ISSN: 1984-8781 - Anais XVIII ENANPUR 2019. Código verificador: **IRCyKOpUMi5Z** verificar autenticidade em: http://anpur.org.br/xviiienanpur/anais

Remoções legalizadas e o Judiciário: o caso das ocupações em Porto Alegre

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Resumo:

Como o Brasil, país com uma das políticas fundiárias mais progressista do mundo, está sendo acusado de violar o direito à moradia de seus cidadãos? Como o Judiciário Brasileiro, apesar dos mecanismos legais inclusivos criados ultimamente, ordena a remoção forçada de milhares de famílias? Essas violações e remoções devem ser entendidas como “despejos legalizados,” práticas de expropriação que não são só um resultado da especulação imobiliária, mas de um processo discriminatório mais amplo em que o Judiciário desempenha papel fundamental. Além de estudar a lógica por trás da expropriação judicial, esse artigo também investiga como elas são validadas, ao analisar o discurso de desembargadores ao julgar processos de segunda instância envolvendo movimentos pela moradia que ocupam áreas centrais em Porto Alegre. Conclui-se que juízes, ao desafiar legislações recentes em suas decisões, mobilizam ideologias políticas que condenam regimes alternativos em favor de certos modelos de propriedade.

REMOÇÕES LEGALIZADAS E O JUDICIÁRIO

O Caso das Ocupações em Porto Alegre

Why is Brazil, a country with one of the most inclusive land policies in the world, being accused of violating its citizens' constitutional right to housing? Why is the Brazilian Judiciary, despite all the legal mechanisms created by recent legislation to reverse exclusionary patters of land use, ordering and executing forced evictions of thousands of marginalized families? I argue that these violations and removals must be understood as part of what I call legalized displacement. Namely, land dispossession practices that are not only a direct result of the financialization of the housing sector, but of a much broader discriminating process, in which the courts are playing a major role. In addition to studying the logics behind judicial displacement, I am also interested in investigating how these practices are being validated (especially through urban-legal paradigms). My main goal in this article is to analyze the apparent gap between the legal framework on land use and judicial adjudication in Brazil. In other words, my aim is to understand, as Gherner (2011, p. 131) puts, how eviction can be perceived as an "act of governance rather than violation". At stake, is not only how public actors denied the right to housing to the urban poor, but more importantly how a legal rhetoric on land and apparatus of property put at risk equitable and democratic urban regimes.

INTRODUCTION

Despite having one of the most progressive land regulations in the world, approximately six million households do not have access to adequate housing in Brazil (FUNDAÇÃO JOÃO PINHEIRO, 2017). The 1988 Federal Constitution declared housing an institutional right. The City Statute, promulgated in 2001, reinforced that property rights should be subject to the "social function" of urban land by creating mechanisms to prevent its underutilization through mechanisms like progressive estate taxation and adverse possession law. Officially, these new legislations enabled municipalities to demand owners of vacant urban parcels to promote their immediate use. These Decrees also produced the legal framework to ensure the right of individual and collective actors to claim formal tenure of urban parcels that have been occupied by them for over five consecutive years. In practice, however, despite these legal apparatuses, judges are determining the evictions of thousands of families from abandoned private and public-owned buildings located in central areas of Brazilian cities.

There is a growing body of literature that argues that the banishment of the poor from the city is more than a simple outcome of housing commodification or a direct consequence of urban development projects led by the State (CALDEIRA, 2000; ROY, 2017). Some authors suggest that displacement is increasingly being endorsed and carried out by judiciary systems on behalf of aesthetics norms or "public interest" and at the expense of the criminalization of the poor (GHERNER, 2011; BHAN, 2016). According to James Holston, the judicial process in

Brazil has been "a means of manipulation, complication, stratagem, and violence by which all parties – public and private, dominant and dominated – further their interests" (2008, p. 203).

With my work, I wish to answer the question: "How are legal frameworks on land use and property rights used to justify displacement?". I hypothesize that, although tenant security is also threatened by real estate speculation and other financial maneuvers, the State, particularly the Judiciary, plays a major role in practices of dispossession. I claim that some legal instruments created by recent legislation have provided the courts with "legitimate" excuses to issue eviction notices. Lastly, I argue that judges are mobilizing political ideologies that condemn certain property regimes in favor of other property models, defying land use legislation in their rulings.

To reflect upon the legal discourse that it is being used to support displacement in Brazil, I grounded my analysis in the case of Porto Alegre, one of the largest cities in the country. To answer the question, I conducted discourse analysis of court records involving judicial disputes of what the Brazilian Judiciary calls the "invasion" of private and State-own buildings. I also interviewed important actors involved in these processes, such as judges, to understand how they are perceiving and applying land law in the country. I have chosen Porto Alegre because of its participatory planning tradition. The city has a past of progressive housing policies, community participation programs, and social justice movements that overlapped with the tenure (for over a decade) of the *Partido dos Trabalhadores* (Workers Party) (PT) in its municipal government. As discussed in the next section of this text, the socialist administration helped to establish several housing movements in the city.

Studying these processes matters because evictions are not only a form of impoverishment, but they are its very source. However, what is at stake here is not just the reproduction of urban poverty itself. There is also the fact that these removals are serving as a political instrument to expel the disfranchised from the city. But worse than leading to social losses like exclusion, inadequate housing, poverty, and homelessness can actually cause civil deaths. Finally, at stake specifically in the case of Brazil, is the violation of the constitutional right to housing and, as a result, the full enactment of citizenship itself, as those who have no access to housing are not entitled to other civil rights. As I will discuss in the next section of this article, Brazil has one of the most advanced legal and policy frameworks on land use and it is impossible to think about housing and property rights without looking at Brazil. Not only several scholars around the globe pay close attention to the intellectual debates on urban reform happening in the country, but many foreign governments also incorporate urban planning mechanisms developed by Brazilian policy makers. Porto Alegre's participatory budgeting experience is an example of that. Municipalities in North America, Europe, Asia, and Africa implemented the city's model of community participation. Yet, local authorities in Porto Alegre seem to be currently coopting housing movements. Yet, judicial systems and municipal power in Porto Alegre, similar to the federal and state governments in Brazil as a whole, are apparently ignoring the lessons of social justice and democracy that they themselves have shared with the rest of the world not so long ago.

HISTORICAL BACKGROUND: LAND RIGHTS IN BRAZIL

An assessment of Brazil's trajectories of land legislation and housing policies reveals that the State always had a fundamental part in both protecting and impairing the access to

shelter of the urban poor. Like in all Latin American countries, government in Brazil has had a central role in the housing sector. In this sense, the 1988 Federal Constitution and the 2001 City Statute were paradigmatic. These laws opened a new chapter in Brazilian history of property rights, creating an innovative urban-legal framework to democratize the access to adequate housing in the country and correct centuries of non-egalitarian and discriminatory land practices.

Nonetheless, these recent legislations might also have had perverse consequences. Initiatives targeting land regulation, associated with social housing programs, might have increased social-spatial segregation and the risk of legalized displacement. One on hand, these instruments gave more power to local authorities, including the Judiciary, to displace and relocate people based on their settlement conditions. On the other hand, these laws, by enforcing the right to urban property, making more people eligible to land titles, also inflated the urban land market in Brazil and made millions more vulnerable to financial manipulations within the formal housing market.

Still in the colonial period, the 1850 Land Law shifted completely the ways in which land was obtained and regulated in Brazil. According to Rolnik (1997), this decree represents the basis of land struggles in the country, separating the right to access land from its effective use and occupation. Since 1850 until recently, the only way parcels could be acquired in the country was through purchase. This action made "illegal occupation" the single option available for the poor families to inhabit the territory and criminalized their only form to access shelter (STÉDILE & LOCONTE, 1997). In fact, many contemporary informal settlements are located in *terras devolutas* – namely the uncultivated land that, due to its lack of market value, was transferred back to the State during the shift from Empire to Republic in 1889. In the early twentieth century, almost 80% of the national territory was covered with *terras devolutas* (HOLSTON, 2008).

In terms of housing policies, prior to 1930, the housing stock in Brazil was only supplied by the private market (AZEVEDO & ANDRADE, 1982). In 1946 the State established the first federal institution focused on affordable housing provision, the *Fundação da Casa Popular* (FCP). Despite FCP's low performance, the institution helped to disseminate the idealization of homeownership ("*sonho da casa própria*"), initiated with President Varga's (1930 – 1945) national development project. Bonduki (1998) claims that with Vargas housing would start to represent both a fundamental condition for the reproduction of the labor force and an element to shape workers' ideological, political, and moral behavior. In the following decades, from 1964 to early 1980s, the military dictatorship, through the National Housing Bank (BNH), financed approximately 2.4 million new dwelling units, but over two thirds of them targeted the middle-class market (MARICATO, 2000). The remaining units were directed towards poor families and fitted the regime's project of slum clearance, as favelas' residents could be relocated to the newly built social housing complexes and the informal settlements, considered a political embarrassment, were rapidly demolished (WAKELY, 2016).

In 1988, the Brazilian Legislative passed the new Federal Constitution, giving municipalities more power on urban land management and regulation, similarly to what was occurring in other Latin American countries. The document also reaffirmed the social function of landed property, "along with the recognition and integration of informal settlements into the city, and the democratization of urban governance" (ROLNIK, 2011, p. 242). Although

there was not a comprehensive national housing policy since the extinction of BNH, in 1986, programs with a local scope were created. This was the case of *Pró-Moradia* that financed dwelling units for low-income families (including the purchase of construction materials, upgrading of infra-structure, and legalization of land) and represented a new hope for the urban poor, especially for those occupying informal settlements. Nonetheless, this optimism did not last long since, in the following years, the few and disarticulated housing projects implemented by the federal government "tended to emphasize finance-based solutions rather than solutions that were specifically targeted at the very poor" (VALENÇA & BONATES, 2010, p. 168).

In the early 2000s, the federal government passed important legislation focusing on land and property rights. The most paradigmatic example is the City Statute, created in 2001, making housing a constitutional right and subjecting property rights to the social function of landed property (MARICATO, 2006). Macedo contends that for private lands the new law "innovates by establishing preemption rights for local governments, whereby areas of interest can be demarcated in local Master Plans and potentially acquired by local governments for projects of social interest, such as low-income housing" (2008, p. 262). According to Fernandes, with the City Statute "municipalities were given more powers to interfere with, and possibly reverse to some extent, the pattern and dynamics of formal and informal urban land markets, especially those of a speculative nature" (2007, p. 213). The legislation institutionalized, for example, the *usucapião coletivo* (adverse possession) law, allowing not only single actors, but also groups living in vacant private property uncontestably and continuously for at least five years to collectively claim its ownership. Moreover, the Statute created "grants for special use", a mechanism similar to *usucapião*, but applied to public land. Though this instrument, people became eligible to claim *Direito de Uso* (right to use) of vacant public property.

Fernandes argues that these and other tools (e.g. extra-fiscal use of local property tax progressively over time, expropriation sanction with payment in titles of public debt, surface rights, preference rights for the municipality, and onerous transfer of building rights) have opened "a new range of possibilities for the construction and financing of a new urban order which is, at once, economically more efficient, politically fairer, and more sensitive to social and environmental questions" (Idem, p. 213). Nevertheless, these instruments might also have had the opposite effect, actually boosting spatial-segregation in Brazil. The City Statue's emphasis on property rights and land regularization might have made it more difficult for the urban poor to resist displacement. Land titling programs, for example, have incited the interest of major construction firms and investors on informal settlements, creating a bigger land market in Brazil. Furthermore, although State-sponsored relocations of people from "unsuitable" areas always have happened in the country, it was expected that the promulgation of the 2001 Legislation would minimize these removals, what ended up not actually occurring. The new law, in fact, granted judges with more legal excuses to order and execute forced evictions.

Finally, other major changes concerning housing plans also came at the turn of the 20th century. When president Lula assumed the presidency in 2003, due to his past as a former union leader and the fact that he was representing PT, much was speculated in terms of his position about the market. Nevertheless, as Valença and Bonates (2010, p. 170) argue, he

followed “a more cautious path, introducing changes piecemeal”. The new president made substantial investments in the housing sector, but, similarly to his predecessors, Lula understood that “the system of social housing provision had to follow an entrepreneurial format” (Idem, p. 171). Most of these resources were concentrated on projects developed by the Ministry of the Cities, institutionalized in 2003 – responsible for urban policies, including land regularization, housing, and transportation projects – and the *Sistema Nacional de Habitação de Interesse Social Social* (SNHIS), the National Social Housing System, established in 2005. With the objective of providing dwelling units for the poor, the government created in 2009 the well-known program *Minha Casa Minha Vida* (MCMV). Through this initiative, the State started to subsidize the acquisition, by low-income households earning up to ten times the minimum wage, of dwelling units mostly built by the private sector. The program boosted the access to housing in the country, however it also promoted the economic growth of the construction industry and significantly expanded the real estate market in Brazil.

THE CASE OF PORTO ALEGRE

Porto Alegre, the capital of Rio Grande do Sul state, has a history of progressive housing policies and participatory planning programs. The city was the first capital in the world to apply the Participatory Budgeting (OP), implemented by PT in its first year of office in 1989. Through this program, citizens could participate in the decision-making process regarding the allocation of municipal resources and investments. The OP also boosted popular articulation among the urban poor around themes like urban infrastructure, housing, and illegal tenancy. Porto Alegre was also one of the first cities in Brazil to execute the *Direito de Uso* (right to use) with the promulgation of the *Lei Orgânica Municipal* (Municipal Organic Law) in 1990, allowing people to claim the right to stay put in public land “invaded” in or prior to 1989. As shown in the previous paragraphs, this right would only be established at a national level eleven years later with the creation of the 2001 City Statute. Like other cities in Brazil, in Porto Alegre the access to land and housing were always one of the main concerns of residents. At the OP assemblies, for example, housing was claimed by the population as the number one priority five years consecutively, between 2000 and 2005 (BAIERLE, 2007). Although housing rights movements emerged in the city prior to the military dictatorship (1964 – 1985), especially through associations like *Federação Riograndense das Associações Comunitárias e de Amigos de Bairro* (FRACAB) (Local Federation of Community Associations and Neighborhood Friends) and *Associação de Moradores* (AMs) (Residents’ Associations), their political consolidation occurred, in fact, in the 1980s, when the military regime was already weakened.

The FRACAB depended on government resources and, thus, when the militaries took power, the institution adopted a compliance strategy. According to Baierle, as soon as the first housing movements emerged in Porto Alegre, there was already an executive and bureaucratic structure prepared to govern them. In other words, during the military regime, these entities had not a demanding character, but an associative and recreational one. Although the *Direito de Uso* (right to use) of public lands was not officially established by then, the author claims that since most of the irregular settlements in Porto Alegre were located in “unsuitable” areas (i.e. riverside, hill slopes, environmental preservation), the municipal authorities’ approach to these settlements was to buy and proclaim them as areas of “public interest”, allowing illegal tenants to stay or ordering their removal, depending on people’s “political behavior”. This situation would change in the last years of the military dictatorship,

when community entities begun to question the authoritarian nature of the relationship between the associations and the regime. As a result, the early 1980s was a period in which workers and residents' organizations would start to mobilize, culminating in the creation, in 1983 and 1987 respectively, of the *União das Associações de Moradores de Porto Alegre* (UAMPA) (Porto Alegre Unions of Residents' Associations) and the non-profit organization CIDADE (CITY) connected to the Architects' Union.

When PT assumed Porto Alegre's municipality, in the late 1980s, the party assisted housing rights movements in the city in their articulations. The consolidation of the OP also helped the movements to consolidate their claims around issues such as the occupation of public and private land and the access to urban infrastructure and basic services. Nonetheless, the promulgation of the already referred 1990 Law, instituting the *Direito de Uso* (CDU) for public land, did not resulted from a political consensus, but from the pressure of organizations like UAMPA, CIDADE, and the *Serviço de Assessoria Jurídica Gratuita* (SAJU), a Free Legal Assistance Service linked to the Federal University of Rio Grande do Sul (UFRGS). The 1990 Legislation was created around two main ideas: to incorporate community participation in the planning and management of Porto Alegre and the adoption of legal instruments associated to the social function of property.

In 1993, the socialist government created the *Programa de Cooperativas de Auto-Gestão* (Self-Management Housing Cooperatives Program), under the Municipal Housing Department (DEHMAB) supervision, encouraging the formation of self-management housing cooperatives. The program gave not only technical support, but legal assistance to these housing groups, helping them in all phases of housing production, including land acquisition. Fruet (2005) argues that since their formation, housing cooperatives in Porto Alegre had three different origins. They were either based on labor unions, residents' associations, or "land invasion" (*ocupações*). Different from labor union and community-based cooperatives, the author highlights that what brings people from cooperatives born out of irregular land occupation together is usually their spatial distribution; as illegal tenants living next to each other often join forces to regularize their situation in the areas they are occupying. As a result, the main – if not the only – reason that motivates the formation of these land invasion-based cooperatives, mostly formed by very poor and informal workers, is to obtain legal property titles. Fruet also claims that these land invasion-based cooperatives are not as articulated and organized as the other two types of housing cooperatives and, thus, have more difficulties in enduring. That is why their partnership with the municipality in the 1990s and early 2000s was fundamental for these housing groups to succeed. Especially in regard to land acquisition, the alliance with DEHMAB was crucial for the cooperatives, in the sense that it provided more credibility for the housing movements while they were dealing with landowners. [1]

While in the municipal government, PT's strategy regarding land disputes in Porto Alegre was very clear: not expropriate, but mediate negotiation between squatters and landowners. This decision was based on the fact that the amount paid as reimbursement to landowners in expropriation processes historically has had catastrophic impacts on municipal budget. Therefore, DEMHAB incorporated a "facilitator" role, serving as a mediator, helping movements to bargain land prices, and guaranteeing a smooth transaction between

[1] Baierle (2007, p. 53) shows that in 1985, fifteen landowners owned approximately 21% of Porto Alegre's vacant urban parcels, which in turn accounted for more than half of the plots in the city.

cooperatives and landowners (PESTANA, 2000 *apud* FRUET, 2005). Nevertheless, Fruet also recognizes that the partnership between housing cooperatives and the municipality was more successful in terms of obtaining the legal property titles than raising the resources to build housing itself, especially due the municipality's financial constraints.

Besides working with the housing cooperatives in acquiring property titles, the socialist government also executed an ambitious land regularization policy in Porto Alegre's central areas, called the *Programa de Regularização Fundiária* (PRF) (OSÓRIO, 1998). Baierle (2007) argues that slum upgrading and land regularization policies led by PT's municipal administration resulted in a gradual decline of housing informality. According to him, in 1988 people living in informal settlements corresponded to 25% of Porto Alegre's population. Ten years later, this rate declined to less than 20% and approximately half of these tenants were already enrolled in the PRF. Although PRF registration did not ensured that the families would have access to formal land titles, it meant that the right to stay put and access to basic services were guaranteed.

In 2000, the *Direito de Uso* (CDU) Law was altered, allowing, under certain conditions, holders of this right to sell their property, via DEMHAB, to buyers in similar (precarious) situation. Since almost 90% of the informal settlements in Porto Alegre in 2004 were located in public areas (BAIERLE, 2007), the application of CDU could potentially benefit many tenants living in informality in Porto Alegre. According to Baierle, from 1995 to 2004, the municipality issued 4.231 CDUs. When PT stepped out of office, the next government, led by the mayor José Fogaça, representing a Central-Left Party, converted CDUs into a housing financing program, creating also a legal framework to support these actions. This meant that if before families would have to pay a symbolic monthly "rent" of 8.00 BRL (approximately 2.00 USD), under the 24-Year new mortgage program, (even with local subsides) now the families would have to disburse monthly up to 150.00 BRL to the banks. In addition, it was also reported in the courts records I analyzed that in 2003 the municipal approach towards occupations has changed, in the sense that the government in Porto Alegre would no longer to expropriate invaded areas, especially to "avoid illegitimate land appropriations" (TJ-RS LAWSUIT N. 70073691867, 2017, p. 43). The new government's zero-tolerance position against squatters can be also illustrated by some programs implemented to encourage illegal tenants to regularize their situation and threating the ones that did not apply for housing subsided mortgages with eviction.

If at the municipal level, the new government was not willing to negotiate with housing movements anymore, at the federal level the scenario was different. President Lula, representing PT, assumed the presidency in 2003 and invited housing movements leaderships to advise him and created programs like and *Crédito Solidário* (2004) and *MCMV Entidades* (2009) to finance the construction of housing units by housing cooperatives. However, differently from what occurred with the DEHMAB's Housing Cooperatives Program, now public subsides tended to be used to build the dwelling units instead of being invested to purchase the land. Due to the lack of funds to cover both phases of housing production, the cooperatives usually had no other choice but to build their dwelling units in "invaded" land (and later) negotiated with the State (WARTCHOW, 2012).

Finally, PT's municipal support of the local cooperatives and other programs targeting informal settlements in the city were crucial for guaranteeing the access to adequate housing

for the urban poor in Porto Alegre. Especially given the fact that during most part of PT's municipal mandate, the federal government did not advance much in terms of housing programs. The majority of housing policies developed nationally in the 1990s and early 2000s, as referred earlier, focused on market initiatives and did not efficiently target low-income families, since many of them were not even eligible for bank loans. At the same time, though, PT's assistance towards housing movements, particularly to land invasion-based cooperatives, may have demobilized these movements. Drago (2011), for instance, argues that in the case of housing cooperatives subsided by *Crédito Solidário*, years later, the housing groups that worked with the government for assistance, assumed bureaucratic roles, ultimately engaging less in political confrontation.

Today, at the same time that approximately 75,000 families have no access to adequate housing in Porto Alegre, the Brazilian Institute of Geography and Statistics estimates the existence of 40,000 vacant or abandoned dwelling units in the city (IBGE, 2016). Some of these units have been occupied by the poor with no other alternative left. However, more than a simple practice enacted to overcome housing deficit in Brazilian cities, housing rights movements adopt the squatting of empty public and private constructions as a strategy of resistance. As a result of decades of lack of substantial investments in affordable housing at a federal level, squatting has historically become the "housing policy" in Brazil (SOARES & SANCHES, 2018). Nonetheless, the articulation of these groups became much more limited in Porto Alegre compared to cities like São Paulo. While local authorities in Porto Alegre estimate that eight buildings in the city's central area are currently being claimed by housing movements,[2] São Paulo's Municipal Secretary of Urbanism and Licensing calculates that there are approximately seventy edifices occupied by housing groups in downtown.[3] Evidently, we must take into account that São Paulo is a much bigger city than Porto Alegre. However, the former has only six times Porto Alegre's informal population – that is, people living in informal settlements and land "invasions" (IBGE, 2010).

Finally, Lago (2011) also highlights that, in contrast to movements in São Paulo, that are advised by organized technical teams of architects, lawyers, and engineers, housing groups in Porto Alegre lack a systematic and coordinated network of support. These numbers might suggest that the attitude of local authorities regarding squatter groups in Porto Alegre has changed. One evidence is that housing movements in the city are being evicted not once or twice, but three times only months after they "invade". This is the case of Ocupação Saraí and Ocupação Lanceiros Negros Vivem. While investigating the latter, Soares and Sanches (2018), argue that in Porto Alegre the more organized and combative a population is, the more judicial and police force is employed to dismantle what can serve as an example for thousands of other people who do not have access to the right to housing. Housing movements in Porto Alegre do not seem to have the support from the municipality they once had while PT was in office. As a leader from Lanceiros Negros Vivem occupation told me informally during preliminary fieldwork in August of 2017, "the position of the current administration has changed towards us. Local authorities tend not to engage with the movements as they used

[2] Retrieved: poa24horas.com.br/prefeitura-de-porto-alegre-soma-dez-ocupacoes-e-30-predios-abandonados-so-no-centro-e-arredores/

[3] Retrieved: g1.globo.com/sp/sao-paulo/noticia/por-que-existem-tantos-predios-abandonados-em-sao-paulo.ghtml

to and many families are getting evicted just months after they invade" (female occupant). This process is understood by some as the *judicialization of land dispute* (SANCHES & ALVES, 2016).

ON BANISHMENT AND LANDSCAPES OF PROPERTY

My paper addresses the economic, political, and judicial dimensions of land, housing, and property rights. I am approaching these themes starting from the premise that the legal space both produces and is produced by the social space. In other words, I assume that law is not objective, but, as Blomley (1994) argues, constantly echoing power structures and incorporating social and cultural systems. Thus, drawing from the literature on racial banishment and landscapes of property through a legal geography perspective, I frame my research problem, that is the legal frameworks on land use and property rights that are being used to justify evictions, around the idea of *legalized displacement*. I am conceptualizing legalized displacement as an outcome of judicial land dispossession, that is, a result of court-ordered removals. Evictions, in this case, are understood as legitimate actions and inserted in broader processes of racialized capitalism. As products of land speculation, housing commodification, and discriminatory initiatives, although these legalized displacement practices can implicate both informal and formal tenants, this article focuses on the former group.

The market alone cannot explain contemporary modes of expulsion. More than a direct and inevitable outcome of the commodification of the housing sector, according to Roy (2017), practices of dispossession must be assessed as part of discriminatory politics and of what she calls a *theory of banishment*. The author argues that eviction became a biased tool used by private actors and local authorities to ban and expel the marginalized from the city. Theory of banishment builds and expands on processes of capital accumulation to explain the continuous encounters between capitalism and racial discrimination. The constitution of Blacks as lesser beings (FRASER, 2016), or the understanding of slums as the unwanted (GHERTNER, 2011) are not only part of a prejudiced judgment performed by civil society. These are also the underlying rationales that shape state policies and justify courts' decisions that will ultimately promote the banishment of marginalized communities.

Roy (2017) also claims that foreclosure, for example, can be understood as a form of social and racial banishment. While investigating the Chicago Anti-Eviction Campaign, the author found that banks are confiscating houses located "out of the way" of capitalist interests. In addition, Desmond (2016) concludes that eviction is a commonplace practice in inner-city black neighborhoods in Milwaukee. He argues that women are more than twice as likely to be displaced than men. Women, especially black women, tend to have less flexible schedules, receive lower wages, and often are the sole providers for their family, which prevents them from working extra hours. As Desmond contends, while black men in the US are locked *up*, "black women are locked *out* (emphasis added)" (p. 121).

While the evictions analyzed by Desmond and Roy do not have an explicit State participation, Perry (2013) argues that, in the case of Salvador, Brazil, black women are disproportionally being subjected to forced removals by local authorities. The evictions she investigated were allegedly being led in order to "make way for new structures that were meant to attract tourists to the city center" (p. 49). However, the author argues that judges

ordered the eviction of poor black women even when they presented the required documentation proving ownership rights. Evoking Kia Lilly Caldwell, Perry summarizes, "black women, especially those living in the poorest urban neighborhoods, traditionally have been consigned to a 'de facto status of non-citizens,' occupying not only the spatial margins of cities but also the socioeconomic margins as the poorest of Brazil's poor" (CALDWELL, 2007, p. 135 *apud* PERRY, 2013, p. 115).

Bhan (2016) and Ghertner (2015) also look at State-sponsored displacement, investigating the fundamental role played by the Judiciary in evicting the poor in Delhi, India. The former highlights that what differentiates post-millennial evictions in India from the ones executed in the past are "the involvement of the courts rather than the state, the use of altered definitions of 'public interest', the silence of the city government and the lack of empathy within the media and the public" (BHAN, 2009, p. 128). Similarly, Ghertner claims that judges confronted with the lack of proper documentation abandoned previous bureaucratic prerequisite and statutory requirements for ordering evictions and "made the appearance of filth or unruliness in and of itself a legitimate basis for demolishing a slum" (2011, p. 287). Eviction, in this sense, became, as Yiftachel (2017) argues, an efficient control tool used by the State and a foundation of contemporary urban citizenship. Displacement is switching "from an act to a systemic condition through which marginalizing power is exerted through policy and legal systems […] one may observe that the greater the threat of displacement, the weaker the urban citizenship" (para. 12).

Social and racial discrimination in the (re)making of the city is not a new phenomenon. From Haussmann's efforts to revitalize Paris to Moses' attempt to redevelop New York, spatial segregation has always been present in urban planning. What has changed is, on one hand, the level of sophistication of financial, policy, and legal instruments being used to exclude. On the other hand, now discriminatory politics are hidden behind populist discourses, precisely the ones I plan on investigating in this piece. These discriminatory practices are entangled with the apparatus of property. Thus, in addition to the literature on banishment, my research also draws from property regimes scholarship. The growing body of literature studying apparatuses of property focuses on uncovering the rhetoric associated with ideas of ownership. While reviewing the works on property regimes, I am particularly interested in understanding what Roy (2003) identifies as paradigms of "propertied citizenship", in which certain prerogatives are directly related to homeownership. The author reflects that the idealization of home ownership is more than just a perpetuated model; it is, in fact, part of a much a broader set of beliefs, values, techniques, and dilemmas.

By claiming that such paradigm was responsible for shaping socio-spatial boundaries in the North-American cities and excluding individuals that did not meet "ideal" norms of residence, Roy summarizes that "propertied citizenship for the select was made possible through the impossibility of shelter and social citizenship for all" (2003, p. 484). Therefore, as Blomley (2016) holds, the idea of property provides a rationale for dispossession. Despite the fact that individual property rights do not exhaust all forms of land tenure, Gibson-Graham highlights that "property is not a fact but an aspiration, albeit a very powerful one" (GIBSON-GRAHAM, 1997 *apud* BLOMLEY, 2004, p. 99). In this sense, the concept of property entails not only claims to territory, but to power and identity. Thus, challenging the belief that private property is the only "proper" and acceptable mandate becomes fundamental when thinking

about the marginalized and ways to ensure their right to housing and to occupy the city.

Moreover, Graham (2010) encourages scholars to reflect on the significances of property within different legal and cultural discourses and practices, recognizing that law is applied differently across geographies. Therefore, it is fundamental to reflect upon the errors of ignoring and condemning alternative models of property and accepting western regimes as the model to be followed. Postcolonial theorists have already highlighted the danger of associating modernity to specific "modes" of space production (see ROBINSON, 2004). Challenging the Anglo-American liberal conception of individual property as the model to be followed, Gillespie (2016) calls into question the universal applicability of Western standards of propertied mandates. The author argues that "legal concepts of property need to be more place sensitive so as not to potentially undermine or destabilize existing and evolving social norms and conditions" (p. 264).

As shown in the previous section, although other factors matter beyond the law when thinking about displacement, the logic behind certain propertied regimes is very much associated with dispossession. The review of Brazil's history of land use and law have demonstrated this. The 1850 Land Law, which created for the first time a real estate market in Brazil, for example, marginalized and excluded those who could not afford to buy land – and, thus, become property owners – throwing them into illegality. More recently, we saw that mechanisms created by the City Statute focusing on land titling represent also a great risk of displacement, to the extent that it makes it easier for developers and investors to negotiate the acquisition of land in favelas. In the next section of this article, therefore, I will present how judges in Porto Alegre are applying the "written" land law. I will also review the discourses the magistrates perform while legitimating these rulings particularly in cases involving squatting of private and public buildings, that is in situations in which housing rights movements occupy properties formally owned by others.

MOBILIZATION OF JUDICIAL DISCOURSES

To understand the role of the Judiciary in the displacement of housing rights groups (i.e. *ocupações*), I am looking at court records related to eleven eviction cases involving squatting movements. By conducting a discourse analysis of these documents, I am able to assess the arguments used by judges to justify or counter forced removals. I had access to these records, by accessing Rio Grande do Sul Court of Justice (TJRS) online database (the tribunal responsible for analyzing lawsuits filed in Porto Alegre). Because I am primarily investigating the possibility of legal frameworks that were established in the last two decades in Brazil to protect housing as a fundamental right being, in fact, ignored by judges in their rulings, I am only analyzing decisions published since 2001. As already mentioned, in this year was approved the City Statute, a key legislation that expanded *usucapião* law in Brazil and created other mechanisms, for example, to allow housing groups to claim possession of idle land. Therefore, targeting the period between 2001 and 2018 and using the keywords "property", "repossession", "occupation/invasion", and "collective"[4] and discarding results with the keywords "commercial/commerce" and "rural"[5] (as I was only interested in cases

[4] "Imóvel", "reintegração de posse, "ocupação/invasão", and "coletiva/coletivas"
[5] "Comercial", "comércio", and "rural".

involving housing rights groups squatting in urban areas), my search initially resulted in sixteen cases, like Table 1 shows bellow.

Table 1: Eviction related cases involving squatter groups in Porto Alegre ruled by TJRS (2001 – 2018)

YEAR	# RULINGS	# QUALIFYING CASES	# CASES RULLED IN FAVOR OF SQUATTERS
2002	1	0	n/a
2004	2	2	1
2005	3	3	0
2009	1	1	0
2014	2	0	n/a
2015	2	1	0
2016	2	2	1
2017	2	2	0
2018	1	1	0
TOTAL	16	12	2

Source: Data collected from TJRS *jurisdição* online database

It is important to highlight that the TJRS is a court of second instance and, thus, decides on appeals of decisions already made at a municipal level. Therefore, the number of actual eviction cases involving *ocupações* in Porto Alegre since 2001 is probably much higher. Also, the reason why I did not investigate the decisions published by the municipal court is because the documents from its database cannot be accessed using specific keywords, only by including the name of the parts involved or their lawyers. Moreover, despite the keywords used, four cases did not qualify, as they did not involve squatter groups. As a result, I analyzed twelve TJRS judgments. Only in two of them, the decision favored the squatters. In other words, in nine cases the judges ordered the forced removal of the groups.

On one hand, in the cases in which the judges ruled in favor of the squatters, the decision was based on the premise that the evictions would aggravate the social problem of lack of housing. First, in the lawsuit arbitrated in 2002, the judges accepted the appeal of seventy families. The squatters were occupying a property owned by the Rio Grande do Sul Housing Company (Companhia de Habitação do Estado do Rio Grande do Sul – COHAB). They sustained that the property has been abandoned for over thirty years and, thus, does not fulfill its *social function*. They also claim that they have the *constitutional right to housing*, and it is the State's duty to grant it. Finally, according to the case rapporteur, the families alert that

carrying out the injunction to remove them, filed by the COHAB, will result in the eviction of more than 70 families, "who will be subject to complete abandonment, having nowhere to go". (TJ-RS LAWSUIT N. 70008436768, 2002, p. 2).

The judge rapporteur to the case, José Francisco Pellegrini, responds to these arguments by arguing that:

> "Although it is necessary to seek in the discipline of the civil law the legal subsidies required to solve controversies, one cannot forget the particularity of this *new social fact* [my emphasis], that of collective invasions, in which people organize themselves in movements that represent neither the solution of an individual problem, nor the interest in individual advantage or benefit, but the fulfillment of a basic need of a community […]. It is known, for example, that under the Criminal Code, one does not commit an offense if she acts in a state of necessity or in self-defense. On the other hand, the right to housing [my emphasis] is constitutionally guaranteed and, unless proven otherwise, those who do not have a shelter to live in are in a state of need." (TJ-RS LAWSUIT N. 70008436768, 2002, p. 5)

He continues and claims that he is grounding his judgement, accepted by the other judges of the case, on two legal principles: highlights two legal aspects in his ruling: the Court's responsibility to the community and the theory of proportionality. The former refers to the fact that Judiciary needs to take a position on strong popular outcry issues – "will the Judiciary only represent another instance of power against the citizen, or will it embody the last instance of power, in his favor?" (Idem). Finally, Pellegrini also sustains that a judge must seek the "least harmful solution" and ask what are the least damaging answer in this case: "to turn away from the needy families who find themselves in the property shooing them away with their junk and pain, or delaying the permanent resolution a little more showing understanding of the seriousness of this Brazilian drama, which does not generate irreversible burdens to the other party?" (TJ-RS LAWSUIT N. 70008436768, 2002, p. 6).

In the second cased determining the permanence of squatters in occupied property, ruled in 2016, the rapporteur Giuliano Viero Giuliato had similar remarks. Although he does not directly make reference to the social function of property or the constitutional right to housing, he agrees that the eviction of four hundred families from the private property they occupied will represent a "social problem of housing. In this case, the judges allowed the families the right to stay put while waiting for a future mediation hearing yet to be scheduled.

On the other hand, the arguments used by the judges when ruling against squatter groups are built basically around two main ideas: the indisputability of private property rights and the fact that the ocupações constitute an illegal act. The application of this discourses depend basically on who is demanding repossession of the parcel, whether a private or public agent. The latter justification is mostly used when the complaint is a public entity is involved, judges usually emphasize the lawlessness of the "infraction" being committed by the "invaders". They often claim that these "invasions" are unfair in the extent that if the State were to guarantee the right to housing to all those who illegally occupy public property, other marginalized citizens not adopting the occupation "tactic" would not be entitled to similar

privileges. When a private actor is involved, the argument is centered around the premise that collective claims cannot surpass individual rights when it comes to property.

When analyzing the ten verdicts evicting squatters, private land was the object of seven of them. One quote, in particular, stands out because it is repeated in two different rulings reported by the judge Cláudio Augusto Rosa Lopes Nunes. Despite acknowledging the mechanism created by the 1988 Federal Constitution and the 2001 City Statute, in lawsuits registered in 2004 and 2005, Nunes uses the exact same words:

> "Even when we understand that properties must fulfill a social function, it is not within the scope of a possessory lawsuit that the State should decide whether the owner was or not subtracting the property from its social purpose. If we accept the defendants' [squatters] argument, all landlords would be liable to lose possession - albeit only in the course of the proceeding - of their property to the homeless when the latter consider the land a socially unproductive property. The fact that a parcel is not occupied by buildings or plantations, even for a long period of time, clearly does not mean that the property in question lacks a social function; at least while the owner has not been yet questioned by the competent authorities about how he will give a proper social allocation to his property. What cannot be admitted, with the danger of implementing a new form of social and legal insecurity, is that those with no access to housing through planned invasions, executed in the dead of night, settle themselves permanently in duly registered and regularized urban parcels, on the basis - possible to be invoked in relation to any non-built plot of land - that the property is not meeting its social purpose. To admit this type of conduct would mean to ensure housing only to those who will have organizational capacity to promote invasions, establishing a real parallel power to that of the State, which, evidently, is not fair, much less acceptable." (TJ-RS LAWSUIT N .70008590465, 2004, P. 3 AND TJ-RS LAWSUIT N. 70012565354, 2005, p. 5)

Moreover, in the 2005 Lawsuit, after including in his monocratic decision that the squatters accuse the owner of not paying property tax for several years, Nunes claims that this "alleged fiscal debt" (Idem) are irrelevant in litigations related to possessory claims.

In another case, while ordering the removal of seventy families, the judge Ângela Maria Silveira maintains that "the principle of the social function of property, guaranteed by the Federal Constitution, in turn, should not be analyzed in isolation, and should coexist harmoniously with the rules disciplined in the Civil and Civil Procedure Codes that regulate the matter" (TJ-RS LAWSUIT N. 70028526036, 2009, p. 5). The rules which she is referring to are those that protect property rights.

Additionally, in a paradigmatic judgment, in which a vacant property owned by a religious institution was occupied by the Ocupação Mirabal, a group constituted only by poor women victims of domestic violence, the judges responsible for the case also emphasize property rights. The judge Dilso Domingos Pereira, for example, praises the "social relevant" (p. 8) work being performed by the group, but claims that the occupied building is private not

public. His remarks suggest that his decision might be different if the contested property was owned by the State. However, as it is shown in the last part of this section, even when this happen to be the case, the Courts tend to order the eviction of the "invaders". Similar to Pereira's argument, the judge Carlos Cini Marchionatti argues that

> "However expressive the purpose of the movement is, the protection of private property and its social function is also a fundamental constitutional right. […] The movement counts with my support as a citizen; as a Judge, my duty is to protect society, a context in which it is necessary to restricting infractions to principles such as social function and private property, values that constitute the foundations of personal and contractual freedom safeguarding the common good of society. Freedom does not exist nor does it resist without property and its social function." (TJ-RS LAWSUIT N. 70072101025, 2017, p. 9)

Before exploring the rulings involving public actors, it is interesting to notice that the judge Matilde Chabar Maia acknowledges the efforts of the local authorities in her decision by highlighting the "political option" adopted by the municipality starting in 2003 to no longer expropriate "invaded" land, "in particular for the purpose of avoiding unlawful appropriations" (TJ-RS LAWSUIT N. 70073691867, 2018, p. 43). Finally, the already cited judge Dilso Domingos Pereira, in his verdict published in 2015, recognizes the constitutional right to housing as a fundamental right. However, he claims that ordering the eviction of the squatters:

> "We are not denying the validity of constitutional principles and norms regarding the right to housing or the dignity of the human person [but] it is necessary to consider the impossibility of rewarding the illegal conduct of the aggravating actor - who confessed to having invaded the property of a third party - to the detriment of the other part that obtained the property and exercised its ownership lawfully and regularly." (TJ-RS LAWSUIT N. 70064392392, 2015, p. 12).

Regarding the lawsuits involving the occupation of public property, two main arguments emerge. First, as previously indicated, the fact that these practices performed by these squatter groups are outlawed as suggested by the following passages: "Although legitimate subjects of debate, it is not possible to admit invasion of public areas for the purpose of claim or protest" (TJ-RS LAWSUIT N. 70072335003, 2017, p. 11). In another ruling, judge Jorge Luís Dall'Agnol argues that it is impossible to let them [squatters] stay in the property under the argument that it would be fulfilling with the social function of the property, since the article on the social function of property in the 1988 Federal Constitution does not protect those who enter, irregularly, in public property (TJ-RS LAWSUIT N. 70010929503, 2005, p. 10).

The second premise used by the Courts is that *ocupações* do not configure a legitimate way to struggle for access to adequate housing and that the Judiciary should not constitute the realm to solve "housing policy issues":

> "Any solution for the relocation of the people who invaded the property, be they children, elderly, and pregnant, should be sought in the political arena, in conjunction with competent administrative agencies. The Judiciary cannot, in violation of the law that deals with possessory litigation, enter into an area of exclusive competence of the Executive Power. […] The condition of social vulnerability is not exclusive to the group that invaded the public property, as social needs are not an exclusive problem of the Municipality of Porto Alegre, since they are present in absolutely all other states." (TJ-RS LAWSUIT N. 70069321636, 2016, p. 10)

The ruling presented above, wrote by the judge Eduardo João Lima Costa, in 2016, is somewhat paradoxical. The object of the lawsuit is a parcel owned by the Municipal Housing Department (DEHMAB - Departamento Municipal de Habitação) that was being occupied by three hundred homeless families. DEHMAB was trying to evict the families from the contested property claiming that the area would serve to accommodate 1,300 families removed from a parcel required for the expansion of the municipal airport. Ironically, Costa ordered the forced removal of homeless families to shelter other families now displaced due to State-sponsored infrastructure work. In other words, the same judge that suggests that a solution for relocation of squatters should be resolved within the scope of the Executive, determines the removal of these families to solve another "housing issue". In this sense, the Judiciary, as Bhan (2009) highlighted previously, is becoming indeed the primary site of urban planning and governance.

CONCLUSION

As discussed in the first part of this article, the question that guided this analysis was "how are legal frameworks on land use and property rights used to justify displacement?". At stake here was not only the fact that evictions might be using as a political tool to limit the territorialities of marginalized populations, but (specifically in the case of Brazil) the violation of the constitutional right to housing.

By addressing the judicial dimension of land, housing, and property rights, I showed that law is not objective, but constantly reverberating power structures. Drawing from the literature on landscapes of property through a legal geography perspective, I reflected upon the notion of eviction as a "legitimate" act. By grounding my analysis in Porto Alegre, I also showed how a city with tradition in participatory planning – that was one of the first in Brazil to create a legal framework to allow the poor to claim the right to stay put in "invaded" land – now witnesses the marginalization of its housing movements, particularly squatter groups.

Through the analysis of judicial discourses in processes of legalized displacement, I found that the State, particularly the Judiciary, plays a major role in practices of dispossession. As exposed in the previous paragraphs, the application of law is influenced by socio-political and economic circumstances, ultimately benefiting some groups over others. Judicial dispossession can be read as a direct outcome of eviction mandates ordered by the courts. However, what makes it legitimate is not only the fact that it is ruled by judges. These practices are embedded within governmental, legal, and policy apparatuses. As Bhan highlights, such legalized displacement is occurring "through democratic processes rather than in their absence" (p. 9).

When judges order the eviction of squatter movements, for example, they are not only ignoring the legal mechanisms created to ensure that Brazilian citizens have adequate access to housing. They are, in fact, violating these people's constitutional right to housing, as tenure security is a key factor in one's entitlement to adequate shelter. When the City Statute was established almost twenty years ago, people fighting for urban reform in Brazil became hopeful that property regimes would now be challenged. Nonetheless, I claim that some of the instruments supposedly created to fight dispossession (e.g. social function of property), instead are being used to displace.

Lastly, judges are mobilizing political ideologies that condemn certain property regimes in favor of other property models, defying established land use legislation in their rulings. Data found on Rio Grande do Sul Court of Justice online database analyzed in the previous section illustrates this. With this preliminary investigation, I demonstrated how legal frameworks on land use and property rights have been mobilized for and against dispossession. Despite some limitations of my research (especially in regard to the pre-selection of lawsuits to be analyzed),[6] I think that further investigation needs to be done with the other parts involved in these cases, particularly the squatter movements themselves. It would be interesting to understand how these poor people's movements are contesting displacement, including the legal remedies that them and their lawyers are trying to apply.

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[6] While randomly searching for eviction cases on TJ-RS online database I found that some cases involving squatter groups were not included in my initial study. This happened because the keywords I used to find these types of lawsuits are only applied to their summaries and not to the entire litigation record.

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