the break-up of the irresponsible mortgage system permitted by the Spanish regulation not imposing clear criteria for credit market. The agenda of the platform was expanded by the activists with the intention of avoiding evictions understanding the due process as a legal instrument for remedies that could opt for the renegotiation of the mortgage debts, social rents or even debt reliefs returning the property to the banks. With the purpose of organizing their demands and making explicit the global asymmetric economic consequences in people's lives, the activists promote welcome sessions called "juridical coaching" in which they listen to the newcomers while they are reading the clauses of their mortgage contracts or reporting their situation. The idea is to orient the affected how to act legally to escape lawfare. Then people are invited to join the weekly assemblies, be aware of the current news on the financial policies and

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<sup>538</sup> Powell, W. (1990). Neither market nor hierarchy: network forms of organization. *Research in Organizational Behavior*, 12(1), 295-336.

<sup>539</sup> Ponce Solé, J. & Fernández Evangelista, G. (2010). Derecho urbanístico, derecho a la vivienda y personas sin hogar. *Revista de Derecho Urbanístico y Medio Ambiente*, 255(1), 39-78. According to Padraic Kenna: "In the absence of effective urban planning, the consequences of this rapid urbanization will be dramatic. In many places around the world, the effects can already be felt: lack of proper housing and growth of slums, inadequate and out-dated infrastructure – be it roads, public transport, water, sanitation, or electricity – escalating poverty and unemployment, safety and crime problems, pollution and health issues, as well as poorly managed natural or man-made disasters and other catastrophes due to the effects of climate change". See Kenna, P. (2006). *Los derechos a la vivienda y los derechos humanos* Terrassa: ProHabitatge, 2006.

<sup>540</sup> See Brenner, N., Marcuse, P. & Mayer, M. (2012). *Cities for people, not for profit: critical urban city and the right to the city*. New York: Routledge. See also Coggin, T. & Pieterse, M. (2001). Rights and the city: an exploration of the interaction between socio-economic rights and the city. *Urban Forum*, 23(1), 257-278.

bank investments in the speculative market. They meet also to occupy public spaces, bank agencies and governmental offices to bring to public attention how the State usually gives biased treatment to save finances not people.

The PAH's members are told that the old members are not lawyers or professionals in charge of anyone's case. Everyone must take responsibility of their own demands, but all support is offered in terms of information, legal advice and company when mortgagors have to visit the banks. Once the new activists become aware of the core information around the international and national policies on the housing system, they are encouraged to help each other at the stage one during the "juridical coaching". Other activities on interest rates and including visits at the Catalanian Parliament or other public agencies, for instance, are part of their agenda to energize the political, economic and social debate for the promotion of the right to housing through democratic methods not relying on the institutional apparatus for transparency.<sup>541</sup> The orientation on how to guarantee an adequate protection and the procedures to have a lawyer from the Spanish State, in case the affected cannot afford one, are also facilitated for the activists. Gatherings in front of the places where families are about to be evicted usually happen to call public notice to the fact that families with children are about to live on the streets. In extreme cases, the platform decides to occupy empty housing units to condemn property speculation and international capital. They name that protocol by "Social Work of the PAH" or "Obra Social de la PAH" and usually see it as civil disobedience since the law might replace the absolute right to property for lives. The Social Work serves also as an instrument of pressure to make public administrations accomplish the social function of property in three dimensions: 1) social rents; 2) application of the 18/2007 Catalanian Housing Act on the correct usufruct of the right to property; 3) coercive fines against banks, real estate investors and city councils as proprietors of houses without people.

Nowadays, the PAH has five objectives: a) social housing through social rents; b) the Social Work for vulnerable families and individuals; c) stop evictions; d) the housing unit given by the person in debt in lieu of payment – in Spain, if a mortgage is not payed, the mortgagor loses the house and has the mortgage debt; e) essential supplies such as water, heating and electricity. With the help of jurists, the PAH made

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<sup>541</sup> Retrieved from <http://afectadosporlahipoteca.com/>

available online documents which can be easily downloaded and filled in by the affected ready to be presented at the law courts. Such strategy has been as an efficient method to make people closer to the juridical jargon creating an empowered movement using the institutional structure as outsiders. Therefore, conveying information on law and rights is the channel selected by the activists to more transparency in property market. It also occurs as parallel actors of the State-private models of governance since the international community had been traditionally designed with a top-down approach that should be led by States. When the Royal Decree 1/2015 was passed by the Spanish Parliament, which is called also as “the act for a second opportunity”, it was supposed to mitigate the consequences of massive unemployment and the indebtedness. However, the level of transparency demanded by the law imposed a myriad of formalities that many people could not prove easily their vulnerable conditions.<sup>542</sup>

The right to the city has been a central element since the international housing crisis erupted in 2008 involving questions of worldwide investments, speculation and macroeconomic analyses.<sup>543</sup> The MTST and the PAH have shown the perspective of the right to housing from a critical point of view without directly criticising international economic models of urbanism. The lack of a more connected view on how cities have been object of a financial urban planning mechanism is the first element that weakens the connecting factor between housing and other city rights. The prefix of *proto* refers to an intense political consciousness in city rights demanded by grassroots movements, but the claims for more rights in city context still belongs to a local neuralgia *status*. In other words, the tow collectives fighting for the right to housing are very sensitive about the loss of people’s dignity and they know having a place to live is

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<sup>542</sup> The Article 5, 18/2007 Housing Act passed by the Parliament of Catalonia, affirms properties shall be complied with its social function. Premium, penalties and internal obligations are also mentioned in the point 3 of the same provision. The competence to define of what is understood by the “social function” is predicted in the Article 2, “i”. The Article 3, letter “d”, defines “empty housing unit” as the one which is unoccupied for more than two years without any justification according to the Article 41. About the expropriation of the property usufruct, see the Article 42.6. To deal with empty houses without any motivated reason, read the Article 42.5; on those provisional measures applicable Article 109.2, letters “b” and “c”; coercive fines the Article 113. The sanctionable typologies are divided into three stages based upon quantitative mechanisms: soft, serious and very serious infractions against the public administration in the Article 118.

<sup>543</sup> Mortgage defaults started being a problem in Brazil and they indicate the start of a housing bubble burst. In January 2017, 49 out of 100 houses are given back, because the buyers cannot honour their debts anymore. According to a detailed report made by Fitch Ratings, 30 companies are responsible for almost 60% of the credit in real estate market. We add the system of interests, conditions of payment and also the speculative profile will be negatively noticed soon after. It is a complex socioeconomic reality in which urbanism is subject to capital in a perverse way. Retrieved from <https://www.fitchratings.com.br/search>

intimately linked to other social rights. However, they disperse the global events connected to public debt as a commodity to attract city investors. Other institutional challenge is the fact of urban planning in Brazil and Spain belong to city administrations and their legislative power induces the two social movements to look for answers inside the city limits. They feel that the housing in itself is not enough to guarantee the right to housing, but the MTST and PAH have not deepened the notion of water, safety, heating, green areas, parks, hospitals, schools, facilities and a myriad of other services as a composite of demands across national borders. Therefore, they could not elaborate their local needs as a global landscape linking the urban surplus value production derivated from public debt system to international actors behind the construction market.

Society was undergoing a complete transformation for Henri Lefebvre during the 1970s and industrialised cities were becoming complex urban areas. For the ones who work and produce the space, cities became a more abstract object. The French thinker does not deny modernity based upon capitalists mode of production, however, he is critical to the emphasis on urban planning as an inanimate object instead of individuals producing the cities organically, i.e., places beyond their geographical frontiers.<sup>544</sup> However, the urban rationality that is currently being under analysis only permits the capital component as a criterion. Property rights play an economic and political organisation of cities that is far from the social possibilities of intervening in the creation of more representative spaces. Then the financial incursions in city limits began to be global in the sense of a total understanding is possible under the auspice of capital, speculation and the location of properties.<sup>545</sup> It is a constatnt construction

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<sup>544</sup> “El dinero y la mercancía, todavía *in statu nascendi*, no aportaban sólo una ‘cultura’, sino un espacio. Abrumada por el esplendor de los edificios religiosos y políticos que la circundaban, la originalidad de la plaza del mercado no ha sido suficientemente puesta de relieve. Deberíamos recordar que en la antigüedad se consideró al comercio y a los comerciantes como externos a la ciudad, ajenos a la constitución política, por lo que eran relegados en las periferias. La propiedad de los fundos, de la tierra, era la base de la riqueza. La revolución comercial hizo entrar el comercio en la ciudad y lo instaló en el centro del espacio urbano transformado. La plaza del mercado era muy diferente de la ágora y del foro: de libre acceso, se abría a todo el territorio circundante (que la ciudad dominaba y explotaba), y a la red de rutas y caminos”. See Lefebvre, H. (2013). Del espacio absoluto al espacio abstracto. In *La producción del espacio* (pp. 303-304). Madrid: Capitán Swing.

<sup>545</sup> “Así se establece en le espacio la trinidad capitalista ‘tierra-capital-trabajo’, que no puede permanecer abstracta y que sólo puede concentrarse en un espacio institucional triple: en primer lugar, *global* o mantenido como tal, el de la soberanía, donde se despliegan las coacciones, por tanto espacio fetichizado, reductor de la diferencias; en segundo lugar, fragmentado, separador, disyuntivo, que localiza las particularidades, los lugares y las localizaciones, con el propósito de controlarlas y negociarlas; y por

without local or national borders in settlements where individuals have to put in practice their energies to change their own lives. The French philosopher affirms that one way to start an urban revolution is through dialogue with the institutional establishment that is conservative by nature. Then encounters with public powers and political forces within the state must be seen critically. The strategy for Henri Lefebvre initiates with techniques maximising forces to change social reality without ignoring the democratic arena for transformation. It is the desire for a political atmosphere in which rationality is devoted to the general interest and always open-minded. Excess funds generated by social labour should be re-invested in expertise and technologies for urban solutions with people at the core.

The MTST and the PAH have internalised supranational documents to enforce the obligation of the state in making real, better and adequate the housing conditions. The global attack from real estate investments against the right to housing seems to be far from public administrations and constitutional judgments. In the case of Spain, the 2008 economic subprime crises left the Spanish local governments catatonic. For Brazil, one of the consequences of that housing bubble tragedy was the presence of property system investments in emerging countries as a way to recover fat profit advantages in not so affected markets yet.<sup>546</sup> The two movements want to expand their demand for the right to housing in other arenas such as equal civil rights for black people and immigrants, bus free-tickets for students, energy, water, sanitation, access to education institutions or even more fiscal transparency in the application of public revenues. The participative budgeting in Brazil or the claims received by Síndic de Greuges in Catalonia are some of the political realms that can energise their demands. However, they are not yet considered the representatives of what Henri Lefebvre's ideas suggested as the right to the city, because the French philosopher's concept is linked to an organised working-class in which different social *strata* are present. It is less a problem of legal normative accomplishmen in itself and more a view on the totality of few rights

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último, jerarquizado, que ubica los lugares depreciables y los nobles, los prohibidos y los soberanos". See Lefebvre, H. (2013). Del espacio absoluto al espacio abstracto. In *La producción del espacio* (p. 319). Madrid: Capitán Swing.

<sup>546</sup> Retrieved from <http://alternativaseconomicas.coop/articulo/dossier/la-batalla-mundial-por-la-vivienda>. It is a useful dossier made by Pere Rusiñol on Brazil. He also points out some links between Wall Street and urban realities in emerging countries.

to the working class. The development of cities and the production of wealth refer to a model of space in which the comprehension of a totality is needed.<sup>547</sup>

As we defended until now, the urban collective participation in these two grassroots movements in city life intuitively looked for adequate measures adopted by public administrations as part of their concepts for more social justice. The exercise of counterarguments introduced along the present chapter contributes to an organic notion on human rights, constitutional theories on the right to property, the role of local powers in public administrations and the philosophical contribution on the right to city are essential for them. It is important to note the MTST and PAH have nurtured a rationale of discredit for the hegemonic political parties and demanded legislative powers more responses for the demands not only affecting their members. These platforms and social movements show an enormous discontentment of political groups desiring blind the institutional State's power and the control of the decision-making process. Such aspect is positive and helps society to understand city as a whole. Other constructive element is their consciousness of the political co-optation forces in institutional politics and how the *potestas* absorb their demands as a way to diminish their independent criticism. It does not depend on right-left concepts and not dated to the 2008 crisis specifically. The history of urban social movements during the 1960s and 1970s in Boussy, Quincy and Epinay in the periphery of Paris showed class struggles and endless challenges about city issues overspilt cascades of criticism against the socialist agendas as well. Urban issues have been in many international contexts and the list of rights demanded by grassroots movements is immense.

When the urban social movement of a roofless working class demand is alive, certain ruptures in the tradition of the property institution are brought out. The first one is the subjects evolved in the discussions about the proprietors' abuse, non-occupied areas and non-execution of the social function of property through the taxes payments. The second one is the public audiences with different sectors of society in public spaces where all information specially the one in benefit of constructors or speculators is available for every citizen. The third one is the progressive fines applied to banks or real estate agencies not committed to their obligations as proprietors denying any kind of agreement to re-calculate the mortgages or accept social rents in *lieu* of the eviction.

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<sup>547</sup> Purcell, M. (2002). Excavating Lefebvre: the right to the city and its urban politics of the inhabitant. *GeoJournal*, 58(1), 103.

From the perspective of the owners, coercive administrative power may be interpreted as cruel mechanisms disrespecting the right to property. The fourth one has to do with the housing legal norms in the constitutional framework and the internalization of an adequate usufruct of the property as principle considered essential for the whole social development of a society. The last one, but not least, the trans-constitutional demand in housing issues from different societies to make real the passage from a proto-right to the right to the city. In other words, the claims of the grassroots movements and their participation can emancipate the public power from the real estate capital lobby on land use, housing market and property rights. It is the possibility of constructing the city by a constant re-building of our own rationale with reference to other issues once a place to live in itself cannot comply with other human urban needs.

### **3.3. From a proto-right to the right to the city: setting the stage for housing, employment and the construction of cities**

In a historical perspective, the demand for more housing units has its origins in the low-income working class. The first neighbourhoods for the workers from the nascent industry in the São Paulo Municipality appeared in the surrounding area where the productive sectors were. Brás, Bexiga and Barra Funda are some of the most famous places where the immigrants and nationals went with the intention of a better life. Some of the *villes* dating back to the beginning of the XX century in the East zone of the city known as Santa Cecília, Vila Matarazzo, Moóca and Vila Maria Zélia were thought to construct the new housing units and other basic services as well. So, the urbanisation of these zones was a tool used by the public powers in order to overcome the rising informality in the city. A series of funds was centralised by the State to finance projects like these. The Brazilian government understood the question of housing and other problems of the city relying on two basic variables, that is, the public capitalisation for the real estate market from pensions.<sup>548</sup> The Municipality of São Paulo became economically more complex at the very end of the 1920s when Getúlio Vargas Dictatorship (1937-1945) was about to start and the rapid transformation of the city

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<sup>548</sup> Bonduki, N. (2011a). Cortiços, vilas e correr de es: a habitação produzida pelo setor privado. In *Origens da habitação social no Brasil: arquitetura moderna, Lei do Inquilinato e difusão da casa própria* (pp. 57-71). São Paulo: Estação Liberdade.

paved the path to a housing programme through many different productive sectors. A speculative market appeared and investors saw a window of opportunity to use the abundant resources centralised by the State and the elevation of the salaries in their favour. However, the land use and the quantity of credit for cities construction were a key question for the Brazilian State. The rents, for example, were nationally frozen to impede any unjustifiable rise and discourage real estate investments committed to exponential gains on public urban policies.<sup>549</sup>

After the 1945, the Brazilian State and the administration of the São Paulo City re-directed the housing question to private sector. Once the costs of buying a land parcel and the construction were concomitantly exorbitant, the level of informality and self-construction rose. Technical, aesthetic and urban problems multiplied with this system. The idea was the maximum reduction of expenses as possible for poor families. With a systemic challenge caused by the absence of funds to construct units and an incipient mortgage market, the Military Regime (1964-1985) created and kept the National Bank for Housing or the *Banco Nacional da Habitação* (BNH) in 1964.<sup>550</sup> The relative and contradictory success of a social housing policy in an authoritarian regime came from the idea of the Brazilian government in sharing the responsibility of a massive programme with the resources generated by working class in different sectors of the economy. In other words, the construction of properties did not depend on exclusive capital from the real estate sector. That alliance was indispensable for the protection of working class against those capitalist initiatives devoted to only profitable urban projects.<sup>551</sup>

The social housing programmes and the level of employment in Spain were very notable during the Military Regime (1939-1975) as well. As it happened in Brazil, it was the time when the working class contradictorily supported the system of property as a way to achieve ownership, but workers did not have enough capital accumulated to pay the initial amount in order to access a new house. Living in poor conditions such as the shacks in derelict areas of Barcelona much before the Olympic Games of 1992,

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<sup>549</sup> Bonduki, N. (2011b). A Lei do Inquilinato e o congelamento dos aluguéis. In *Origens da habitação social no Brasil: arquitetura moderna, Lei do Inquilinato e difusão da casa própria* (pp. 208-245). São Paulo: Estação Liberdade.

<sup>550</sup> Bonduki, N. (2011c). A habitação por conta do trabalhador. In *Origens da habitação social no Brasil: arquitetura moderna, Lei do Inquilinato e difusão da casa própria* (pp. 280-313). São Paulo: Estação Liberdade.

<sup>551</sup> Bonduki, N. (2011d). O fim da era Vargas e a busca de novos horizontes para a cidade do presente. In *Origens da habitação social no Brasil: arquitetura moderna, Lei do Inquilinato e difusão da casa própria* (p. 316). São Paulo: Estação Liberdade.



improvised dwellings in Montjuïc Hill, Barceloneta and L'Example, the working class had to face the changes of an industrial city to a place of services especially after the 1980.<sup>552</sup> As many other cities in Spain, Barcelona had always been a place of industries where workers looked for opportunities including better housing conditions.<sup>553</sup> With the de-coordinated urban policies after 1978 with the Spanish Constitution, specially when the State left the real estate market more flexible to dictate its own rules promoted a rapid transformation of the city with expensive properties and high unemployment rates.<sup>554</sup> Nowadays, most of the affected by the 2008 mortgage crisis in Catalonia are direct descendants of the same historical past. The social and economic conditions to pursue the right to housing depend on democratic notions of how cities are constructed. We will develop in the following section two concepts on sovereignty and how they are relevant to urban transformation.<sup>555</sup>

#### **4. Beyond transparent participative public administrations: the right to the city destituting the actual economic property right**

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<sup>552</sup> “Durante los primeros años de la década de los 80 la metrópolis de Barcelona inicia su etapa postindustrial. En estos años, por primera vez, las ocupaciones en el sector servicios superan en peso relativo a las del sector industrial (figura 1). Como es sabido, este proceso de terciarización del sistema productivo no es particular de Barcelona, sino que al mismo tiempo ya se estaba produciendo en el resto de grandes ciudades españolas (Méndez y Caravaca, 1993), eso sí, con cierto retraso con respecto a otros países industrializados en los que esta transición productiva ya había comenzado en los años 70 (Bell, 1976)”. See Sarasa, S., Porcel, S., Navarro-Varas, L. & Thiers, J. (2015). Desindustrialización y crisis en la Barcelona postolímpica: ¿hacia una ciudad dual?. *Institut d'Estudis Regionals i Metropolitans de Barcelona. Working Paper in Sociology*, 15(02), 1-43.

<sup>553</sup> Molinaro, M. D. (2010). El empleo, la construcción y la vida en las barracas. In Tatjer, M. & Larrea, C. (Eds). *Barracas: la Barcelona informal del siglo XX* (pp. 83-106). Barcelona: Ajuntament de Barcelona.

<sup>554</sup> *Instituto Nacional de Estadística* [on-line]. Encuesta de población activa. Principios y resultados [Accessed on 14 August 2017]. Retrieved from [http://www.ine.es/jaxi/Datos.htm?path=/t22/e308/meto\\_02/pae/px/10/&file=03004.px](http://www.ine.es/jaxi/Datos.htm?path=/t22/e308/meto_02/pae/px/10/&file=03004.px)

<sup>555</sup> “Estos tres episodios [Eixample, Barceloneta and Montjuïc] sobre las relaciones entre proyectos urbanísticos y procesos de erradicación del barraquismo en la Barcelona del siglo XX son solo ejemplos puntuales que podríamos ampliar con otros casos. Todos ellos nos llevan a una reflexión sobre cómo se construye la ciudad y cuáles son los modelos escogidos en la programación de su transformación, casi siempre modelos urbanísticos de larga duración – más de setenta y cinco años para el paseo Marítim – que en general, apenas consideran los aspectos sociales y la vida de las personas”. Tatjer, M. (2010). Barracas y proyectos de remodelación urbana en Barcelona, del Eixample al litoral (1922-1966). In Tatjer, M. & Larrea, C. (Eds). *Barracas: la Barcelona informal del siglo XX* (p. 59). Barcelona: Ajuntament de Barcelona. The numbers, date and the legal concept of the social function of property as we presented, respectively, in the Chapters I-II and III, seem to show how housing and the level of employment are intimately linked. The right to the city appears when the working class is organically organised to extend the right to a dignified and affordable place to other rights.

Sovereignty derives from the territorial and legal constructs as we saw along the historical approach on *imperium* and *dominium*. Nonetheless, at least two forms of sovereignties can be found in the theoretical debate involving political matters in Brazil and Spain. One of them is based upon the State-sovereignty concept as a modern notion we pointed out in the manuscripts written by Francisco de Vitoria and Pedro Fernández de Navarrete. Selective groups in power repeats the tradition of a centralised model of government as legitimate gift for those who conquered a mandate to govern. Therefore, the modern sovereignty in the Iberian tradition means the expansionist conquest of the lands overseas, but also expansion of the internal limits of ownerships. As we presented beforehand, the emotional right to property is a territorial amalgam with administrative, penal and moral codes respecting the logic of a privilege. In that sense, within the limits of the property the law, the rules of conviviality and land usufruct were dictated by the owner of the property. In other words, the State protected the property and the landlords promised they did not incite the people in their communities against the head of the political power. The *imperium* did not interfere in the *dominium*, then the private lands were not an object of public issue and a matter of *imperium* administration. Cases of confiscation and expropriation without any kind of compensation were commonly used to punish the loss of confidence.

As the continuation of that modern notion of sovereignty and the internal limits of property, the authoritarian regimes serve to illustrate how ownership was used to destitute the social contestation as it happened in Brazil and Spain. In Spain, between 1961-1975, more than four million houses were constructed.<sup>556</sup> The Brazilian case is very similar since between 1967-1984 more than 4.3 million mortgage contracts were firmed to finance housing units.<sup>557</sup> It is the irony of housing policies and programmes with the expansion of credit access linked to ownership. However, what is implicit in that model of construction and funds for potential proprietors has to do with the promise of an economic investment. This is one of the differences between a democratic use of property and the speculative elements in the contemporary absolute internal limits in titles of the recent owners. The indebtedness is sold by centralised powers as the means for a future joy through a well-valued product in real equities in a long-term period. Moreover, public administrations are just the arms of a central power that keeps itself as

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<sup>556</sup> Retrieved from [http://www.fnff.es/Politica\\_de\\_Viviendas\\_53\\_c.htm](http://www.fnff.es/Politica_de_Viviendas_53_c.htm)

<sup>557</sup> Retrieved from [http://repositorio.ipea.gov.br/bitstream/11058/2814/1/td\\_0654.pdf](http://repositorio.ipea.gov.br/bitstream/11058/2814/1/td_0654.pdf)

the political and legal body to dictate over proprietor's duties, taxes and limits. So, any sort of claim for the right to dignified and affordable housing confronts the tradition of a sovereign in alliance with proprietors in Brazil and Spain. As a response for the lack of an effective right to housing, social constestation emerges as a constitutional possibility questioning the establishment of hierarchical powers.<sup>558</sup> The possession or the usufruct of empty properties for speculative purposes becomes then a city matter reporting the illegitimacy of those State authorities and public powers yet resisting in imposing limits for the actual model of ownership.

Yet it would be interesting to analyse the notion of authority from a more plural international comparison including other examples, we put in evidence our two cases. We assume as a premiss that the Spanish Military Dictatorship (1939-1975) and also the Brazilian Military Regime (1964-1985) influenced directly their juridical powers during their non-democratic periods.<sup>559</sup> Certainly the making of law, professional careers and the institutionalism of the two States deemed as urgent a vigorous control of political ideologies. Firstly, because a progressive magistrature would not resist unscathed any attempt to confront the authoritarian robust centralism in favour of freedom, life and property as some contemporaneous political powers trying to renew the personal aspect or the emotional right in the XXth century concept of sovereignty.<sup>560</sup> Secondly, part of

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<sup>558</sup> See the Ley Orgánica 4/2015, de 30 de marzo, de protección de la seguridad ciudadana for Spain; and the Brazilian Act, Lei Antiterrorista No. 13.260/2016, 13 de março de 2016. Social movements claiming the right to housing have been considered in both countries terrorists. See the speech made by Cristina Cifuentes, del Partido Popular Español, in an interview on the 23rd of March 2013 in the Spanish media press. Retrieved from [http://politica.elpais.com/politica/2013/03/25/actualidad/1364203963\\_208246.html](http://politica.elpais.com/politica/2013/03/25/actualidad/1364203963_208246.html); and the action of the 49th Military Battalion of the State of São Paulo to expel activists demanding an affordable and decent place to live in an zone called Jardim Colonial Occupation, East area of the Capital of São Paulo. Retrieved from <http://g1.globo.com/globo-news/jornal-das-dez/videos/t/todos-os-videos/v/liberados-os-lideres-do-mtst-detidos-durante-reintegracao-de-posse-em-sao-paulo/5584454/>

<sup>559</sup> The debate around the regime called Spanish Courts (1942-1975) is not taken into consideration. The fact of anti-democratic practices on freedom of expression, human rights, individual liberties, the obliteration of the right to assemble and free industry in collective associations are enough to consider the period in question as just one. We use military dictatorship or regime as synonyms. Carl Schmitt conceptualises the legal order in three categories: a) normativist with the ideological idea of impersonal decisions; b) decisionist in which the correct good law encounters a political situation, but linked to a personal decision; c) and institutional with the personal element being transcended and the unfolding of the legal thinking forges organisations and institutions. These three examples are not free from the exercise of a sovereign nurtured by superpowers. See Schmitt, C. (2005a). Preface to the second edition (1934). In *Political theology* (p. 3-10). Chicago: Chicago University Press. According to the author: "legal order rests on a decision not on a norm".

<sup>560</sup> "There exists a tendency toward the reconciliation of law and power through which the otherwise unbearable 'state of tension' can be eliminated". See Schmitt, C. (2005c). The problem of sovereignty as the problem of the legal form and of the decision. In *Political theology* (pp- 24-25). Chicago: Chicago University Press.

the magistrates doctrined in positivist law lessons supported the empire of law believing norms would prevail above State-sovereignty based upon violence. Then, the self-image of the authoritarian sovereignty would divide the public opinion in two false sides, that is to say, order and disorder.<sup>561</sup> The dichotomy serves the social control in any way once those in favour or silent with reference to the state of force would end up defending God, family and property. Those against considered subversive individuals. Thirdly, in both military regimes in Brazil and Spain the interpretation of the law was not under the auspices of the a horizontal idea on the rule of law, but a hierarchy in the sources of law.

#### **4.1. The effective right to housing as an international source of law for democratic systems**

The right to property was in both courts an object of adjective law in the debate of individual defenseless as we saw in numerous *recursos de amparo* or *mandados de segurança*, conflicts of competence in the appeals and civil code provisions about proprietors' usufruct of their ownership. Yet these questions are important for the constitutional debate, we understand the decisions of the two courts turned the aspect of proportionality aside.<sup>562</sup> The exercise of powers regulated by the legal apparatus in both realities did not ponder the impact of their decisions related to eviction, expropriation in

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<sup>561</sup> Schmitt, C. (2005b). Definition of sovereignty. In *Political theology* (p. 12). Chicago: Chicago University Press.

<sup>562</sup> The role of the Federal Supreme Court of Brazil after the constituency exercised a powerful control of the Magna Charter's interpretation, but excessively close to parties. A good example is the Brazilian representative dispute in the National Congress permanently transformed into a legal battle for certain groups. The highest tribunal has defined the meanings of norms and rites for the dissolution of political quarrels that are repetitive in events, but the contingency is always said to be singular. Dilma Rousseff, elected in 2014, suffered a process of impeachment between 2015-2016 without any crime against her evolving illicit business. Totally different from the ex-president Fernando Collor de Melo (1990-1992) that was personally linked to cases of corruption, money laundering and administrative improbity. The Supreme Court is a central-key in all dramatic political processes. See Koerner, A. & Freitas, L. B. (2013). O supremo na constituinte e a constituinte no supremo. *Lua Nova*, 88(1), 141-184. The same centralised control of the constitutionality is felt in Spain in the following years of its constitution's promulgation. Miguel A. Aparicio says: "En otras palabras, la regulación que contiene el título VI es difícilmente encajable en la distribución constitucional que reparte los centros de imputación de poder entre Estado central y las comunidades autónomas [political and juridical bodies]. Más bien la figura del poder judicial se eleva sobre dicha distribución y ejerce una función unificadora en la aplicación concreta de los distintos sistemas jurídicos". Read Aparicio, M. A. (1980). El sistema político constitucional. In *Introducción al sistema político y constitucional español* (p. 106). Barcelona: Ariel, 1980. See Delgado, J. L. & Segura, J. (1977). *Reformismo y crisis económica. La herencia de la dictadura*. Madrid: Saltés. And also Tamames, R. (1977). *Un proyecto de constitución para España*. Barcelona: Planeta.

legislative acts, housing and land matters. Dogmatism should be a tool compatible with the political bounds defined by the constitutional order such as the social function of property, limits for the proprietors' usufruct of their ownership and more strictly the right to housing. As we have said before, our interest is devoted to those cases in which juridical decisions imply more than one or two housing units. So, why did the local competences in both countries make the same mistakes in not combating surplus value, urban speculation by giant constructors and the financial system on property contracts in global scale? This is evident in the content of all petitions we analysed. For those leading cases as Rumasa Bank and the Judgment 37/1987 in Spain; or the few local quarrels won by administrations against Brazilian proprietors, the diffuse control of constitutionality did not take into consideration the meaning of social function of property in its real value. The political aspect in the constitutional debate evolving the local exercise of power should be taken into consideration by the courts of both countries once there is an explicit agreement of co-optation. Giant entrepreneurs are in contact and lobbying the social action in housing questions.

In both constitutional debates on the usufruct of the right to property, we noticed the singular absence of a juridical reflection on wealth accumulation through property selling. The discussion of a profitable market in long-term rates that has benefited banks or other giant constructors. In *La teoría del derecho en el paradigma constitucional*, Luigi Ferrajoli nominates that inexistence of making more effective constitutional rights as the *lacunae* of juridical constitutionality control.<sup>563</sup> In our cases, we may use that concept to translate the political vacuum created in public administration generated by both constitutional courts in Brazil and Spain. The fact of not holding more adequate judgments on the role of public administrations and their competences in applying the constitutional prerogatives of the social function, the Constitutional Court of Spain and the Federal Supreme Court tend to promote the weakness of the administrative power in municipal levels. Moreover, the lack of enforcement with reference to the internal limits for non-residential ownerships debilitate the right to housing as a right connected to the right to property. That legal institutional insufficiency between the powers has led to a deficit in places to live if we take into consideration the economic aspects of the working class, but not in terms of available housing units in both countries. The eviction

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<sup>563</sup> Ferrajoli, L. (2008). Sobre la teoría del derecho en el sistema de los saberes jurídicos. In *La teoría del derecho en el paradigma constitucional* (pp. 110-111). Madrid: Fundación Coloquio Jurídico Europeo.

of an individual by single proprietors for unpayment as we saw in many Spanish cases is completely different from massive dislodgements in benefit of a financial enterprise based upon a perverse system of credit. So, impugned regional acts and conflicts of competences aforesaid have reduced the power of local administrations and discouraged them in closing the gap of 3.4 empty million housing units in Spain. In Brazil, the progressive taxes in order to put forward the social function still face resistance from economic powers while 160 million people live in urban areas pressure the system of property.<sup>564</sup> In the appeals we saw that the Brazilian municipalities still struggle to make more effective the social function in urban planning acts as the case of São Paulo. In other words, the Civil Law tradition we mentioned in the first chapter should be revisited regarding the correction of the property hiatus to create an alternative for the *motto* “people without houses and houses without people”.<sup>565</sup> It is essential to think that the imperative of the social function of property should be constitutionally shared with the administrative power in order to meet housing matters. This is one of the adequate judgments to be considered in the notion of *dominium* we extensively described in the second chapter of our present thesis.

The need for more adequate decisions seems be the leeway local judges to comply with the usufruct of the right to property to its social function. It is fundamental for an effective social function of property the identification of the abusive use of the *dominium* tradition.<sup>566</sup> Nevertheless, we have seen that the adequate decisions for the usufruct of the right to property are not part of the *ratio decidendi* in the Brazilian and Spanish constitutional judgments analysed in the present chapter. Neither ordinary nor extraordinary instances, local or regional tribunals, reaffirmed the exercise of public powers as a legal instrument to weigh, typify and define the limits for the usufruct of property from a constitutional perspective. It is much more a legal and normative application of the juridical category of the social function, but not a more coherent

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<sup>564</sup> Instituto Brasileiro de Estatística e Geografia [on-line]. Vamos conhecer o Brasil [Accessed on 1 April 2016]. Retrieved from <http://7a12.ibge.gov.br/vamos-conhecer-o-brasil/nosso-povo/caracteristicas-da-populacao.html>

<sup>565</sup> Retrieved from <https://www.theguardian.com/society/2014/feb/23/europe-11m-empty-properties-enough-house-homeless-continent-twice>. See also Censo Demográfico 2010, page 5. The property system we have as an object presents 11 million empty houses in Europe and more than 6.1 million in Brazil. Retrieved from <http://www.ibge.gov.br/home/presidencia/noticias/imprensa/ppts/0000000402.pdf>

<sup>566</sup> See <http://eur-lex.europa.eu/summary/glossary/proportionality.html> to check a possible definition we bear in mind: “The principle of proportionality is laid down in Article 5 of the Treaty on European Union. The criteria for applying it are set out in the Protocol (No 2) on the application of the principles of subsidiarity and proportionality annexed to the Treaties”.

thesis based upon the constitutional pact after the constituency of both countries. The consequence of that unobservance relying on property guarantees and limits has resulted in a massive expansion of giant investors stimulated by the public powers. Private ownership pursued abusive speculating behaviour in the housing economy, because the majority of the judgments in all levels shielded paper based readings disregarding the evolution of property system. Financial enterprises have taken an enormous advantage of a supposed judicial non-interference in the forces of the market. Formalities, dogmatism and adjective law are important for law, but if the unique political level of a society in judiciary power is not so active distortions may prevail.<sup>567</sup> So, we are thoroughly familiar with the use of the constitutional right to property by companies or expressive real state agencies as proprietors different from the prerogatives designed for individual proprietors. In our examples, the judgments from individual claimants addressed against other privates have much in common if dogmatism underlied the legal reasoning of petitioners, but little in the sense of how property system and proprietors have changed.<sup>568</sup>

Javier Perez Royo presents the 1978 Constitution of Spain as a radical change in the traditional forms of the dictatorial State at the time it was passed. However, it is explicit in his considerations a constitutional democracy respecting the logic of a vertical legal order. The domestic law has the supremacy of a primary source and it is one of the premisses for the construction of a new political regime. Therefore, as the author says, the constitution is recognised as the legal head of the juridical power and in a lower position the “ley orgánica” or both acts elaborated the parliamentary houses. In

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<sup>567</sup> Zuloagar, J. & Ruiz, R. (2015, June 3). Las viviendas protegidas de Blackstone cotizarán en bolsa. *Expansión*. Retrieved <http://www.expansion.com> and Marco, A. (2015, 16 July). Blackstone aflora unas plusvalías del 50% con su inversión en las VPO de Madrid. *El Confidencial*. Retrieved from <http://www.elconfidencial.com>. To check how Blackstone Real State has brought private investors with massive speculative mechanisms to Europe from United States. The ex - mayor of Madrid sold in 2013 official protected housing units. Rejón, R. (2016, April 05). Ana Botella vulneró “las más elementales reglas de buena gestión” en la venta de pisos protegidos a fondos buitres. *El Diario.es*. Retrieved from <http://www.eldiario.es>

<sup>568</sup> The concept of regressive taxes on property derives from the idea of buying housing units in massive quantities paying lower prices and selling them in more profitable conditions specially not occupying them. If I buy one housing unit paying 5% of taxes to acquire it, the future buyer will pay 5% of an inflated price. The real gains discounted the inflation are much higher than any other speculative sector in economy. Because of these regressive taxes, housing construction and its market have established a global net acting on the countries demand for property. Retrieved from <http://www.blackstone.com/the-firm/asset-management/real-estate>. In order to have an idea of how the surplus value is generated in cities based upon tradable services, check the on-line property market industry offered. Retrieved from <http://www.goldmansachs.com/what-we-do/investment-banking/industry-sectors/real-estate.html>

a sequence, we find the international law, the communitarian law or the treaties from regional international organisations and, lastly, the application of the autonomous law.

<sup>569</sup> In a nutshell, a very centralised structural design of power with all complexities of the Civil Law when compared to the Common Law tradition that leads to a much more horizontal constitution for the sources of law. <sup>570</sup> The tension starts with the intensive integration of legal obligations overlapping the constitutional order of the States. The Spanish and the Brazilian Constitutions are committed to universal custom of values, principles and obligations through international agreements, but they tend to rank an order of those norms considered more applicable than the others. For the purposes of our thesis, the conflicts involving the internal limits of the property right to control the abuses of idle owners or even the elaboration of legal judgements on the social function would be carried out with the help of a traditional hierarchy of norms. In other words, the civilist tradition is prone to consult obtusely the codes in a self-referential exercise and the Common Law willing to evaluate openly the cases with a strong component of a contingency in expansion beyond the written normativity. The role of international law is supposed to enter with more fluidity the constitutional systems solidifying the making of primary sources of law not opposed to internal normativity: “Em termos formais, o direito internacional se assemelha àquele regime de normas primárias, embora o conteúdo de suas normas (amiúde sofisticadas) seja muito diferente daquele das normas de uma sociedade primitiva, e muitos de seus conceitos, métodos e técnicas sejam os mesmos que os do moderno direito interno”. <sup>571</sup> So, the internal limits of the right to property shall be open to the international order carrying the seeds of how the concept is

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<sup>569</sup> Royo, J. P. Introducción. In *Las fuentes del derecho* (pp. 16-23). Madrid: Tecnos. Numerous authors suggest even rights divided into historical generations which is dangerous because such hierarchy in time also implies a vertical organisation of contents, sources of law, interpretation of norms, sovereignty etc. We mentioned two cases of a transversal application of the international law as a primary source before. See the “International judgments towards the right to housing affecting Spain”, Chapter IV.

<sup>570</sup> “It is true, of course, that this call for methodological self-consciousness is an unfamiliar one. At least so far as I can see, our legal culture is sufficiently disorganized (or should I say schizoid?) that many of its principal actors—lawyers, judges, legislators—move back and forth between the perspectives of the Ordinary Observer and Scientific Policymaker quite effortlessly with no sense of impropriety. Consistent with the genius of the common law, advocates are quite happy to indulge either form of argument when it suits their advantage. And judges (as well as legislators) are willing to rule neither kind of argument beyond the pale of legal thought, though they surely have no explicit criteria for determining the contexts in which one or the other legal form should be given preponderant, let alone exclusive, weight”. See Ackerman, B. A. (1977). On the nature and object of legal language. In *Private property and the constitution* (pp. 168-169). New Haven: Yale University Press.

<sup>571</sup> Hart, H. L. A. (2009). O direito internacional. In *O conceito de direito* (pp. 292-301). São Paulo: Martins Fontes. The author also mentions the importance of creating between international and internal law a common bases for the construction of those rules of recognition.



expected to be adequate for the imperative and moral judgements of the social function referring to the residential use of it avoiding its pure economic end. It seems crystal clear that the international efforts to promote an affordable and decent place to live made by the nations under the auspices of the *United Nations Habitat III Programme on Housing and Sustainable Urban Development* mandate since Quito's Conference corroborates the right to housing as a primary source of law leading to the right to the city.<sup>572</sup>

The consensus of the ruling groups on violence was a central element for them to establish what they understood as the social order. The Brazilian and Spanish *juntas* relied on the social position of proprietors to form their support as a political class. In that sense, the values around ownership in terms of tradition would never be part of a democratic concept.<sup>573</sup> We may re-phrase that idea of coalition evolving property and political power referring to the notion of modern sovereignty aforementioned. As an aspect of the State of exception in Spain and Brazil, a group of *domini* and not strictly one powerful *persona* was responsible to the "social order". Cities and public spaces were then the territory of an *imperium* in which proprietors did not interfere. The limits on property could be formally established by law, which is observed with the social function of property during the dictatorships in questions, but curiously it is the time when more private owners accumulated capital. The preferences of the *imperium* and *domini* as a political body are mainly in the orbit of a violent institutionalism to impose their interests and overviews on society.<sup>574</sup> The juridical power tends to transmit the image of a stable institution as it is supposed to be the practice of the head of the State.

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<sup>572</sup> Hans Kelsen admitted the international law could be part of primary sources if the countries relying on their internal values, history and imperatives accepted them. See Kelsen, Hans (1926). *Les rapports de système entre le droit interne et le droit international public. Collected Courses of the Hague Academy of International Law, The Hague Academy of International Law, 14(1), 227-332.*

<sup>573</sup> Religion, means of production, wealth, academies linked to the forged cultural process and the sense of justice's definitions are led by the ruling classes. They may converge on a political and centralised body. See Mosca, G. (2014). *La clase política. In Diez textos básicos de ciencia política* (pp. 23-36). Barcelona: Ariel. The German *Reichstag* had to convalidate the state of exception according to the Article 48, 1919 Weimar Constitution. See Schmitt, C. (2005b). Definition of sovereignty. In *Political theology* (p. 11). Chicago: Chicago University Press.

<sup>574</sup> "Altogether different is the sociology of concepts, which is advanced here and alone has the possibility of achieving a scientific result for a concept such as sovereignty. This sociology of concepts transcends juridical conceptualization oriented to immediate practical interest. It aims to discover the basic, radically systematic structure and to compare this conceptual structure with the conceptually represented social structure of a certain epoch. There is no question here of whether the idealities produced by radical conceptualization are a reflex of sociological reality, or whether social reality is conceived of as the result of a particular kind of thinking and therefore also of acting". See Schmitt, C. (2005d). *Political theology*. In *Political theology* (p. 45). Chicago: Chicago University Press.

Both declare themselves the defenders of the social harmony and the formalities of the law. In that relation, the sovereignty is established by the executive and judiciary power. The presence of legislators is figurative or even does not exist while the model of the State-sovereignty relies on the extreme control of the city, public space and freedom of thought.<sup>575</sup> The ruling classes of proprietors in the state of exception deny the existence of a non-justifiable violence in which the normality is the physical aggression, because the use of force is always legitimate.<sup>576</sup>

How could a judiciary power and forms of State-sovereignty coexist after the approval of the right to property in the 1978 Spanish and 1988 Brazilian Constitutions? In part the answer comes from the challenge a considerable number of judges and magistrates did not stop to think and that is connected to the enormous quantity of empty housing units in both countries. Other explanation is born in the judgments on property usufruct once the effects of the sentences put more in practice the exercise of constitutional rights pro proprietors specially financial institutions than reinforcing the limits of ownership elaborating a constitutional thesis on the matter. Other reason is that the State-sovereignty never agreed that public administrations created an autonomous culture to impose restrictions, fines and sanctions against proprietors' abuse. We have seen how many were the *mandados de segurança*, appeals and extraordinary motions in both Brazilian and Spanish courts questioning the competences of the administrative power in regulating the inadequate use of property. We saw an expressive quantity of legal procedures along the judgments we analysed in the previous chapter, but not the transformation of a constitutional reasoning holding up a new view on the financial attack international proprietors promote. Related to the ordinary juridical powers, the highest courts did not create a rationale to incentivise the civil and the constitutional debate on property issues taking into consideration all matters in a constitutional charters is a question of general interest. In Brazil and Spain, there seems to be yet an enormous concentration of the constitutionality control as an inheritance of cultural

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<sup>575</sup> Exception is the 'borderline case' not the routine. State of exception is a state theory not necessarily reduced to state of siege or emerging decrees. See Schmitt, C. (2005b). Definition of sovereignty. In *Political theology* (p. 05). Chicago: Chicago University Press.

<sup>576</sup> As Hannah Arendt remembers, authority has to do with the capacity of public competences in making the others do what the officials institutions consider appropriate without any interference of freedom. See Arendt, H. (2011). Que é autoridade. In *Entre o passado e o futuro* (p. 144). São Paulo: Perspectiva.

*modus operandi* that still conflicts with the notion of popular sovereignty.<sup>577</sup> As internal consequence of the federal and autonomous system of government in Brazil and Spain based upon a centralised military regime notion of property, the order of the State-sovereignty is always understood by the proprietors as the final word once owners can count on an anti-democratic idea of property. The interpretation of what would be the social function of property evolving local administrative powers, regional parliamentary acts and city council policies yet reveal a clear dispute for a hierarchical exercise of authority by the national powers of both States.<sup>578</sup>

#### **4.2. Popular sovereignty: from the right to housing to democratic cities**

The other concept of sovereignty is the popular one. More participation lies at the root of the debate in these political models for land usufruct and self-government. As Marsilius of Padua proposed during the medieval times writing the *Defensor pacis* to refuse the idea of the plenitude power of the pope, the spiritual power of the Roman Catholic Church should not rest on property and political sovereignty. Although he did not mean all civils could be in the government, the distribution of land was necessary to lead sovereign power to peaceful coexistence. The demand for more participation and the democratic notion for the inclusive usufruct of the property confront directly the idea of State-sovereignty. When the MTST and the PAH question the ineffectiveness of the right to housing and other rights leading them to the public space of the cities, they motivate the public powers and the constitutional courts to treat the right to property by the limits of a formal political pact. It means that they understand the usufruct of vacant houses, progressive taxes and the action of the local powers a question of democracy. The two urban grassroots movements organise themselves in order to give an answer to the structured real estate investments that eventually are protected by a selective use of

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<sup>577</sup> Reflections on the Spanish Act 6/2007 and the partial reformation of the Constitutional Spanish Court evolved also the exponential number of *mandados de segurança* proposed by individuals. The need for objectiveness in the individual recourses, which is translated into the necessity of jurisprudence and non-accomplishment of constitutional doctrine by ordinary jurisdictions, generates a self-referential system from where proportionality is not present. See Garcia, J. C. C. (2010). El recurso de amparo que queremos. *Revista Española de Derecho Constitucional*, 88(1), 39-81. For the case of Brazil, read Costa, A. A., Carvalho, A. D. Z., Farias, F. J. (2016). Controle de constitucionalidade no Brasil: eficácia das políticas de concentração e seletividade. *Rev. direito GV*, 12(1), 155-187.

<sup>578</sup> Schmitt, C. (2005b). Definition of sovereignty. In *Political theology* (pp. 13-15). Chicago: Chicago University Press.

the rule of law. On the one hand, David Harvey says “The class interests involved on the production side are, however, also lopsided, and this has implications for who ends up holding the ‘sticky end’. Bankers, developers, and construction companies easily combine to forge a class alliance (one that often dominates what is called ‘the urban growth machine’ both politically and economically)”. On the other hand, the geographer mentions “But consumer housing mortgages are singular and dispersed, and often involve loans to those who occupy a different class or, particularly in the United States (though not in Ireland), racial or ethnic position”.<sup>579</sup>

So, the diffuse control of constitutionality should lead to a property theory on which public administrations could rely on to make their decisions, impose sanctions and reduce the harassment of giant proprietors interposing numerous expedients to run away from their obligations as proprietors. The local and regional acts on many types of property taxation impugned by the State representatives in the constitutional tribunals may reveal how the central governments want to concentrate its power. However, as part of a balanced interpretation of the property as a fundamental right, any kind of ownership shall rest their existence on their usufruct and obligations at the same time. In Brazil and Spain, the social function is an instrument to promote the sort of equilibrium demanded by the civil society in times of crisis such as the years after 2008. Therefore, this is why the State must rely on popular sovereignty to defend the values of freedom and the human vital needs in a project for all. Property right is part of that constitutional idea in which the unity is based upon the principle of a constant constituent assembly: “Since 1848 the theory of public law has become ‘positive’, and behind this word is usually hidden its dilemma; or the theory has propounded in different paraphrases the idea that all power resides in the *pouvoir constituant* of the people”.<sup>580</sup> According to Carl Schmitt, for any power constituting the legal order by the legitimate use of force and not representing the wishes of people, there is a dictatorship.

The counterarguments we presented along the present chapter are essential to re-conduct the energy from the right to housing demand into city problems. The defense of a place to live in itself does not seem to comply with a critical global view for a more

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<sup>579</sup> Harvey, D. (2013). The urban roots of the capitalist crises. In *Rebel cities: from the right to the city to the urban revolution* (p. 47). New York: Verso.

<sup>580</sup> Schmitt, C. (2005d). Political theology. In *Political theology* (p. 52). Chicago: Chicago University Press.

effective right to housing. It is necessary a more contextualised democratic participation in urban life in order to reveal the abuses of the surplus value generated by who work in cities. The idea of participating here refers to the presence of people occupying public spaces, but also being part of what city best offers to them. It is true the Brazilian and the Spanish grassroots movements studied along the thesis have created a very powerful agenda on housing issues, but they are yet to discover how the search for human rights can impose more limits for the international capital devoted to real estate investments. Public debt systems, the construction of cities and urban interventions are some of other topics that have to be include as a demand connected to housing matters. One of the reasons for that is that privileged entrepreneurs run private-public contracts with tax payers money to serve city with infrastructure and then take advantages of the price of the land speculating with new housing units or offices. Another reason is the debate on general interest in public administrations and the challenge of transparency to avoid corruption in urban planning. The philosophical dimension is another counterargument that suits the feeling of solidarity for both social movements to construct the right to the city. For Henri Lefebvre, the organic thoughts on urban issues are important to question the means of production, the wealth accumulation and make more solid the working class demands.

The right to an adequate and affordable housing is essentially one of peaces for a dignified life. The popular initiatives of the MTST and PAH, respectively, being part of the São Paulo Urban Planning Act 1.6050/2014 and the Housing Act 18/2007, illustrate well the path to popular sovereignty. When they collected the signatures of people to make legislative changes in housing and urban matters, they showed they can organise and demand parliamentary representative to act accordingly to the democratic pact. As a way to deepen the principle of a constant constituent power, it is important to revisit the constituency in the point all power emanates from the people and affirmed by both of the constitutions. Ownership, its usufruct, the appropriation of the urban surplus value derived from public investments, financial institutions as proprietors and the housing occupation need to be included in their claims too.

So, popular sovereignty means democratic government in which life, freedom and property are important for individuals. However, the isolated demand of these rights may not make effective the accomplishment of these constitutional prerogatives for all.

The social need for fundamental and social guarantees became more evident since the 2008 housing crisis when the concentration of properties in few international global real estate markets exploded. People lost their houses while banks and financial institutions had back an enormous quantity of property. For the first time, a worldwide bankruptcy revealed the same symptom on people's restriction to the housing access in benefit of non-resident investors. Cities could be seen as an effect of a fictitious economy that was constructed in stock exchange markets. They are still object of that practice as we posed in the beginning of the present thesis. Moreover, it is mainly the popular sovereignty that is able to connect the right to housing to other rights such as employment.



CONCLUSIVE OBSERVATIONS FOR A THREE-DIMENSIONAL RATIONALITY VALIDATING THE  
HYPOTHESIS





### **Conclusive observations for a three-dimensional rationality**

At the very beginning of the present thesis, our hypothesis was the more the use of a three-dimensional rationality for adequate judgments about the right to property to avoid empty housing units, the less public administrations would be captured by the impositions of global economic forces in matters related to urban planning law. It is an imperative to clarify that the fact of “being judgmental” means in our work decisions in courts or tribunals, but also our democratic capacity in constructing critical judgments about the system of property in other public powers towards citizenship. After making some considerations from an economic, historical and legal view on the right to property through the analysis of constitutional and lower courts’ decisions, we identify the lack of a three-dimensional rationality on the usufruct of the right to property in Brazil and Spain as a structural fissure for a more effective right to housing. It is not the legal judgment either affirming or denying the social function of property, for instance, that corroborates a solid interpretation of what means a democratic property system for people. It is far beyond a normative strategy in law and legal acts to apprehend how property has gained a financial realm transforming housing into shares of banks, global real estate firms and financial institutions. Actors that have been playing aggressively with housing matters in national economies since the 2008 crisis are an evidence of that phenomenon. However, the urban grassroots movements of the *Movimento dos Trabalhadores Sem-Teto* and the *Plataforma de Afectados por la Hipoteca* have put forward legal demands either to legislatures or to public administrations in order to impede the global forces of capital affecting housing matters. In both cases, the social function of property is seen as a mechanism that cities should use to empower their actions against non-residential proprietors. The right to housing for them is an alternative to protect the property in its social use associated to other rights for more inclusive cities.

We list a series of conclusions to reiterate the previous arguments of our thesis introducing a three-dimensional rationality for adequate judgments on economic, historical and legal doctrines related to the property system. These three dimensions interacting suggest the creation of a third alternative which is an explicit denial in accepting the pendular game between a vulgar neo-Keynesianism and neoliberal ideologies. Only under the umbrella of a non-binary approach, we can multiply the

possibilities for the effectiveness of the right to housing as a general interest matter in the use of property. It is also true our anti-pendular panorama encourages the use of ownership through public policies to promote an affordable and decent home as a connecting factor for the construction of city rights.<sup>581</sup> The role of the urban grassroots movements is decisive to incentivise that alternative agenda for an effective right to housing and, consequently, democratic cities.

## **1. The economic reasons supporting the hypothesis of a three-dimensional rationality for adequate judgments**

1.1. The analysis of supply-demand theory in global real estate investments seen in the first chapter shows us how the property market does not correspond to a perfect market in urban context for many cities worldwide. The formation of prices tends to obey the housing demands of those families and individuals that can pay more for the same good. This is why speculation is the general rule that coopts the legality and stresses the legal systems in Brazil and Spain.

1.2. Global investments colonise the national capacity of producing dwellings and urban policies in a more socioeconomic democratic context. That process essentially occurs, because the national demands for property are supplied by systems of credit and mortgages dictated by the remuneration of the global capital. In other words, national

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<sup>581</sup> The theoretical foundations for a third alternative leaving behind the binary or pendular approach on democratic reflections started in the 1980s. In that context of political transformation worldwide after the fall of Berlin's wall, some intellectuals began questioning the binary debate between State-oriented policies, which were based upon consumerism plus credit expansion, and neoliberal ideologies was in fact relevant. The main thinkers and debaters of that movement are the professor Roberto Mangabeira Unger, Duncan Kennedy and Guido Calabresi as we mentioned in the beginning of our thesis. In Brazil, a very close contribution to that legal movement is made by the professor Marcelo Neves with his theory on trans-constitutionalism, that it to say, international legal disputes do affect the States if they respond to them unilaterally disrespecting either binding or non-binding legal norms. In Spain, the professor Manuel Atienza was also an important thinker taking into consideration the structural and functional approaches on legal decisions, but also power-conferring rules, non-normative powers and social interests. See Unger, R. M. (2015). *The critical legal studies movement: another time, a greater task*. New York: Verso; Kennedy, D. (1982). The stages of the decline of the public/private distinction. *University of Pennsylvania Law Review*, 130(1), 1349-1357; Calabresi, G. (2003). An introduction to legal thought: four approaches to law and to the allocation of body parts. *Faculty Scholarship Series*, 2022(1), 2113-2151; Atienza, M. & Manero, J. R. (1996). *A theory of legal sentences*. Dordrecht: Kluwer Academic Publishing; Atienza, M. (2007). Prólogo. In Courtis, C. & Atienza, M. (Eds.), *Observar la ley: ensayos sobre metodología de la investigación jurídica* (pp. 9-12). Madrid: Editorial Trotta; and Neves, M. (2013). *Transconstitucionalismo*. São Paulo: Martins Fontes.

governments permit abusive clauses for interest rates in mortgage and urban contracts with the excuse of alluring investments. As we made explicit in the first chapter, the conditions to produce and innovate in the construction of social housing are dramatically national and the wealth from foreign direct investments has only the objective of making profits in the property market.

1.3. The macroeconomics of the real estate investments is strengthened by the public debt system. Brazilian and Spanish governments remunerate their national and foreign investors with a relatively higher interest rate compared to the investments for social housing. This is why the volume of international assets is more expressive and take advantages of speculative practices. Therefore, yet the funds in foreign direct investments are expected to stay in the country for a long-term period by definition, they do not necessarily go to the production of social housing or even are part of urban policies with low-speculative profile. As a result, the investments in public debt system for infrastructure, for example, is superior compared to the productive sector of social construction.

1.4. Marginal returns for real estate investments are a commodity to be imported by countries poor in capital factor. In a long-term, the Brazilian and Spanish governments decide to preserve part of their gross domestic product forming a primary surplus to allure the funds from global markets. That decision is an anomaly once the national wealth used in the operation comes from the public budget that should be applied in strategic sectors such as health, education, housing etc.

1.5. The real estate market relies also on the unemployment rates. When the national economies do not permit the democratic and affordable access to systems of credit in order to give individuals and families the opportunity to buy a place to live, wealthy families and firms concentrate a large number of properties. However, based upon a structure of imperfect market, these actors have an enormous advantage to control the prices of rents even when people are not having access to lines of credit. This is why we pointed out the price of rental contracts as an extremely dependent variable on

employment's level. In addition, real properties are very effective for speculative purposes since the depreciation of the good is slower than moveable properties.

1.6. The *poor demography* synthesises the socioeconomic reality of families led by single mothers vulnerable to the monopolistic or oligopolistic property market in urban context. The number of the impoverished people in urban context grows and women are more exposed to that process. So, the perverse consequences of the progressive concentration of income affect and make vulnerable the right to a decent and affordable housing.

1.7. The reasons aforesaid compose the capital conditions for the deconstruction of a fair economic urban model development for people. In other words, we presented in the first chapter the notion of a possible adequate judgment on the global economy of the property market as an alternative to evaluate critically the status quo of foreign direct investments and create an alternative for a more democratic access to the right to housing. That dimension is maybe the most important one since the speculative and cumulative dynamic of the real estate investments is not part of the civil law and constitutional traditions to assess the conflicts generated by the global property system.

1.8. Non-residential real properties for speculation affects the right to housing. If that model is multiplied exponentially, a set of rights legally connected to housing issues will be endangered resulting social convulsions. So, as we mentioned in chapters II and III, property has a social function and that dimension is not only to limit owners' usufruct, but mainly to redirect the accumulation of wealth generated by ownership in imperfect conditions of competitiveness to other productive sectors. The argument is legitimate once we see the system of property speculating as a result of public policies combined with financial sectors. In that sense, the construction of housing units and cities are usually an amalgam of contracts with high marginal returns for property market and banks.

1. 9. The actual usufruct of the right to property by real estate investments, banks and financial institutions distorts the purpose of the right to property devoted to residential

matters. Once the property is not used for residential purposes, the concept of an absolute property right is renewed, that is to say, the global capital of real estate companies invades constitutional systems imposing new *domini*. This contribution of speculative wealth destabilises the political pacts celebrated by a complex network of rights that has as its premise a plural and democratic project that had already included a real estate market devoid of political power.

1.10. The ideological pendular vibration between neoliberalism and a vulgar Keynesian orientation in the economy hides the discussion of a third possible urban alternative dedicated to the right to housing in the constitutional democracies of Brazil and Spain. Once housing issues are shaken by financial practices purely economically motivated, other rights are imperilled. So, the right to the city needs a three-dimensional rationality for adequate judgments since the the economy of real estate investments has captured the right to housing with the help of the legal, civil and constitutional dogmatism. It is important to remember that housing is a strong connecting factor for other rights in urban context.

## **2. The legal and historical reasons supporting the hypothesis of a three-dimensional rationality for adequate judgments**

2.1. For the Roman Civil Law, land was an object delegated to the power of *imperium*, i.e., conquest, not a legal matter present in private contracts dominated by economic reasons. Therefore, the expansion of the public *locus* was a topic for politics debated among the Roman citizens with diminished pecuniary motivations. We have narrowed the definitions of property rights in the Civil Law tradition to contrast them with their current use and perception.

2.2. The usufruct of lands was part of a social-political strategy for occupation. As we showed, Marcus Tullius Cicero and Lucius Junius Moderatus Columella emphasised the importance of land as a productive territory where the *dominus* could set vital rules. For the legal contemporaneous jargon, land was considered a fundamental and residential right deriving from the usufruct of it with a strong political aspect.

2.3. The legal figures of *concessio*, *possessio* and usufruct were linked to the use of land. In that sense, private contracts were permitted to be made under that prerogative and conflicts involving occupation were solved by the same criterion of effective use of the land.

2.4. The legal concept of land or *locuples* suffered a radical transformation during the Middle Ages. The dimension of property and its usufruct were extended to any territory that could be militarily occupied, although the lawful category of property with absolute aspects was only applied to moveable *res*. The social use of the land was reintroduced in the XIV century, but the Catholic Church and the European sovereigns agreed in sharing the monopoly of a legal concept on property to solidify their sovereignties. So, the usufruct and the use of property were reduced to the political contracts by the temporal and spiritual powers. The presence of landlords was indispensable for that process. The occupation of lands by productive collectives was tolerated, negotiated or even suppressed based upon the conveniences of the established *potestas*.

2.5. The concept of property has been under constant redefinition. Its absolute notion is a historical construct that migrated from moveable to immovable ownership. In that sense, the use of force was essential for the stabilization of a complete ownership for the exercise of civil, penal and administrative norms inside the private lands. The emotional right from the Philippine Ordinances published in 1603 is the legal *corpus* that consolidates the concept of an absolute jurisdiction on the usufruct of property, but it also re-founds the legal alliances between political and private interests for the construction of modern sovereignty.

2.6. We identified that the use of land and later on ownership was not only a matter of modern legislators. In order to solve the conflicts in modern constitutions between the absolute and limited right to property, the social function appeared or persisted as a legal normative framework in different political pacts not necessarily in democratic regimes. In 1919, for example, the promulgation of the Constitution of Weimar Republic expressed limits for the right to property with the principles of a democratic

parliamentary republic through an elected legislature supported by proportional representation. However, the legal concept was kept during the Reich III (1939-1945) by a totalitarian State. The cases of Brazil and Spain had the same patterns since the general interest and the social function were not matters only for representative constitutional models. In Spain, the 1954 *Ley de Expropiación Forzosa* and its regulation published on 26 April 1957 Decree altered the article 349 of the Civil Code in that matter with the provisions 71 to 75 during Francisco Franco's regime (1939-1975). The Brazilian Constitution of 1967, which was modified in 1969, both texts elaborated by the Military Regime (1964-1985), maintained in its article 153, § 22, the expropriation for social or public interest; and the social function of property in its article 160, III. The cases we analysed from both Brazilian Supreme and Spanish Constitutional Courts do not make evident the majority of judges have noticed the radical changes in the nature of property ownership. Different from the first litigations we had access, nowadays the conflicts involve more banks or real estate firms with non-residential purposes and individuals in socioeconomic vulnerable conditions. It is common in the decisions the legal argumentation of the supreme and constitutional courts a very similar rationale applied to relatively symmetrical disputes between two individuals. Furthermore, the speculative proprietors tend to refuse the renegotiation of contract clauses or even a new formula to refinance the mortgagor's debt. As the professor Roberto Mangabeira Unger proposes, the economic order demands a rapid and efficient variation in legal arrangements to guarantee contracts, but there are some aspects of the contractual relation that are not convenient for them. The absolute right to property is positive for the economic order, however, its social function is the poor cousins of the same family.<sup>582</sup>

2.7. The history of the concept of absolute ownership produces a cognitive bias in public and private actors, who still make decisions under a historically inertial mental framework. According to the Roberto Mangabeira Unger, a judge should stay closer to

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<sup>582</sup> Unger, R. M. (2015). The context, the movement and the book. In *The critical legal studies movement: another time, a greater task* (p. 8). New York: Verso. According to the author: "The relative stability of private law worked to strip this discovery of its significance. It perpetuated, in direct contradiction to the thesis of the legal indeterminacy of the market, the idea that certain varieties of private property and contract were the natural and necessary legal basis of a market economy, with limited scope for variation [...] The same way of thinking could then easily be applied to democracy and to civil society as well: they, too, were claimed to have a natural and necessary institutional form".



social reality to fulfil the task of deciding on a conflict. However, legal traditions created in law the illusions of rationality and others: “Suppose, then, that we treat the question ‘How should judges decide cases?’ as a special question, requiring a special solution. Suppose, further, that in offering this special answer we take care to avoid the illusions of rationalizing legal analysis, its illusions about analogy, about arbitrariness, and about reform”. Therefore, it is implicit in the making of a judgment the respect for the practical needs of individuals and the indispensable openness for social reforms: “We should define the method in a way that respects the human reality and the practical needs of the people who come into court without harnessing them to a glittering scheme for the improvement of law. We must be sure that our judicial practice leaves open and available, practically and imaginatively, the space on which the real work of social reform can occur”. The path-dependency created by dogmatic views usually impede practices that can contribute to a different imaginative spirit to reconnect socially our democratic experiences: “We must eschew dogma and accept compromise in our account of the practice as well as in our understanding of the society to which the practice contributes. We should try to remain close to what judicial decisions in contemporary democracies are actually like”.<sup>583</sup> Nevertheless, not only did justices seem to have forgotten the issues about path dependency, but also the economists since most of them tend to ignore the importance of history among many other human sciences. The standard, the logic and the ends are some of the patterns that excessively explained or unraveled with obsessive cohesion may lead our perception to mental traps.<sup>584</sup> Curiously, the minds with such desire for fables or any other simple narratives to explain the reality tend to believe in simplified methods of analysis, judgment and evolution.<sup>585</sup>

2.8. The legislative power played a historical role introducing legal concepts for the usufruct of property. Nevertheless, it is the democratic culture that shows whether the social content is relevant for a legal debate based upon strategic tools to limit the right

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<sup>583</sup> Unger, R. M. (1996). The fourfold root of rationalizing legal analysis: the commanding role of the judge. In *What should legal analysis become?* (p. 113). New York: Verso.

<sup>584</sup> Liebowitz, S. J. & Margolis, S. E. (1990). The fable of the keys. *Journal of Law and Economics*, 33(1), 1-25.

<sup>585</sup> Hathaway, O. A. (2003). Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System. *Yale Law School Legal Scholarship Repository*, 3(1), 101-165.

to property in cases of abuses for non-residential purposes. We defend the usufruct of ownership is a matter of a democratic sovereign state not a contingent topic for parties and government. The intents of public administrations in notifying and penalising speculative or inappropriate usufruct of the dwellings, specially those units which are left empty for a long time, reveal more a resistance of private owners in following the law. As we showed in the IV chapter, it was necessary the presence of other actors than legislators to enforce the law. So, the notion of a political culture, with civil initiatives and the strengthening of the institutions to incentivise urban grassroots movements, devoted to a more democratic property market can provide more the effectiveness of right to housing or other social rights than insisting on the model of formal democracy as a constant making of laws.<sup>586</sup> Brazil and Spain experienced two different dictatorships and they still have similar residual questions involving non-residential property system as part of a non-democratised regime. Progressive taxes, inheritance and mortgage credits are polemic agendas if ownership has to be used to finance social demands.

2.9. As demonstrated at the beginning of our thesis, real estate investments, banks and financial institutions in possession of housing units are the actors who still use an absolute concept of property rights. Based on the theory of supply and demand, they present the arguments of a free global market and the initiative to introduce foreign direct investments in national borders, but it is precisely the foreign capital that brings the seeds of destructive externalities. The first negative effect refers to competition limited by national savings and, inevitably, forms of global oligopolies. We draw attention to the fifty largest funds from real estate firms. The second is the pressure that these investments exert on governments. When investments enter capital-poor countries, there is a demand for the growth of available funds that are intended to support mortgage systems whose clients are individuals and families seeking credit to access a property. So, the rapid change in transforming urban areas attracts property buyers, and prices stop fluctuating due to supply-demand patterns to give rise to highly speculative behavior. In the case of emerging or industrial poor countries in investment and credit, for example, Brazil and Spain, governments are prone to borrowing with exorbitant

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<sup>586</sup> Almond, G. A. & Verba, S. (2014). La cultura política. In *Diez textos básicos de ciencia política* (pp. 171-201). Ariel: Barcelona.

interest rates and marginal returns for international creditors. In the short term, the construction market operates artificially in indebted nations like rich nations, but in the long run individuals and governments have to adjust their life projects by paying more interest. The effect of this cycle is the property at very high costs of over-indebtedness. What initially was a macroeconomic problem and public investment policies in the national market turns into a complex legal battle.

2.10. There is an enormous confusion in the debate of the social function of property as a legal formula to restrict the absolute usufruct of the right to property. Our thesis has suggested along the chapters that non-residential empty housing units, which belong to banks, real estate firms and financial institutions, must be the object of democratic legislative acts and administrative actions in order to guarantee fundamental rights including the social dimension of the right to property. Those places used as a first, second or even third residence are not included in our debate.<sup>587</sup> One of the aspects for a three-dimensional rationality for adequate judgment is a non-exhaustive interpretation of the procedural matters with reference to the responsibility of non-residential owners in keeping their properties occupied. In Catalonia, the 18/2007 Housing Act affirms in its article 3.d) that a unit cannot be left more than two years vacant. On the one hand, some doctrines defend that time starts being counted when the public administration notifies the proprietor about the status of the empty housing unit. So, the owner has to make it available in the market soon after.<sup>588</sup> On the other hand, there is a legal rationale that understands electricity, gas and water bills as enough material evidence to identify whether a place is unoccupied. Using that procedure, the consumerism of basic supplies are easily checked and, in case of an empty dwelling, the public power has the competence to order the immediate occupation of the place. We have pointed out how the judges in Catalonian courts have interpreted the latter version as more appropriate than the former. For them, the law establishes two years for the empty housing condition and the enlargement of time with procedural matters would deviate the

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<sup>587</sup> Read David, N. B. (2009). Efficiency aspects of increasing inheritance taxes while decreasing income taxes. *Journal Applied Economics*, (41) 26, 3359-3366. See Piketty, T. (2014). *Capital in the twenty-first century*. Cambridge: The Belknap Press of Harvard University Press; and

<sup>588</sup> For a critical and recent view on the Spanish debate, see Tomàs, D. S. (2008). La utilización anómala de las viviendas: la desocupación permanente, la sobreocupación y la infravivienda. In Ponce Solé, J. & Sibina Tomàs, D. (Eds.). *El derecho de la vivienda en el siglo XXI: sus relaciones con la ordenación del territorio y el urbanismo* (pp. 463-492). Barcelona: Marcial Pons.

purpose of reducing the number of days for a vacant unit. For this reason, the public administrations have committed themselves to the social function of the property respecting the exact two years. It should be noted that vacant homeowners still insist on using procedural rules to prevent compliance with law and administrative acts. Other aspect that must be mentioned has to do with the fact of unoccupied housing units in dense urban zones, as it says the article 12.6 of the 18/2007 Catalan Housing Act, are also the responsibility of proprietors linked to speculative businesses. The Catalan judges have called the attention of banks, real estate firms and investors to revise their protocols taking into account the urban condition of their properties.

### **3. The international reasons supporting the hypothesis of a three-dimensional rationality for adequate judgments**

3.1. In the chapters IV and V, we made comments related to the conflict between the usufruct of the right to property by non-residential owners and the social demand for places to live. However, the constitutional interpretation of the social function should enlarge a three-dimensional rationality for an adequate judgment with reference to the constant growth of vacant houses in Brazil and Spain. The methodology is one of the cornerstones to elevate the quality of the research, which can represent also the interest of a justice, a politician or an academic, to experiment a radical model of democracy. Narratives, reports, medias etc are some of the material supports to orient, for example, the effectiveness of rights or public policies.<sup>589</sup> We recognise that the Catalan courts have made an enormous progress in that sense and the City of São Paulo advanced with the idea of progressive taxes on non-occupied units in its urban planning. As as we posed before as a third alternative, judges and public administrators should be encouraged to invoke the law to formulate mechanisms that democratically redirect the surplus value of non-residential properties to be occupied with social interest. The role of the courts and public administrations is important to establish a legal stage that reinforces the fulfilment of the social function. Social housing, for example, is one of

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<sup>589</sup> Dias, A. L. F. & Cunha, B. El-Dine B.; Souza, L. G.; Godinho, L. Fernandes; Álvares, L. P.; Carvalho, M. C. A. & Martins, V. B. (2014) O que é seu não lhe pertence: ações de gestão do espaço público em Belo Horizonte envolvendo a população em situação de rua. In Grinover, A. P.; Almeida, G. A.; Gustin, M.; Lima, P. C.; Iennaco, R. (Eds). *Direitos fundamentais das pessoas em situação de rua* (pp. 605-620). Belo Horizonte: D'Plácido.

the parameters for an adequate use of property if it is thought to be an institutional tool for redistributing speculative wealth. The restriction of speculative property, therefore, benefits families and individuals living in the city. It is a relevant and strategic plan for the realization of a municipal sovereignty based on the United Nations Agenda 2030 and the objectives of Habitat III for sustainable development. All these contributions are very close to a three-dimensional rationality for adequate judgments on housing issues.

3.2. The *United Nations Habitat III Programme on Housing and Sustainable Urban Development Conference* is in theory using a three-dimensional rationality for adequate judgments on how cities and property system are produced. The argument of a sustainable development, the social function of the property and the city is excessively concentrated on the task of legislative and public administration's role. The Resolution A/RES/71/256 in its point 13, letter "e", envisages cities and human settlements to: "Fulfil their territorial functions across administrative boundaries and act as hubs and drivers for balanced, sustainable and integrated urban and territorial development at all levels"; or simply it takes for granted in its point 35 governments and public administrations as the main actors to assess and guarantee more responsive solutions: "[...] promoting, at the appropriate level of government, including subnational and local government, increased security of tenure for all, recognizing the plurality of tenure types, and to developing fit-for-purpose and age-, gender- and environment-responsive solutions within the continuum of land and property rights, with particular attention to security of land tenure for women as key to their empowerment, including through effective administrative systems". For an adequate judgment combined with the idea of a third alternative, it is extremely important the inclusion of the United Nation's resolution in the system of justice of Brazil and Spain.

3.3. Another relevant point for a three-dimensional rationality for adequate judgments supporting a third alternative relies on how international organisations or regional agreements may incorporate mechanisms on transparency, citizenship participation and democratic socioeconomic development. The European Union and the MERCOSUR affirm in their constitutive documents the three listed principles as the *Código Iberoamericano de Buen Gobierno*. Nevertheless, these documents repeat the emphasis

on governments' and administrations' tasks forgetting the role of the judiciary power. It seems to be indispensable for a more democratic society the same values extended to courts and tribunals. For the purposes of our thesis, as we showed in the chapter V, the practices of good governance and good administration are intimately connected to economic issues. In the chapter IV, we saw how banks, real estate firms and property agencies started behaving properly after the Catalan administrative courts made a more effective use of the legal figure of the social function of property against non-residential proprietors. In the 1970s, Guido Calabresi, for example, defended that economic costs should be used not only by public administrators and legislatures, but also by judges to the create a broad sense of justice in a society.<sup>590</sup>

3.4. The presence of the *amicus curiae* in property conflicts is another tool for the construction of a three-dimensional rationality for adequate judgments. The case *I.D.G. v. Spain*, which was analysed by the Committee on Economic, Social and Cultural Rights, in the Communication No. 2/2014, had an immense contribution with the help of a third-party submitting substantial information on the legal connections between the speculative property and the decision of evicting a mortgage debtor for default. The support of the International Network for Economic, Social and Cultural Rights (ESCR-Net) presented data on massive foreclosures in Spain and how the right to housing had been violated by the Spanish State. In addition, it was said that: “[...] the legislative measures taken by the State party, such as Royal Decree-Law No. 6/2012 and Act No. 4/2013, are insufficient to resolve the social crisis caused by mortgage foreclosures, since the Spanish legal framework continues to favour financial institutions over the interests of the persons concerned”.<sup>591</sup> As evidence that such insufficiency still persists in a problem that is three-dimensional, the Constitutional Court of Spain suspended Law 4/2016 for the protection of the right to housing for those in situations of socio-economic vulnerability and residential exclusion.

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<sup>590</sup> Calabresi, G. (1970). Two major problems in reducing accident costs. In *The costs of accidents: a legal and economic analysis* (140-141). New Haven: Yale University Press.

<sup>591</sup> Committee on Economic, Social and Cultural Rights (CESCR), Communication No. 2/2014, Views adopted by the Committee at its fifty-fifth session (1-19 June 2015), p. 8.

3.5. The urban grassroots movements we have introduced and denominated the civil actors for a proto-right to the city claim the effectiveness of the right to housing. In the Spanish context, the activism of the *Plataforma de Afectados por la Hipoteca* has defended the notion of an affordable and decent place to live through public policies as a response to the effects of the 2008 economic crisis. The article 47 of the 1978 Constitution of Spain on the right to housing is one of the pillars of the organisation. With the collapse of the mortgage system, families and individuals noticed how much the economic progress made by the Spanish society was artificial once the main engine for the construction sector was in its core a speculative model of foreign direct investments. In Brazil, the *Movimento dos Trabalhadores Sem-Teto* dates back to the end of the 1990s and demands the effectiveness of the constitutional right to housing affirmed in the article 6 of the 1988 Constitution of the Federative Republic of Brazil. However, it is a proto-right once these two civil platforms still struggle to harmonise their demands with an international agenda for more democratic cities. Furthermore, they do not present any strategy through a three-dimensional rationality for adequate judgments using appropriately economic and legal counterarguments as we pointed out before. They promote a sensible rationale to represent their social demands very close to what had been called by Henri Lefebvre the philosophy of right to the city, but they still have to coordinate a criticism on the surplus value. They can systematise, for example, a demand for progressive taxes on non-residential properties and reconnect the wealth generated to municipal services or small private-public enterprises.

3.6. Is the city a common? The answer is ambiguous. On the one hand, it is affirmative if the concept of city is made by individuals that have clear two variables. The first one is that the natural resources are scarce with the inevitable growth of the global population. The second one is the habitat needs an effective contract that guarantees the sustainable access to the commons. However, both conditions were thought theoretically by Garrett Hardin and others as a rational combination in which politics is reduced to a game of calculus of a non-zero-sum. Everyone gains! On the other hand, the city is not a common if it is coopted by socioeconomic ruling classes that violate the sustainability of the city habitat, permitting the growth of the global population in miserable conditions and abusing the forms of private contract. When Hardin wrote *The*

*tragedy of the commons* at the very end of the 1960s, he emphasised the only way to save the planet was the concentration of the commons in few hands through private property. The formation of oligopolies has increased since the 1970s and now in the future we are very far from a possible rational use of the city. Therefore, in that negative part we are in front of a zero-sum game. Most of us have lost since we were born! We defend the right to housing as a possibility to construct that rationality necessary to imagine cities as commons.

3.7. Observing the actual stage of the two urban grassroots movements in Brazil and Spain that we describe as defenders of a “proto-right to the city”, it is plausible the belief they have in the participative decision-making process for citizenship. It is in fact a legitimate and a high-quality tool to share information, promote transparency and construct a democratic concept of the good administration. In that sense, if a radical participation and representativeness are assumed as a binding government for cities, we may reach a more humanised use of the urban space and its construction will reflect the needs of many. In delicate issues, for example, the use of referendums and consultancies are forms of decision-making process elicited by Elinor Ostrom in her Nobel prize from her contributions for collective actions and social norms.

3.8. As a halfway line, the concept of the right to the city of Henri Lefebvre, if used from the right to housing and the social function of property, for instance, may lead urban grassroots movements to a global agenda in which housing is a connector factor for the making of the city. As the French author says, the political city is closer to the mankind origins and refers constantly to the vital elements we need for our survival. Furthermore, although a different concept for the legal realm, the right to the city in legislatures has produced very important documents in international, national and local realities. The *European Charter for the Safeguarding of Human Rights in the City*, the *Brazilian Estatuto da Cidade* and the *Carta de la Ciudad de México por el Derecho a la Ciudad* are examples of efforts made that the *United Nations Habitat III Programme on Housing and Sustainable Urban Development Conference* ratified in 2016.



3.9. The urban grassroots movements are one of the main important links between the State powers and city transformation. It is more and more nevertheless a relation in which vertical structures tend to disappear. The international agreements, charters and meetings promoted by States, governments and civil society are closer to civil society, specially the ones demanding radical democracies, than the game of national politics and its institutionalism of the other powers. So, the demands of the urban grassroots movements are transversal and trespasses the constitutional order. The right to the city is an example of that transversal or three-dimensional rationality.<sup>592</sup>

3.10. The three-dimensional rationality applied to the right to the city, through housing questions, for example, may favour urban grassroots movements with a critical analysis of two different constitutional orders – the effectiveness of the right to housing and the connecting factors that derive from it. When the speculative gains of the same real estate firms appeared in both Brazil and Spain, these movements and platforms from civil society presented immediately a unified agenda even not being necessarily part of the decision-making process. Furthermore, transparency is amplified and the demands in two different geographical points of the planet have the same object, in that case, the battle against the speculative usufruct of the right to property by non-residential owners. More recently, a third actor, the Catalan *Observatori dels Drets Econòmics, Socials i Culturals* has incorporated the transnational cause, or a three-dimensional rationality in our terminology, to defend the right to housing and the right to the city.<sup>593</sup>

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<sup>592</sup> Neves, M. (2013). Da constituição transversal. In *Transconstitucionalismo* (pp. 55-113). São Paulo: Martins Fontes.

<sup>593</sup> *Observatori Drets Econòmics, Socials i Culturals* [on-line]. Dossier-Raportatge “La batalla mundial per l’habitatge [Accessed on 29 May 2017]. Retrieved from <http://observatoridesc.org/presentacio-del-dossier-reportatge-batalla-mundial-lhabitatge-fruit-col-laboracio-entre-lobservatori>



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## Judgments, Appeals & Mandados de Segurança<sup>594</sup>

### *Judgments & Appeals*

Ação Direta de Inconstitucionalidade Nº 1.700-6/DF

Ação Direta de Inconstitucionalidade Nº 2.732-0/DF

Reclamação Nº 3.437-2/PR

Recurso Extraordinário Nº 149.788-2/SP

Recurso Extraordinário Nº 153.771-0/MG

Recurso Extraordinário Nº 167.654-0/MG

Recurso Extraordinário Nº 192.737-2/SP

Recurso Extraordinário Nº 204.666-3/SP

Recurso Extraordinário Nº 230.343-7/SP

Recurso Extraordinário Nº 199.281-1/SP

Recurso Extraordinário Nº 232.063-1/SP

Recurso Extraordinário Nº 229.233-7/SP

Recurso Extraordinário Nº 140.436-1/SP

Recurso Extraordinário Nº 178.836-4/SP

Recurso Extraordinário Nº 248.892-5/RJ

Recurso Extraordinário Nº 225.132-1/RG

Recurso Extraordinário Nº 387.047-5/SC

Recurso Extraordinário Nº 226.942-7/SC

Recurso Extraordinário Nº 399.624-0/RS

Recurso Extraordinário Nº 423.768-0/SP

Recurso Extraordinário Nº 586.693-0/SP

Recurso Extraordinário Nº 422.349-0/RS

Recurso Extraordinário Nº 466.400-0/RS

Agravo Regimental Nº 183.188-0/MS

Agravo Regimental Nº 189.824-8/SP

Agravo Regimental Nº 191.181-3/SP

Agravo Regimental Nº 194.944-7SP

Agravo Regimental Nº 196.337-9/MG

Agravo Regimental Nº 222.172-2/SP

Agravo Regimental Nº 229.164-5/MG

Agravo Regimental Nº 423.678-7/MG

Agravo Regimental Nº 456.513-1/SP

Agravo Regimental Nº 481.031-1/RJ

Agravo Regimental Nº 463.679-9/SP

Agravo Regimental Nº 468.801-0/SP

Agravo Regimental Nº 394.010-4/RS

Agravo Regimental Nº 470.599-6/RJ

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<sup>594</sup> Use the link to search complete judgments, court orders and *mandados de segurança*. Fill in the gap “Número” on the following link. Type just numbers without “Nº”, dots, dashes, slash nor the last number in the indicated field. Retrieved from <http://www.stf.jus.br/portal/jurisprudencia/pesquisarJurisprudencia.asp>. E.g.: 1700, 2732, 3437, 149788, 183188 etc. Be attentive to the abbreviations. ADI for Ação Direta de Inconstitucionalidade; Rcl for Reclamação; RE for Recurso Extraordinário; AgR for Agravo Regimental; MS for Mandado de Segurança.

Agravo Regimental Nº 345.416-1/RJ  
Agravo Regimental Nº 430.421-0/RJ  
Agravo Regimental Nº 390.688-2/RJ  
Agravo Regimental Nº 482.017-6/RJ  
Agravo Regimental Nº 841.221-3/RJ  
Agravo Regimental Nº 403.613-4/RJ  
Agravo Regimental Nº 428.675-1/PR  
Agravo Regimental Nº 417.958-5/RJ  
Agravo Regimental Nº 458.404-2/RJ  
Agravo Regimental Nº 516.410-2/RJ  
Agravo Regimental Nº 408.062-0/SP  
Agravo Regimental Nº 362.670-5/RJ  
Agravo Regimental Nº 338.859-2/RJ  
Agravo Regimental Nº 486.301-1/MG  
Agravo Regimental Nº 392.144-4/RJ  
Agravo Regimental Nº 511.572-1/RJ  
Agravo Regimental Nº 478.327-2/RJ  
Agravo Regimental Nº 380.427-8/RJ  
Agravo Regimental Nº 646.582-1/RJ  
Agravo Regimental Nº 659.918-9/RJ  
Agravo Regimental Nº 362.578-1/RJ  
Agravo Regimental Nº 478.903-3/RJ  
Agravo Regimental Nº 550.848-9/RJ  
Agravo Regimental Nº 518.648-2/PR  
Agravo Regimental Nº 226.942-7/SC  
Agravo Regimental Nº 636.315-3/PR  
Agravo Regimental Nº 727.315-7/MG  
Agravo Regimental Nº 583.636-0/MS  
Agravo Regimental Nº 437.107-0/PR  
Agravo Regimental Nº 607.616-0/RJ  
Agravo Regimental Nº 595.080-0/PR  
Agravo Regimental Nº 652.935-0/RS  
Agravo Regimental Nº 466.312-0/RJ  
Agravo Regimental Nº 598.218-0/RJ  
Agravo Regimental Nº 590.360-0/ES  
Agravo Regimental Nº 752.743-0/MG  
Agravo Regimental Nº 568.947-0/SC  
Agravo Regimental Nº 466.400-0/RS  
Agravo Regimental Nº 742.328-0/MG  
Agravo Regimental Nº 394.011-0/RS  
Agravo Regimental Nº 704.846-0/PR  
Agravo Regimental Nº 752.117-0/MG  
Agravo Regimental Nº 639.632-0/MS  
Agravo Regimental Nº 822.429-0/SC  
Agravo Regimental Nº 32.752-0/DF

*Mandado de Segurança*

Mandado de Segurança Nº 21.348-5/MS  
Mandado de Segurança Nº 22.164-0/SP  
Mandado de Segurança Nº 22.285-9/SP  
Mandado de Segurança Nº 22.302-2/PR  
Mandado de Segurança Nº 22.802-4/PB  
Mandado de Segurança Nº 23.312-9/PR  
Mandado de Segurança Nº 23.032-6/AL  
Mandado de Segurança Nº 23.949-2/DF  
Mandado de Segurança Nº 2.213-0/DF  
Mandado de Segurança Nº 23.759-7/GO  
Mandado de Segurança Nº 23.148-4/GO  
Mandado de Segurança Nº 24.307-4/DF  
Mandado de Segurança Nº 23.006-6/PB  
Mandado de Segurança Nº 24.503-4/DF  
Mandado de Segurança Nº 24.547-6/DF  
Mandado de Segurança Nº 24.494-1/DF  
Mandado de Segurança Nº 24.488-7/DF  
Mandado de Segurança Nº 24.764-9/DF  
Mandado de Segurança Nº 24.573-5/DF  
Mandado de Segurança Nº 25.299-5/DF  
Mandado de Segurança Nº 26.129-3/DF  
Mandado de Segurança Nº 26.192-0 /PB  
Mandado de Segurança Nº 26.336-0/DF  
Mandado de Segurança Nº 25.344-0/DF

### **Judgments, Court Orders & *Recursos de Amparo***<sup>595</sup>

#### *Judgments*

STC 41/1981  
STC 32/1982  
STC 26/1983  
STC 77/1983  
STC 111/1983  
STC 62/1984  
STC 158/1985  
STC 203/1985  
STC 33/1986  
STC 40/1986  
STC 89/1986  
STC 135/1986  
STC 37/1987  
STC 152/1988  
STC 70/1989  
STC 207/1989

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<sup>595</sup> Use the link to search complete judgments, court orders and *recursos de amparo*. Fill in the gaps with number and year in the respective blanks. Retrieved from <http://hj.tribunalconstitucional.es/en>

STC 149/1990  
STC 212/1990  
STC 6/1992  
STC 85/1992  
STC 87/1992  
STC 222/1992  
STC 233/1992  
STC 34/1993  
STC 198/1993  
STC 199/1993  
STC 340/1993  
STC 89/1994  
STC 249/1994  
STC 131/1995  
STC 1/1996  
STC 92/1996  
STC 225/1996  
STC 156/1997  
STC 158/1997  
STC 149/1998  
STC 170/1998  
STC 199/1998  
STC 219/1999  
STC 51/2004  
STC 193/2005  
STC 197/2005  
STC 155/2009  
STC 58/2010  
STC 61/2010  
STC 137/2011  
STC 137/2012  
STC 122/2013  
STC 197/2013  
STC 30/2014  
STC 69/2014  
STC 141/2014  
STC 169/2014  
STC 05/2015  
STC 32/2015  
STC 57/2015  
STC 93/2015  
STC 135/2015  
STC 154/2015  
STC 181/2015  
STC 259/2015

*Court Orders*

Auto 203/1985  
Auto 314/1994  
Auto 171/1995  
Auto 213/1995  
Auto 156/1997  
Auto 137/1998  
Auto 233/1998  
Auto 179/2002  
Auto 111/2003  
Auto 435/2006  
Auto 9/2007  
Auto 37/2014  
Auto 135/2015

*Recurso de amparo*

Rec. Amp. 461/1984  
Rec. Amp. 479/1984  
Rec. Amp. 538/1984  
Rec. Amp. 16/1985  
Rec. Amp. 468/1985  
Rec. Amp. 328/19

**International Judgments**

C-43/75, Court of Justice of the European Union, *Defrenne v. Sabena*

C-347/03, Court of Justice of the European Union, *Regione Autonoma Friuli-Venezia Giulia and Agenzia regionale per lo sviluppo rurale (ERSA) v. Ministero delle Politiche Agricole e Forestali*

C-306/93, Court of Justice of the European Union, *SMW Winzersekt GmbH ('Winzersekt') v. the Land Rheinland-Pfalz*

C-203/11, Court of Justice of the European Union, *Olivier de Clippele v. Gouvernement Flamand*

C-415/11, Court of Justice of the European Union, First Chamber, *Mohamed Aziz v. CatalunyaCaixa*.

F-135/14, Court of Justice of the European Union, *DE v. European Medicines Agency (EMA)*

T-486/11, Court of Justice of the European Union, *Orange Polska S.A. v European Commission*

## Catalan Judgments by ordinary courts & administrative actions

*Abanca Corporación, División Inmobiliaria SL & NCG División Grupo Inmobiliario SL v. Ajuntament de Terrassa*, Procedimiento Ordinario N. 427/2014-4, Sentencia 18/2016, 1<sup>st</sup> Administrative Court of Barcelona, January 2016.

*Banco Popular Español S.A. v. Ajuntament de Terrassa*, Procedimiento Ordinario 245/2014 – BY, Sentencia 193/2016, 14<sup>th</sup> Administrative Court of Barcelona, July 2016.

*Banco Popular Español S.A. v. Ajuntament de Terrassa*, Procedimiento Ordinario 153/2015 – BR, Sentencia 206/2016, 14<sup>th</sup> Administrative Court of Barcelona, September 2016.

*Banco Popular Español S.A. v. Ajuntament de Terrassa*, Procediment Ordinari 155/2015-B, Sentència N. 255/2016, 5<sup>th</sup> Administrative Court of Barcelona, October 2016.

*Banco Popular Español S.A. v. Ajuntament de Terrassa*, Procedimiento Ordinario N. 148/2015-C, Sentencia 196/2016, 11<sup>th</sup> Administrative Court of Barcelona, June 2016.

*Banco Popular Español S.A. v. Ajuntament de Terrassa*, Recurso Contencioso-Administrativo Ordinario N. 155/2015-A, Sentencia 59/2016, 15<sup>th</sup> Administrative Court of Barcelona, March 2016.

*Banco Popular Español S.A. v. Ajuntament de Terrassa*, Recurso ordinario 178/2015 – V, Sentencia 10/2016, 3<sup>th</sup> Administrative Court of Barcelona, January 2016.

*Banco Popular Español S.A. v. Ajuntament de Terrassa*, Recursos Contencioso-Administrativo Ordinarios N. 156/2015-B and 176/2015-F, Sentencias 401/2015 and 402/2015, 7<sup>th</sup> Administrative Court of Barcelona, December 2015.

*Banco Santander S.A. v. Ajuntament de Terrassa*, Rollo de Apelación Auto N. 237/2015, Sentencia N. 115/2006, Tribunal Superior de Justicia de Cataluña, Sección Tercera, February 2016. Recurso Contencioso-Administrativo N. 566/2014, 8<sup>th</sup> Administrative Court of Barcelona, February 2015.

*Banco Santander v. Ajuntament de Terrassa*. The content of the decision can be consulted in the Procedimiento Ordinario N. 568/2014, Sentencia 10/2016, 9<sup>th</sup> Administrative Court of Barcelona, January 2016.

*Bankia S.A. v. Ajuntament de Terrassa*, Recurso Contencioso-Administrativo N. 470/2014, Sentencia 932/2015, Tribunal Superior de Justicia de Cataluña, March 2015.

*Bankia S.A. v. Ajuntament de Terrassa*, Recurso Contencioso-Administrativo N.



- 473/2014, 14<sup>th</sup> Administrative Court of Barcelona, January 2015.
- Bankia S.A. v. Ajuntament de Terrassa*, Procedimiento Ordinario N. 468/2014-4, Sentencia 189/2015, 1<sup>st</sup> Administrative Court of Catalonia, October 2015.
- Bankia S.A. v. Ajuntament de Terrassa*, Procedimiento de Ordinario N. 469/2014-A, Sentencia 372/2015, 8<sup>th</sup> Administrative Court of Barcelona, December 2015.
- Bankia S.A. v. Ajuntament de Terrassa*, Procedimiento Ordinario 475/14-2A, Sentencia Núm. 179/2015, 12<sup>th</sup> Administrative Court of Barcelona, July 2015; Recurso Ordinario 467/2014 F-1, Sentencia 315/15, October 2015.
- Bankia S.A. v. Ajuntament de Terrassa*, Procedimiento Ordinario N. 471/2014, Sentencia 4/2016, 9<sup>th</sup> Administrative Court of Barcelona, January 2016.
- Bankia S.A. v. Ajuntament de Terrassa*, Recurso 472/2014-J Recurso ordinario, NIG: 08019 - 45 - 3 - 2014 – 8009897, Sentencia Núm. 192/2015, 10<sup>th</sup> Administrative Court of Barcelona, July 2015.
- Bankia S.A. v. Ajuntament de Terrassa*, Recurso Administrativo-Contencioso Ordinario N. 472/2014-F, Sentencia 343/2015, 7<sup>th</sup> Administrative Court of Barcelona, September 2015.
- Bankia S.A. v. Ajuntament de Terrassa*, Rollo de Apelación Auto N. 258/2015, Sentencia N. 932/2015, Tribunal Superior de Justicia de Cataluña, Sección Tercera, December 2015.
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- Building Center S.A.U. v. Ajuntament de Terrassa*, Procedimiento Abreviado N. 147/2015-B, Sentencia 267/2015, 13<sup>th</sup> Administrative Court of Barcelona, October 2015.
- Building Center S.A.U. v. Ajuntament de Terrassa*, Procedimiento Ordinario 146/2015 – AA, Sentencia N. 267/2016, 14<sup>th</sup> Administrative Court of Barcelona, November 2016.
- Caixa d'Estalvis de Catalunya v. SJM B 21/2013*, Recurso N. 13/2011, Sentencia, 6<sup>th</sup> Administrative Court of Barcelona 2013.
- Criteria Caixaholding S.A. v. Ajuntament de Terrassa*, Procedimiento Ordinario N. 137/2015-E, Sentencia 317/2016, 8<sup>th</sup> Administrative Court of Barcelona, December 2016.

*Criteria Caixaholding S.A. v. Ajuntament de Terrassa*, Recurso Contencioso-Administrativo Abreviado N. 132/2015-A, Sentencia 282/2015, November 2015, 15<sup>th</sup> Administrative Court of Barcelona.

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