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ROBERT ALEXY'S FUNDAMENTAL RIGHTS THEORY AS AN ANALYTICAL MODEL OF SOCIAL HOUSING RIGHT: PRINCIPLE ARGUMENTS IN A REFERENCE FIELD OF IT'S IMMEDIATE APPLICABILITY

A TEORIA DOS DIREITOS FUNDAMENTAIS DE ROBERT ALEXY COMO MODELO ANALÍTICO DO DIREITO SOCIAL À MORADIA: ARGUMENTOS DE PRINCÍPIO NO CAMPO DE REFERÊNCIA DE SUA APLICABILIDADE IMEDIATA

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ABSTRACT

The right to housing, situated as a fundamental social right, is analyzed under an analytical model that allows its classification as a complete fundamental right, essentially demanding both positive and negative actions by the State, is a theoretical perception that allows its landmark constitutional normative is thought of as a device of immediate applicability and not subject to the reserving of the possible. We opted for a theoretical analysis whereby the normative correspondent of the social right to housing is studied from a principles perspective that, starting from Ronald Dworkin (2010; 2013), finds in Robert Alexy (2014; 2015) his great theoretical justification. The problem that arises in this work is: Alexy's theory of fundamental rights makes it possible to build an analytical model of the right to housing as a social fundamental right by immediate applicability, capable of theoretically and robustly referring to the jurisprudence that applies to this type of demand? The results made it possible to find a powerful system of thought according to which the right to housing, as a complete fundamental right, requires the recognition of the fullness of its indisputable applicability to the issues presented in housing claims in which it is questioned.

Keywords: Fundamental rights. Right to housing. Complete fundamental right. Immediate applicability. Jurisprudence.

RESUMO

O direito à moradia, situado como direito social fundamental, é aqui analisado sob um modelo analítico que permite sua classificação como um direito fundamental completo, essencialmente exigente tanto de ações positivas quanto negativas por parte do Estado, percepção teórica que então permite com que seu marco normativo constitucional seja pensado como dispositivo de

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aplicabilidade imediata e não sujeita à reserva do possível. Optou-se por uma análise teórica pela qual o correspondente normativo do direito social à moradia é estudado sob uma ótica principiológica que, partindo de Ronald Dworkin (2010; 2013), encontra em Robert Alexy (2014; 2015) sua grande justificativa teórica. O problema que se coloca neste trabalho é: a teoria dos direitos fundamentais de Alexy possibilita a construção de um modelo analítico do direito à moradia como um direito fundamental social de aplicabilidade imediata, porquanto capaz de referenciar teoricamente e de maneira robusta a jurisprudência que se aplica a este tipo de demanda? Os resultados permitiram encontrar um pujante sistema de pensamento segundo o qual o direito à moradia, como um direito fundamental completo, requer a necessidade do reconhecimento da plenitude de sua indiscutível aplicabilidade frente às questões apresentadas em demandas fundiárias nos quais ele é questionado.

Palavras-chave: Direitos fundamentais. Direito à moradia. Direito fundamental completo. Aplicabilidade imediata. Jurisprudência.

1. INTRODUCTION

In common jurisprudential research in which the right to housing is adopted as a search descriptor, this is contextualized as a recurrent legal problem in the most diverse modalities of land disputes that mark the Brazilian social reality, deeply affected by the growing housing deficit and by the recurrence of the most diverse forms of precarious housing, it is common to come across quite different results when its enforceability is called into question.

This disparity is materialized in the contradictory way in which the scope of the right to housing is treated by Brazilian jurisprudence. In demands in which the treatment of this right assumes centrality - whether in removals or forced evictions of people residing in risk areas, or in actions for repossession, both combined or not with demolition requests - the position of judges moves between two poles distinct: on the one hand, those that recognize certain limits to jurisdictional intervention in the context of the actions of the Public Authority and, for this reason, identify the social right to housing as a social right subject to the reservation of the possible, that is, to the budgetary limits of the State; on the other hand, several other judgments recognize the full effectiveness of article 6º of the Federal Constitution, which would ensure that the right to housing is an indisputable fundamental right, to be opposed against the State, whereby the latter must succumb to its immediate applicability.

This is illustrated by the examples listed below:

> In fact, it is an indisputable fact that the Appellant suffered considerable moral and material damages with the collapse of the water dam and, consequently, the flooding of its property. However, as established by the distinguished judge in the judgment under appeal, it is unreasonable and disproportionate to require the Municipality to take action in relation to all families who take up residence in risk areas unsuitable for housing, mainly because they voluntarily place themselves in

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> such a situation when choosing to settle in areas of irregular occupation. (BRASIL. Tribunal de Justiça do Amazonas. Apelação Cível julgada em 15 de setembro de 2020)
> Therefore, in view of the evidence provided in the case file, especially in the photographs (pages 58/60), it is imperative to maintain the decision to protect the family residing there, determining their immediate removal to a safe place. . Furthermore, it is totally unreasonable to raise the principle of the reservation of the possible in this case, especially when the fundamental right of a family in a situation of risk of life is on one side. It is not legitimate to invoke the reservation of what is possible in the face of an omission of the State's obligations to provide constitutionality imposed on the Public Power. Finally, it is noteworthy that, as to the social right to housing, the Federal Constitution provides in its art. 23, item IX, which is also the common competence of the Union, the States, the Federal District and the Municipalities to promote housing construction programs and the improvement of housing conditions and basic sanitation and, in relation to the Municipality, establishes art. . 30, item VIII, which is responsible for promoting, as appropriate, adequate territorial planning, through planning and control of the use, subdivision and occupation of urban land, which was highlighted in the learned decision. (BRASIL. Tribunal de Justiça do Rio Grande do Sul. Agravo de Instrumento julgado em 02 de outubro de 2019)
> The right to housing was formally included in the list of social rights of the Federal Constitution of 1988 (art. 6), by Constitutional Amendment 26, of February 14, 2000. This is a field whose complexity is external to different areas of public law , especially in the broad areas of constitutional law and administrative law. It is indivisible, interdependent and is closely linked to a set of other personality rights connected to this right, for example, the right to life, the right to health, the right to privacy, the right to property, the right to rest, the right to freedom. The correction of public policies by the Judiciary must take place in exceptional situations (cf. STF, ARE 761127 AgR/AP, Rel. Min. Roberto Barroso, Primeira Turma j. 24/6/2014). The jurisprudence adopts a restrictive position for the imposition of judgments on the merits that oblige the State to adopt/change public policies. (BRASIL. Tribunal de Justiça de São Paulo. Apelação Cível julgada em 11 de junho de 2020)

In fact, the confusion about the nature and scope of the right to housing, as a constitutional guarantee that may or may not be legally demanded in the face of the State, refers to a type of incongruity that affects the jurisprudential construction of social rights as a whole, being able to produce a certain state of legal uncertainty regarding the definition of the limits of coverage of the guarantees provided for in article 6º of the Federal Constitution, especially when located in the base instances, closer to the origins of several land disputes and, therefore, potentially, more apt to directly impact the material living conditions of the people involved.

This is a type of divergence capable of hurting the integrity of the interpretation of this relevant constitutional provision, especially because, in addition to generating conflicting precedents in the context of discussions about the immediacy of the right waved, it empties the legal debate of the real context of social inequality that structurally affects access to decent housing in the country, which then justifies the importance of analyzing in principle terms the content of this norm, prescribed as a guarantee, historically emerged as a device of constitutional stature.

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On the one hand, the jurisprudence remains jealous of the economic and financial limitations of the Public Power and the limitation of its constitutional competence and, for this reason, it withdraws its hand when it is urged to decide on certain causes where the practical realization of the social right to housing is claimed by part of a population contingent excluded from the formal processes of home ownership and, therefore, is involved in lawsuits in which it is the target of forced removals and evictions.

On the other hand, by prioritizing the economic functions of the State, to the detriment of the immediate realization of this social right, it ends up making an evaluative option that, roughly speaking, disarticulates the fundamental objective of the Federative Republic of Brazil, which is textually consistent in the eradication of poverty and marginalization and the reduction of social and regional inequalities, therefore subjecting this priority scope, rooted in the principle of human dignity, to another *ethos*, this one more suited to economic and budgetary provisions.

Thus, the empirical reality that reports this impasse in Brazilian jurisprudence is suggestive of a type of theoretical research whose objective will be to analyze the fundamentality of the right to housing from an analytical model that allows its classification as a complete fundamental right, whatever that is. which demands both positive and negative actions on the part of the State, that is, that conditions the Brazilian State both to perform acts that make it viable, and to abstain from actions that prevent its actual implementation.

This perception arises from a joint empirical research activity currently undertaken in the form of jurisprudential research carried out within the scope of the Doctorate, in progress with the Graduate Program in Law of the Federal University of Minas Gerais, whose objective undertaken there is to carry out a taken up on the jurisprudential production on the subject of forced removals motivated by risk. Although the objective of this article is not to articulate the quantitative results of this jurisprudential research, the findings we came across in the context of the empirical reality investigated, offered us a fruitful secondary field of analysis, through which, given the recurrence of forms disparities in understanding about the scope and practical feasibility of the fundamental right to housing, justified, in parallel, the present theoretical study that now serves to investigate the essence of its fundamentality, which is the object of this article.

The theoretical arsenal capable of allowing the constitutional normative framework present in article 6 of the Federal Constitution to be analyzed under the defense of its fundamentality, will be the one that allows the analysis of the social right to housing from a principled perspective, based on Ronald Dworkin (2010 ; 2013), finds in Robert Alexy (2015; 2015b) its great theoretical justification.

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Considering what Dworkin and Alexy prescribe about fundamental rights, giving special focus to those that the latter calls rights *to provision in the strict sense*[3] – or fundamental social rights – the aim is to emphasize the constitutional values that structure the social character of the right to housing, as an aspect of an urban policy aligned with the democratic project that identifies the structuring ethos of Brazilian society as the one from which it is committed it to eradicate poverty and marginalization of its people, as well as to reduce social and regional inequalities.

For this reason, by using, as conceptual assumptions that will guide this investigation, the principled perspective supported by the thought of Robert Alexy (2015; 2015b) to understand the normative structure of the right to housing, we seek to achieve the objective specific of offering here an analytical model of the fundamental right to housing capable, in turn, of shed light on the jurisprudential production on this difficult theme.

The problem that arises in this work is: Alexy's theory of fundamental rights enables the construction of an analytical model of the right to housing as a complete fundamental social right, as it has immediate applicability, capable of theoretically and robustly referencing jurisprudence in the what concerns the linking of positive and negative actions taken by the State? The results allowed us to find a thriving system of thought according to which the right to housing, as a complete fundamental right, requires the need to recognize the fullness of its indisputable applicability in face of the issues presented in land claims, in which its feasibility is questioned.

2. RIGHT TO HOUSING AND HOUSING DEFICIT

According to data from a survey carried out by the Getúlio Vargas Foundation (FGV) in 2017, the housing deficit in Brazil would be 7.78 million homes missing, this in a scenario of projections that point to a number that will grow to 11.9 million by 2027 (FGV, 2018). The survey also pointed out that, of the families that make up this deficit scenario, 91.7% of them would fall into an income range that goes up to 3 minimum wages and that, in order to meet the housing needs of this specific group, an investment around of R$ 104.8 billion for the construction of 7.1 million new units.

[3] "Benefit rights in the strict sense are the individual's rights, vis-à-vis the State, to something that the individual, if he had sufficient financial means and if there was a sufficient supply in the market, could also obtain from private individuals.." (ALEXY, 2015, p. 499).

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The João Pinheiro Foundation presented in 2018 (FJP, 2018) the result of its research on the housing deficit in 2016, this being around 6.3 million homes missing[4]. At that time, the survey also found that, with regard to the components and subcomponents that make up its methodology for accounting for inadequate households (excessive burden with rent, family cohabitation, precarious housing and excessive density of rented households), about half of this shortage it was presented by families whose income would not exceed three monthly minimum wages.

The João Pinheiro Foundation also points out that 87.7% of the total housing deficit in Brazil is represented by the lack of housing in the urban area, and in the urban area there are about 6.3 million empty or underutilized properties (FJP, 2018). The IBGE (Brazilian Institute of Geography and Statistics) reports the presence of 8.27 million Brazilians, occupying an average of 2.47 million households located in 27,660 risk areas across the country (IBGE, 2018, p. 32).

The concept of housing deficit, although compatible with a discursive memory that considers the problem of lack of housing and its confrontation through the replacement of the stock of units and by promoting the transfer of private property via home ownership, has been, however, the anatomy of a discourse through which it is possible today in the country, to dialogue with the issue of the lack or precariousness of housing. Far from showing isolated statistical data, it constitutes an important material indicator from which land claims must be considered.

Although this is a notion whose thematic choices are historically dependent on the discourse that the problem of homelessness is resolved through the logic of producing more houses, being limited to the emergence of a housing policy historically conditioned to exchange value , depending on the market to produce and sell real estate via government subsidy, this without taking into account other housing solutions based on community regularization and self-management systems, this is a specific type of data production that can greatly assist in the investigation of capacity of this same housing policy to offer a confrontation that matches the unequal reality according to which, a contingent excluded from these home-buying processes, continues to

[4] The numerical divergence shown in relation to the FGV and FJP surveys are due to the fact that the survey carried out by the Getúlio Vargas Foundation, contracted by the Brazilian Association of Real Estate Developers - ABRAINC and presented in October 2017, although based on the indicators Housing projects formulated by the João Pinheiro Foundation and adopted as a reference by the Federal Government (excessive burden with rent, family cohabitation, precarious housing and excessive density of rented homes), underwent methodological adjustments, with a view to rebuilding some of its components. For this reason, the figures presented took into account the incorporation of "total cohabitation" - in which the total number of cohabiting families was considered, relating them to the number of existing households - and the number of improvised households, in compatibility with the projection of the total Brazilian population by IBGE for the year 2017, which represented an increase in the final deficit result. However, even with the application of these methodological changes, with the exception of the representative numbers of family cohabitation, in relation to the other items, the divergence is not that accentuated. Let's see: Precarious housing 12.4% FGV/2017 - 14.8% FJP/2016; family cohabitation 41.3% FGV/2017 - 29.9% FJP/2016; excessive burden with rent 42.3% FGV/2017 - 50.0% FJP/2016; excessive density 3.9% FGV/2017 - 5.2% FJP/2016 (FGV, 2018, p. 9-10; FJP, 2018).

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challenge the State, in the sense of revealing its inability to promote the materialization of this right of undeniable social importance.

Judging by the deficit numbers that are increasingly present in the panorama of the country's rapid urbanization[5], it can be seen that the dynamics of this paradigm of housing production continues to be built on the basis of a strong process of dispute for the proper occupation of the land[6]. The result of this is the growing submission of the weaker side of this struggle to processes of socio-spatial exclusion and, therefore, the feedback of more precariousness, as the result of a social dynamic according to which impoverished populations are removed from the processes of housing acquisition via the purchase and sale of their own house, they are pushed to self-produce their own territories and houses, these often built on land belonging to others or even unsuitable for housing.

Paradoxically, it is more or less since 1950, that is, since the historical moment in which the country's urbanization process intensifies, that power relations, which structure the type of political and social organization existing in Brazil, have been trying to articulate, including legally, security and control devices tending to deal with something that seems to become chronically problematic in our social situation: the housing emergency. Regardless of what was built during all these decades, from 1960 to 2020, in the various versions through which a housing policy was sought in the country, the housing crisis is the social and political fact that, in the field of popular housing, is constant in the Brazilian urban reality and invariably continue to challenge jurisprudence regarding the real scope of the social right to housing.

The political confrontation of this crisis has historically been designed from a model according to which housing production is increasingly no longer a state social policy, to become a capital reserve materialized in the state practice of mercantilization and after the financialization of that right, increasingly taken as a product fed by the monthly installments of financing contracts, with a strong tendency to enter, with no prospect of returning, the gears of the market.

Brazilian housing policy, over the last six decades, has invariably walked pari passu, with this methodology of political action according to which the market takes a privileged place as a guaranteeing agent of the basic conditions of well-being to be achieved through consumption. On

[5] Segundo dados da Divisão de População do Departamento de Assuntos Econômicos e Sociais das Nações Unidas, em termos projecionais, a população urbana no Brasil cresceu de 36,2%, em 1950, para 87,1%, em 2020 (ONU, 2018).

[6] É possível se pensar nas condições de possibilidade dessa disputa desde o momento de sua irrupção histórica quando, no Brasil, a abolição do regime formal de escravização do povo negro fez surgir a necessidade de introdução de um regime de proteção jurídica à propriedade privada. A Lei de Terras, de 1850, abolindo no país o antigo regime de doação ou concessão de terras pela coroa, passa a priorizar a titulação em detrimento da mera ocupação, possibilitando a oposição do domínio da terra pelo colonizador em face do ex-escravizado, doravante tornado pobre e desterrado. A propriedade privada passa então a ser assegurada como um direito juridicamente protegido e oponível às ocupações.

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the other hand, and roughly speaking, it is possible to note that this system of ideas has increasingly codified the judicial interpretation of the social right to housing, being a contiguous and not an opposite part of this performance of power. It shows a rationality whereby abundant jurisprudence continues to filter land conflicts submitted to its appreciation, often due to the logic of the State's economic functions, as it seeks shelter in the proclaimed principle of the reserve of the possible.

In the archeology of discourses in which the principle of reservation of the possible is used to justify the forced displacement processes carried out without offering housing solutions in favor of the affected population, the meaning that emerges from this solution route, common in jurisprudence, points to a certain fidelity to security notions[7] (FOUCAULT, 2008, p. 15) that act in favor of the economic functions of the State as a legal asset in itself, even if to the detriment of legislated social rights.

In fact, in the scenario of these precarious forms of land occupation, one can see the inscription of active legal practices in the sense of maintaining this security order of contractual exchange, tending to serve as support points for power relations that institutionalize the hegemonic forms of access to housing via private acquisition of land ownership, therefore, in line with the routinization of this privatization policy of the State. They carry out massive processes of evictions and forced evictions without offering an alternative housing to the evicted people, and they almost always mobilize under justifications according to which the Judiciary cannot invade the budgetary competence of the State.

The way in which removals and repossessions work, carried out without a solution of housing continuity in relation to their targets, end up re-updating the issue of the housing deficit in the country; establish with it a kind of joint construction from which a direct and inseparable connection stands out - or even presents itself as a side effect - of the housing policy model historically adopted in the country, reproducing the forms of security government management that are inscribed in this field, as deserving to be confronted with the way in which the law is organized and reorganized within these excluding dynamics.

[7] Depois da soberania e da disciplina, a técnica que Foucault vai reconhecer e que se sobressai nesse processo de transformação dos modos de gestão capitalista do Estado, é a segurança: "A segurança é uma certa maneira de acrescentar, de fazer funcionar, além dos mecanismos propriamente de segurança, as velhas estruturas da lei e da disciplina" (FOUCAULT, 2008, p. 14). As características gerais desse dispositivo seriam: a conformação de espaços de segurança por uma série indefinida de elementos; o tratamento aleatório desses elementos e das probabilidades que os constituem; a normalização de condutas; a repartição espacial de multiplicidades e a circulação, em prol das diferentes funções econômicas do Estado (FOUCAULT, 2008, p. 15).

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3. THE RIGHT TO HOUSING AND THE FEDERAL CONSTITUTION

Provided for in chapter II of the Federal Constitution, social rights are found, albeit in a non-concentrated manner[8], listed in article 6º of the CF, where the presence of the right to housing can be identified.

Decent housing had already been raised to the category of a human right – because it cannot be dissociated from the dignity of the human person – by the Universal Declaration of Human Rights, of 1948[9] and by the International Covenant on Economic, Social and Cultural Rights (PIDESC/UN), adopted by the XXI Session of the General Assembly of the United Nations, on December 19, 1966, and later enshrined in national legislation, through Decree No. 591, of July 6, 1992.

Even though it was recognized in those international normative frameworks, the right to housing only became an explicit part of the Brazilian constitutional text by virtue of Constitutional Amendment No. 26, of February 14, 2000, after which it was implemented as a social right. in article 6º of the Federal Constitution of 1988.

Originally absent from the list of social rights provided for in article 6º, the gap concerning the right to housing as a constitutional social right revealed a mismatch in the design of the Federal Constitution itself, seen from the context of its enactment, in 1988.

The fact is that the approval of the right to housing, as a declared constitutional norm, took place only 12 years after the publication of the Magna Carta, in which, since its origin, already enshrined, in article 5, item XXIII, the social function of property , and in article 182, the forecast of urban development policies to promote the social functions of the city[10], which sounded

[8] "In this sense, like other fundamental rights, social rights are not limited to the list of article 6 of the CF, also covering, under the terms of article 5, paragraph 2, of the CF, implicit rights and guarantees, rights affirmed in other parts of the constitutional text (outside of Title II) and also of rights affirmed in international treaties. It should be noted that the jurisprudence of the Federal Supreme Court, changing the understanding until recently in force, currently tends towards enshrining the supralegal, but still infraconstitutional, hierarchy of human rights treaties, that is, the prevalence of the treaty over law infraconstitutional internal (RE 466.343/SP), maintained, however, the attribution of a merely legal hierarchy to treaties on other matters. On the other hand, there is a less conservative position regarding the recognition of implicit and dispersed rights in the constitutional text, as are examples, among others, the right to housing (today inserted in the original text of the FC) [...]". (SARLET, 2014, p. 540-541)

[9] Article XXV 1. Every human being has the right to a standard of living capable of ensuring him and his family, health and well-being, including food, clothing, housing, medical care and essential social services, and the right to security in the event of unemployment , illness, disability, widowhood, old age or other cases of loss of livelihood in circumstances beyond their control. (Organização das Nações Unidas. Declaração Universal dos Direitos do Homem, 1948).

[10] "The notion of the right to the city took shape with the propositions that resulted from the formulation of a Popular Amendment for Urban Reform by a set of entities and class associations, non-governmental organizations-NGOs, civil associations, movements and social groups that work with the urban issue that understood the importance of participating in the institutional process of the National Constituent Assembly. The popular

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somewhat contradictory, since the social functions of property and the city could not be thought of, legally and politically, regardless of its main premise, which is the social issue of housing, in this case related to decent housing to be thought of as an unequivocal right in favor of which the State should act.

However, as stated, given Brazil's regulation of international instruments concerning housing and, furthermore, giving in to internal pressures from popular movements and other entities[11], such antinomy present in the constitutional norm was corrected by the aforementioned constitutional amendment, which ended up inserting in the text of article 6 the right to housing as a social right.

In the legal-normative field, the institutional design of the Federal Constitution of 1988 demarcated the social right to housing as a right whose practical scope would reference the development of an urban policy capable of carrying it out functionally. It is a right based on a publicist logic, as defined in a functional dimension, whose content is represented by the social functions of property and the city.

In fact, the right to housing, as a social right, has not been dissociated from the constitutional provisions that are essentially dedicated to Urban Policy, especially with regard to articles 5, item XXII and 182 and corresponding paragraphs and items, of the Federal Constitution - and that present as a highlight the functional aspect that gives meaning to the right to property as a right whose exercise is conditioned to its social pertinence, which is intrinsically linked to the right that dignified urban life can be achieved without distinction to all people who live and use of city spaces.

3.1 Fundamental right to housing?

The analysis of the right to housing as a fundamental social right to be undertaken here is based on the assumption supported by the doctrine that it is part of the list of fundamental rights provided for in the Federal Constitution of 1988 (SARLET, 2012, 2014; BARROSO, 2003; CANÇADO TRINDADE, 2004, apud ESCRIVÃO FILHO; SOUZA JÚNIOR, 2016).

amendment signed by 131,000 voters was presented by the National Articulação do Solo Urbano – ANSUR, Movement for the Defense of the Favelado – MDF, National Federation of Architects – FNA, National Federation of Engineers – FNE, National Coordination of Borrowers and Institute of Architects of Brazil – IAB. The popular amendment of the Urban Reform played an important role in the constituent process, as several of its terms were used as a reference for the elaboration of the Urban Policy Chapter of the 1988 Constitution" (SAULE JÚNIOR, 1997, p. 25)

[11] "The ideas advocated by the Centrão on the urban issue were clearly to avoid the institution of self-applicable constitutional norms in order to enable the Government to implement an urban policy that generates responsibilities and obligations for private agents for the use and appropriation of urban space." (SAULE JÚNIOR, 1997, p. 31)

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> Furthermore, the provisions of article 5º, §1º, of the Federal Constitution also apply to social rights, in such a way that, like the norms of fundamental rights, the norms enshrining social rights have direct applicability and immediate effectiveness, even if the scope This effectiveness must always be evaluated in the context of each social right and in the light of other rights and principles. (SARLET, 2014, p. 541)

This doctrinal position, as transcribed, is reaffirmed by Ingo Sarlet (2012) in another work in which he observes, from the topographical disposition of social rights, the example of the right to housing (after the preamble and following the fundamental principles) , its status as an authentic fundamental right: "in addition to translating greater logical rigor, insofar as fundamental rights constitute a hermeneutic parameter and superior values of the entire constitutional and legal order" (SARLET, 2012, p. 66), they embody the principle the dignity of the human person.

Social rights, as those that guarantee the value of equality, are listed, as well as Individual and Collective Rights, within Title II of the Federal Constitution, which is why we can, hermeneutically and in line with the doctrinal positions previously espoused, adapt them to the genre of "Fundamental Rights and Guarantees".

On the other hand, it should be confirmed that the legal categorization of social rights receives different classifications in Brazil. For Tavares (2014, p. 701), they would be social rights, rights of the second dimension, because their realization would require a secondary legislative action from the Public Power. For Barroso (2003), social rights would be represented by constitutional norms defining rights and, with regard to the right to housing, demanded by the State (BARROSO, 2003, p. 96), which is responsible for the concrete implementation of what the Constitution inscribes as a guarantee.

It so happens that, in the political context of Brazil, taking the 1988 Constitutional Pact as a legal framework, formulated from the need to legitimize a new democratic perspective of development, there was a hierarchical breakdown of the founding rules of its legal orders. This provision of cascading rights ended up installing a generational categorization present in part of the doctrinal understanding, whose foundations sought to classify the rights and guarantees present in the Federal Constitution (TAVARES, 2014).

However, according to Escrivão Filho and Sousa Júnior (2016), both quoting Cançado Trindade, it is a thought that "has, moreover, fostered the atomized view of human rights, with all its distortions" (CANÇADO TRINDADE, 2004 *apud* ESCRIVÃO FILHO; SOUSA JÚNIOR, 2016, p. 38), which helps to justify some obstacles that materialize from what the author considers a false hierarchy decanted by the doctrine.

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The understanding of the generational evolutionary linearity of human rights is materialized in the interpretation of the formal content of the Federal Constitution, which reveals the priority institutional treatment of a certain core of individual fundamental rights, to the detriment of economic, social and cultural rights.

Paragraph 1º of Article 5º of the Federal Constitution states that "the norms defining fundamental rights and guarantees have immediate application" (BRASIL, 1988), which, for the purpose of this analysis, adopts the understanding that this norm is one of those whose nature is endowed with plasticity, because, as it does not textually define the topical location of the rights it provides in its literalness, it favors the understanding that it encompasses the set of fundamental rights that will be constituted in the following chapters, for example of Chapter II, which deals with Social Rights, which includes the right to housing (not always expressed in the constitutional norm, as previously seen).

> For us, the principle of immediate applicability of the rules defining fundamental rights encompasses all fundamental rights (even those not provided for in the Title II catalog) and those not provided for in the Constitution itself, provided that, in relation to these, they bear the distinctive note of the material fundamentality (such as those arising from international treaties to which Brazil is a signatory). This is not only because art. 5, §1 refers verbatim to fundamental rights - making use of the generic formula "fundamental rights and guarantees" - without discriminating against them, but also due to a systematic and teleological interpretation that may fall into the analysis of the aforementioned provision. (CUNHA JÚNIOR, 2016, p. 554)

For Escrivão Filho and Sousa Júnior (2016), limiting the scope of §1, article 5, of the Federal Constitution, would reveal a political intention to formally consign a Bill of Rights that, in the most practical sense, would end by ratifying the liberal nature of the A state that hegemonically overrides the constitutionally established guarantees: "In a scenario of extreme concentration of ownership, as is well known in the countries of the global south, it is not difficult to understand the service provided by such dominant ideas" (ESCIVÃO FILHO; SOUSA JÚNIOR, 2016 , p. 40).

Chinchilla Herrera (2009), a professor at the Faculty of Law and Political Science, at the University of Antioquia, in Colombia, conceiving that fundamental rights are not restricted to those baptized by constitutional semantics, warns of the need for an adequate theory of constitutional rights, based on a methodology of precedents, in order that the fundamental rights provided for in the founding charter have a "trusted identity" (CHINCHILLA HERRERA, 2009, p. 12).

For the aforementioned author, regarding social rights, which include the right to decent housing and the social function of property - from which the city's social function derives - its dimensional classification would meet a categorizing purpose of social rights as rights of a nature benefits, contained in the so-called “second generation” rights, hierarchical in this way to protect

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the “first generation” rights.

Resuming the discussion about the dimensional aspect of fundamental rights, and its compartmentation given under the parameters of realization, taken from the Eurocentric tradition, this theoretical model, defended by Herrera, for example, and transplanted to the reality of Latin America, reveals if, in the point of view of Escrivão Filho and Sousa Júnior (2016), it is inadequate to the political-cultural trajectory of countries inserted in this post-colonial reality, this is due to the importance of strengthening human rights from a perspective of indivisibility and integrality (ESCRIVÃO FILHO; SOUSA JÚNIOR, 2016, p. 38).

Regarding thinking about human rights from an overall perspective and the importance of adapting them to the concrete reality, it is convenient to transcribe the following fragment:

> That is why it is said that human rights are not available in pieces, not subject to a selection in which some are prioritized to the detriment of others. They cannot be fragmented or dissociated from each other, in such a way that the violation of a human right impacts directly on several other correlates such as a domino effect, while, on the other hand, the realization of a right strengthens the guarantee and actual realization of a series of other rights intrinsic to its realization. (ESCRIVÃO FILHO; SOUSA JÚNIOR, 2016, p. 41)

Jordi Borja, albeit more from an economic-financial perspective[12], works the notion of dialectical conception of the city and citizenship, in the sense that the development and protection of individual rights are imbricated in the expression and construction of collective rights: “socialized centralities, mobility and accessibility, socially and functionally diversified zones, places with significant attributes” (BORJA, 2003, p. 22, our translation).

When the protection of fundamental rights, given a certain social situation, is an emergency, the problem of classifying it, categorizing it or even justifying it becomes secondary to the urgency of its practical materialization. In other words, it is about knowing "what is the safest way to guarantee them, to prevent that, despite solemn declarations, they are continually violated" (BOBBIO, 2004, p. 45).

> It is known that the tremendous problem facing developing countries today is that of finding themselves in economic conditions that, despite ideal programs, do not allow them to develop the protection of most social rights. (BOBBIO, 2004, p. 63)

Therefore, it is possible to understand that economic, social and cultural rights (among those in which the social function of the city and property is inscribed), thus included in the

[12] In “Company and Merchandise Homeland: notes on the discursive strategy of urban strategic planning”, Carlos Vainer analyzes urban strategic planning based on signs of competitiveness by capital investment and the globalization of the economy, defended by authors such as the Spanish urbanist Jordi Borja, and its harmful consequences for Latin America (VAINER, 2013).

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Brazilian Constitution, together with civil and political rights, spread in a kind of normative web that results from a process of political emancipation in Latin America, and arises, seminally, from its historical trajectory and from the needs accumulated over the centuries in which it was, at least institutionally and formally, under the domination of the European metropolises. They derive, therefore, from a reaction to international relations of dependency, which is why "the fruit of the processes of struggle that demand the protection and intervention of the State so that the rights to decent work, to land and housing, to education and health, are effectively performed", (ESCRIVÃO FILHO; SOUSA JÚNIOR, 2016, p. 39).

Therefore, once the theoretical notions that help us define the fundamental scope of the right to housing have been defined, we are left with the construction of the analytical model that supports the understanding of its immediate applicability, capable of theoretically and robustly referencing jurisprudence with regard to the linking of positive and negative actions taken by the State, which will be done based on Alexy's theory of fundamental rights.

4. RIGHT TO HOUSING AS A COMPLETE FUNDAMENTAL RIGHT OF IMMEDIATE APPLICABILITY ACCORDING TO ROBERT ALEXY'S ANALYSIS

Rules and principles, norms inserted in the social, political, administrative and economic structure of the country, materialized from the same institutional act, in which fundamental guarantees and social and political rights were cataloged, based on the legal value of the dignity of the human person , foundation of the democratic rule of law itself, guarantor of equality and social justice, henceforth demand an interpretive exercise that is increasingly fundamental to the context of its legal applicability and its normative force.

It can be said that the dignity of the human person, as a structuring principle of the Federal Constitution (SARLET, 2015), consists of a normative postulate[13] (MARTINS, 2015) which serves as an epistemological premise for understanding the entire legal system, being, in the case of Brazil, a principle admittedly positive in Article 1, which is part of the list of fundamental rights. This is a founding principle (and value) "which, as such, should serve as a guide for the interpreter, who is responsible for ensuring the necessary normative force". (SARLET, 2014, p. 124).

[13] "It is wrong to see in the legal system only legal norms, rules and principles. There is also a third type of elements: they are normative axioms that do not depend on positivity, they are valid even if they are not expressly or implicitly positive." (MARTINS, 2015, p. 34)

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For Ingo Sarlet (2015, p. 106), the principle of human dignity has what the author calls a double nature, that is, it is both a principle and a rule, therefore subject to various levels of achievement, insofar as "each human being is, by virtue of their dignity, deserving of equal respect and consideration" (SARLET, 2015, p. 118).

In fact, reflecting on the dignity of the human person and the ideal of a dignified life and its categorization as a right of all humanity, this is carried out in the fullness of fundamental human rights, whatever their dimension, whatever, of indelibly, the question of social rights.

The dignity of the human person is considered by Robert Alexy (2015) as a substantive key idea, or material reference of fundamental rights, closely linked to human rights, whose analysis model, suggested in the work Theory of Fundamental Rights (ALEXY, 2015), emphasizes the relevance of the elaboration of a structural theory of fundamental rights[14], with a view to arriving, for example, at an analytical model of a fundamental social right that allows its understanding according to a logical structure[15].

Ronald Dworkin (2010) provides the necessary clues to go deeper into Robert Alexy's structural and analytical thinking, when he recognizes that a theory of law that is limited to rules would be an incomplete theory, so that, for that first author, a liberalist of principles, the recognition of the preexistence of rights, such as freedom and equality, as normative postulates or general clauses, foundations of a given legal system, legitimize liberalism itself and categorize pure positivism as an anti-liberal restriction strategy[16] (DWORKIN, 2013).

For Dworkin, this theoretical finding is capable of revealing a level of subordination of the established norm to precepts prior to it. A subordination that, for the author, often imperceptible, is conceptual and political: that is, subject to principled arguments and policy arguments (DWORKIN, 2010).

Because, when the positive rule, taken as a performative act of the legislator (MARTINS, 2015), comes to contradict a principle - this one categorized by Alexy as the expression of a claim of correction inherent in the Law itself -, this contradiction would result in what Ricardo Marcondes Martins (2015) calls the technical failure of the legislator, or the performative contradiction of

[14] "As an integral part of an integrative theory, a structural theory is primarily an analytic theory. But only primarily, and not completely analytical, because it investigates structures such as the concepts of fundamental rights, their influences on the legal system and on the basis of fundamental rights, with a view to the practical tasks of an integrative theory. Its main material is the Jurisprudence of the Federal Constitutional Court" (ALEXY, 2015, p. 42-43)

[15] (1) All people have human dignity. (2) Human dignity entitles all human beings to be taken seriously as a person. (3) All human beings have the right to be taken seriously as a person. (ALEXY; SILVA, 2015b, p. 171)

[16] Judges must apply the law created by other institutions; they must not create a new right. This is ideal, but for several reasons it cannot be fully realized in practice. [...] Therefore, judges must sometimes create a new right, whether this creation is covert or explicit. (DWORKIN, 2010, p. 128)

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normative postulates.

According to this view, then, the arguments of principle, in addition to beacons of the positive rule, would then also justify judicial decisions and, for Dworkin, would be situated in a field of reference, of "propositions that describe rights" (DWORKIN, 2010, p. 141). With this reasoning, Dworkin refounds the importance of the principles, taking them as a benchmark of justice (DWORKIN, 2010), with the function of establishing standards of equity that prevent, for example, that in a given case that, eventually, does not fit. in pre-existing rules – the so-called difficult cases –, their solution is not at the mercy of merely discretionary criteria adopted by the judge (DWORKIN, 2013), but which are endowed with principled foundations.

This theoretical categorization by Dworkin serves here as a basis and justification for the reasoning that will be developed based on Alexy's Theory of Fundamental Rights (2015), which, distinguishing rules and principles, defines them both as projections of norms that must be brought together as species of the same genus: "Both rules and principles are norms, because they both say what should be." (ALEXY, 2015, p. 87).

From this assumption it appears that, although rules and principles come from the same generic trunk, as normative species, both must be analyzed according to their peculiarities. For Alexy, they are the mandated principles of optimization (ALEXY, 2015), that is, they indicate a varied degree of satisfaction, whose incidence will depend on external circumstances and also on the other rules that pass through and interact with them. The rules, in turn, are what they are, that is, they have a character of determinism, as endowed with a narrower space for expanding or reducing their interpretation and applicability, they need to be subsumed and duly adjusted to the factual and legal conditions on which affect (ALEXY, 2015, p. 91).

The principles "can be satisfied to varying degrees and due to the fact that the due measure of their satisfaction depends not only on the factual possibilities, but also on the legal possibilities" (ALEXY, 2015, p. 90), in addition to being considered reasons for rules, the principles “may also be reasons for concrete decisions” (ALEXY, 2015, p. 107).

When dealing with the models of rules and principles, Alexy analyzes the importance of the latter, when they reach relevance for decisions that deal with fundamental rights. Such prominence is thus recognized both in those principles relevant to fundamental individual rights, and in those referring to collective fundamental rights (ALEXY, 2015), such as social rights, for example. However, for the author, the importance of these commands is not produced exclusively in view of the formal character of fundamentality they bear, but: "The inquiry about the demonstration of their substantial relevance in the argumentation in the scope of fundamental rights remains indispensable" (ALEXY, 2015, p. 137).

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Thus, given what has been said, the right to housing must be categorized as a complete fundamental right, according to Robert Alexy, part of a reasoning that, from an analytical exposition of the structural theory of fundamental rights, will adapt it to a weighing model (ALEXY, 2015, p. 514) between the existential minimum and the financial reality of the State (ALEXY, 2015, b, p. 176). The first stage of this reasoning corresponds to the identification of what the author calls a system of fundamental legal positions, which is defined by a triple theoretical basis, defined in three elements: rights to something, freedoms and competences (ALEXY, 2015).

These are three positions that Alexy recognizes as structuring her analytics, whose division into distinct arrangements allows them, together, to assume all three high relevance, both when analyzed individually and when combined for analysis as a whole. In the case of the right to housing, its essence, as a social right that integrates the minimum existential compatible with a decent life, is registered as a fundamental right rule that is unequivocally compatible with a right to something and with the freedom to exercise it in name of the dignity of human existence.

4.1 Right to something: right to negative actions and right to positive actions

What Alexy calls the right to something is, ontologically, the conforming basis for the recognition of the existence of three fundamental legal positions: at one end, the subject who postulates, at the other the State, recipient of the demand to implement certain rights that, finally, fill of content this triadic relationship that completes itself in the object itself then postulated as a right to be implemented:

> [...] a right to something can be understood as a triadic relationship, whose first element is the holder or holder of the right (a), the second element is the recipient of the right (b) and the third element is the object of the right (G). [...] The object of a right to something is always an action of the recipient. This stems from its structure as a triadic relationship between a holder, a recipient and an object. If the object was not an action of the recipient, then it would not make sense to include the recipient in the relationship. (ALEXY, 2015, p. 194).

The author uses a general formula that he then operationalizes to define his reasoning - a (exemplified by a natural or legal person, holder or holder of a right) has, in face of *b* (the State, or even a private person, a recipient of that right claim), a right to *G* (the object of the postulation, which can be a positive action or an abstention). *G*, the object, will invariably be an action of *b* in favor of *a* (ALEXY, 2015, 194).

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Using this expression proposed by Alexy, it is possible to apply it thinking in terms of a postulation situated in the field of the right to decent housing as a right to something, – "(...) Art. social [...], to housing [...] in the form of this Constitution." (BRASIL, 1988) - which although defined in a simplified way, as it apparently prescribes two positions (the holder, subject of law, and the object), such textual reference, although concise, does not hide the role of its recipient, in this case the State, nor the sense that it needs to succumb to a bundle of positions in which a right to something and the freedom to exercise it stand out. The practical realization of this constitutional provision, therefore, is divided into the right to negative actions and the right to positive actions by its recipient:

> [...] the rights to negative actions correspond to what is commonly called "rights of defence". On the other hand, the State's rights to positive action only partially coincide with what is called the "right to benefits", as will be demonstrated below. [...] Citizens' rights, against the state, negative state actions (rights of defense) can be divided into three groups. The first group is composed of rights that the State does not prevent or hinder certain actions of the holder of the right; the second group, of rights to which the State does not affect certain characteristics or situations of the holder of the right; the third group, of rights that the State does not eliminate certain legal positions of the holder of the right. (ALEXY, 2015, p. 195-196)

The group of rights to negative actions, or citizen's defense rights against interventions by Public Authorities, are taken by Alexy (2015, p. 43) as rights belonging to a "negative status in a broad sense". In this field of abstentions, those where the State is conditioned not to eliminate certain legal positions of the holder of the right and whose exemplary prototype would be, for the author, for example, not impeding or not hindering[17] access to constitutionally guaranteed rights (ALEXY, 2015, 196). It would be exactly the no-embarrassment to your enjoyment

The fact of the primacy of private property as a historically hegemonic form of access to housing in Brazil, is supported by housing policies that over decades have hindered access to this right in relation to a large contingent of urban poverty[18], it can be taken here as an example of embarrassing circumstances (ALEXY, 2015, 197) that act in the face of well that move fluidly

[17] In Alexy's own words, "the impediment of an action of a by b occurs when b creates circumstances that make it factually impossible for a to perform the action. [...] It is possible to speak of making an action of a difficult on the part of b, if b creates circumstances that can stop the action of a. [...] In addition to the distinction between the concepts of impediment and hindrance, there are differences within these concepts. There are very different kinds of impediments and difficulties, and the difficulties can have very different intensities. This last fact is why the boundaries between hindering and hindering are fluid, which, however, does not constitute an argument against the distinction." (ALEXY, 2015, p. 196-197)

[18] "The researchers periodize three phases of housing provision, but which in fact can be summed up in two: an initial one based on the provision of housing by companies (the workers' villages), reducing the expenses incurred directly by the workers, but debiting them from their wages; and a later phase, in which the acceleration of the migratory flow and the formation of a surplus of labor makes it unnecessary for the worker to be fixed to the company, which transfers the responsibility for providing housing and urban services to the worker himself. and for the State." (ARANTES, 2009, p. 116).

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between the difficulty and impediment of actions by the recipient (b) of the proposed housing demands by the holder of the right (a), that is, an example of what Alexy will name as the super-concept of embarrassment.

Objective and also subjective requirements that permeate, for example, home ownership financing contracts, subsidized by the Federal Government, such as the purchaser's adequacy to minimum wage ranges and proof of financial health, make these embarrassments explicit: recently, for example , the Casa Verde Amarela Program, launched by the Federal Government in 2020[19], removes from its spectrum of action a housing policy aimed at the less favored classes, people who have no proven income, therefore eliminating the abstract legal position of this population contingent of becoming owners and, consequently, of the freedom to access the right to housing.

> The constitutional guarantee of the legal institute of property is subjectified to the extent that there are individual rights not to eliminate abstract positions that relate to the creation, undoing and legal consequences of the position of owner. (ALEXY, 2015, p. 200-201).

In the case of the group of rights to positive actions, or the right to state benefits in a broad sense, Alexy puts them in opposition to the rights of defense and which is based on the right to an existential minimum, whose satisfaction can occur both through a in a legal form (norm creation, normative positive actions in a broad sense), and through factual action (factual positive actions in the strict sense) (ALEXY, 2015, 202).

> Knowing whether to what extent norms that guarantee rights to benefits in the broad sense should be attributed to fundamental rights devices is one of the most controversial issues in the current dogmatics of fundamental rights. Especially intense is the discussion on so-called fundamental social rights, such as, for example, rights to social assistance, work, housing and education. (ALEXY, 2015, p. 433-434)

For Alexy (2015), the various constitutions of different countries find the very right to protect the dignity of the human person as the main point of support for subjective rights to benefits from the State, which is understood as a general statement on which the other norms are sheltered.

[19] Admittedly a program to increase the country's housing stock, aimed at stimulating and modernizing the civil construction sector (BRASIL, 2020), the Casa Verde e Amarela Program (PCVA) established by Law No. 14.118/21 (result of the Measure Provisional No. 996/2020) and submitted to the coordination of the Ministry of Regional Development, is intended for housing financing with FGTS and FAR resources, and presents as an innovation a slight reduction in the interest rate, applied to property acquisition contracts, indexed by the TR - with more predictable and little fluctuating rates - and, henceforth, also by the IPCA - floating correction index, more linked to inflation -, observing patterns of regional differences of decrease of 0.25% for the North and Northeast (BRASIL , 2021; BRAZIL 2021b). Similar to the PMCMV, the PCVA also has its interaction with the public scaled according to the income level of the contracting people. Band 1.5 (Urban Group 1), in which families with gross income of up to R$2,000.00 are eligible, interest rates of up to 4.75% per year are applied, with subsidies of up to R$47,500.00; group 2 (Urban Group 2), aimed at families with gross income of up to R$4,000.00 and subsidies that can reach R$29,000.00 according to income standards and property location; and tier 3 (Urban Group 3), for families with gross income of up to R$7,000. (BRASIL, 2021b; CAIXA, 2021).

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guarantors of rights of this kind, regardless of whether in their content such constitutional letters present a nature more focused on the right to negative actions, or rights of defense (ALEXY, 2015, P. 435).

This is not the case in Brazil when seen in the context of the promulgation of the Federal Constitution of 1988. In fact, with the objective of guiding the plural reality of Brazilian society, once fresh out of a military dictatorship in which it operated for 20 years. If a policy of restrictions on rights, the Original Constituent Power of 1988, with the scope of defining the democratic political-normative identity of the country, was prodigal in demarcating, alongside the rights of defense, an extensive set of rights to positive actions of the State, listed for the benefit of its citizens.

Well, returning to the theoretical and normative foundation of the social right to housing, as a right to something, also positive action, it is important to understand here that, for Robert Alexy, the right to positive benefits, situated in the opposite theoretical-analytical field to the right of defense or of state abstention, it is "every right to a positive action, that is, an action of the State, it is a right to a provision". (ALEXY, 2015, p. 442).

4.2 Freedom: right to freedom to an existential minimum

From what has already been understood about the notions of impediment and impediment regarding the provision of a positive action by the recipient of a right, or even the non-elimination of legal positions relevant to its full realization, Alexy suggests that the fine line that separates the practical distinction of one and the other can be thought, as said, from the supra-concept that defines hybrid situations of impediment and difficulty as those that can be called embarrassments (ALEXY, 2015, p. 197).

Within a system of fundamental legal positions, the freedom to exercise, in the name of the dignity of human existence, a right to something is, according to Alexy, constituted by a triadic relationship between a holder of a freedom (or a non-freedom) , an obstacle to freedom (an embarrassment) and an object of freedom (a right) (ALEXY, 2015, p. 220).

The right to housing as a constitutionally provided social right, seen as a postulation of its holder in relation to the recipient, in this case the State, when it is thought of in terms of the fundamental legal position it occupies, which consists of the freedom to exercise it, it manifests itself in terms of factual and legal freedom, whose object is the alternative of an action (ALEXY, 2015, p. 222) on which one cannot think of prohibitions without injuring fundamental rights.

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> [...] legal freedom, that is, the permission to do or not to do something, has no value without a (real) factual freedom, that is, the factual freedom to choose between the permitted alternatives. The formulation of this thesis is quite general. But it is at least necessarily correct if interpreted in such a way that the legal freedom of a to carry out, or not, action h does not cease to have value - in the sense of being useless - for if a, for factual reasons, does not have the possibility to choose between the realization and non-realization of h. (ALEXY, 2015, p. 503)

In the case of the right to housing, the object of freedom is the alternative of the action of occupying the space or not, according to the obstacles imposed to this action, on the one hand, by the right to private property (legal non-freedom) and, by another, due to the lack of financial conditions to do so (economic non-freedom). However, being a freedom protected through a constitutional guarantee existing in relation to the State, which is the one present in article 6 of the Federal Constitution, the right to housing constitutes a true protection, "a right not to be embarrassed in the enjoyment of this freedom" (ALEXY, 2015, p. 229), so, being a right to something – subject to the right to negative and positive actions by the State –, it assumes in the system of fundamental legal positions, the condition of freedom protected.

> [...] it is a matter of making it possible for the bearer of freedom to do what is allowed and, in this sense, legally possible, then there is a structural coincidence. This structural coincidence justifies, despite the ordinary use of language, calling the protection of freedom also the connection between a freedom and a right to a benefit in the strict sense, which makes possible the real enjoyment of what is optional. (ALEXY, 2015, p. 234)

Therefore, to speak of an argument for freedom, as a descriptor of a fundamental legal position that qualifies the right to housing as a complete fundamental right, is to think of it as an element that acts predominantly in favor of the existential minimum. For Sarmento (2016), thinking of freedom - here in terms of a freedom not only juridical, but also factual, made possible primarily by a state activity - as one that provides the minimum existential would be a persuasive argument, since "access to basic material conditions is really essential to enable people to exercise their freedoms (SARMENTO, 2016, p. 1652).

For Alexy, the right to the existential minimum has a true character of rule (ALEXY, 2015b, p. 176) that facilitates an efficient judgment of balancing between the dignity of the human person and the rule of competence restricted to the financial possibility of the State.

> Human dignity takes precedence over financial possibilities when the existential minimum is not guaranteed. Under this condition the state is obliged to ensure the existential minimum; the individual has an indisputable right to do so, and the constitutional court is definitively obliged to condemn the state if it fails to fulfill this state duty. (ALEXY, 2015b, p. 177)

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Therefore, regarding what the model explained in the aforementioned Theory of Fundamental Rights by Robert Alexy consists of, one arrives at the conceptual definition that the social right to housing can be considered a "complete fundamental right", which in itself concentrates "a bundle of positions of fundamental rights" (ALEXY, 2015, p. 249), which consists of the combination of ownership of a right to something, inseparable from the freedom to exercise it, insofar as, in relation to it, the State does not create embarrassments for its implementation and, also, that it protects its exercise.

> A complete fundamental right of this kind is something fundamentally different from the complete fundamental right which is constituted only by a conjunction of definitive positions. This has a static character; that a dynamic character. One is the provisional result of a decision-making and argumentative process, which is located outside the fundamental right; the other includes requirements that go beyond this result and, therefore, clashes with other fundamental rights and principles that concern collective interests and, therefore, is necessarily linked to its normative environment." (ALEXY, 2014, p. 253)

We then arrive at a theoretical model of the right to housing as a complete fundamental right, taking as reference the structural theory of fundamental rights by Robert Alexy (2015), without however simplifying the materialization of this social right, thus discrediting it from the possibilities and financial limitations that fall on its materialization. For Alexy (2015, p. 176), such verification leads us to an even greater discussion about the weighting of social rights.

5. IS THE RIGHT TO HOUSING A DIFFICULT RIGHT?

For Silva and Masson (2015), social rights are those addressed to individuals to assert them not only against the State, but against society as a whole, especially when enacted in law, which, according to the authors, converge to convenience to legally demand them. For Appio (2010), the search to define a balanced posture of judicial action, with regard to judicial intervention in the pursuit of public policies, the hypertrophy of the Judiciary is as democratically undesirable as its indolence.

Even so, the reserve of the possible has been the solution used to equate what the individual can really demand from society and what is above the budgetary capacity of this entity, which, although, however, does not prevent the Judiciary from ensure the realization of social rights, even in the face of factual situations that require difficult exercises to weigh the costs of social rights.

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> Human dignity takes precedence over financial possibilities when the existential minimum is not guaranteed. Under this condition, the State is peremptorily obliged to ensure the existential minimum; the individual has an indisputable right to do so, and the constitutional court is definitively obliged to condemn the State if it does not fulfill this State duty. (ALEXY; SILVA, 2015b, p. 177).

What is placed here in the boundary zone are two heterogeneous fields, namely politics and law, which, in the limit between conservatism and interventionism, can fit into a combination model (ALEXY, 2015b, p. 175) which would justify proportional interventions capable of judicially establishing the democratic concreteness of priority fundamental rights, especially taking into account a social situation in which social rights positively consigned and closely related to the fundamental needs of people are far from being realised.

Lênio Streck (2014) comprises an undeniable "displacement of the tension pole of the other powers in relation to the Judiciary" (STRECK, 2014, p. 198), as it constrains the latter to a certain degree of interventionism in favor of reducing inequalities , an interventionism that is covered, in the case of the right to housing, by the constitutional principles of the social function of property and the city, the balancing of interests and proportionality, and which is primarily justified in defining the role of the Federal Constitution in our society, ensuring its normative force.

In this way, it is recognized that the right to housing, as a social right, closely related to the principle of human dignity, is situated among the fundamental rights norms whose obligation Alexy will define based on three criteria: norms that guarantee subjective rights or norms that objectively bind the State; binding norms or non-binding norms and, finally, norms that support definitive rights and duties, or prima facie (ALEXY, 2015).

> The diversity outlined above gives rise to the assumption that the problem of fundamental social rights cannot be reduced to an all-or-nothing issue. It seems inevitable that differentiations are made. From this background, a brief analysis of the arguments for and against "fundamental social rights" is necessary [...] The objective is to develop a proposal, based on the theory of principles and on the idea of formal character presented above, which takes into account both the favorable and the contrary arguments. (ALEXY, 2015, p. 502-503)

Thus, for the author, guaranteeing or not guaranteeing a fundamental social right is, a priori, a matter of weighing up principles, which is carried out not only from the dogmatics proper to each fundamental social right, which makes the requirement of an infraconstitutional perspective (ALEXY, 2015), but also considering the bundle of legal positions that claim their fundamental rights to provision in a strict sense to an existential minimum.

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Therefore, considering the bundle of fundamental legal positions that qualify the social right to housing not only as a right to something, but also, due to its close connection with the right to an existential minimum, based on the principle of human dignity, being also a right related to the freedom to exercise it, freedom not only juridical, as enshrined in article 6 of the Federal Constitution, but also factual, since it depends on a positive and serviceable state activity, its judicial implementation cannot fail to be appreciated according to a balancing exercise that bypasses this analysis.

In addition to the analysis suggested by Alexy, the fact that, being a right inscribed in the constitutional text, consigned as a political ideal, weighs under the weighting judgment to be judicially exercised, when confronting the existential minimum and the reserve of the possible , the right to housing cannot be subjected to political strategies of budget preferences according to which the suppression and contingency of public spending operate, predominantly compromising equally constitutional ideas of eradicating poverty and marginalization and reducing social and regional inequalities .

According to studies carried out by OXFAM Brasil, CERS and INESC (Institute of Socioeconomic Studies)[20], the imposition of a "New Tax Regime" in Brazil, known as the Spending Ceiling Amendment[21], Approved, converted and promulgated on December 15, 2016 by the Federal

[20] Em maio de 2019, entidades como Fórum Nacional de Reforma Urbana (FNRU), Observatório das Metrópoles, Pólis - Instituto de Estudos, Formação e Assessoria em Políticas Sociais, Confederação Nacional das Associações de Moradores (CONAM), Movimento dos Trabalhadores Sem Terra (MST), Movimento Nacional de Luta pela Moradia (MNLM), União dos Movimentos de Moradia da Grande São Paulo, Conselho Nacional de Direitos Humanos, Plataforma de Direitos Humanos (DHESCA-Brasil), Oxfam Brasil, Instituto de Estudos Socioeconômicos (INESC), Coalizão Negra por Direitos, Articulação de Mulheres Brasileiras, dentre outras, ingressaram nas ADIs interpostas contra a Emenda na condição de *amici curiae*, ocasião em que nelas apresentaram demonstrativos dos efeitos da Emenda do Teto de Gastos na área do acesso ao Direito à Cidade (INESC, 2020b). No documento apresentado à Relatora Ministra Rosa Weber, firmaram a necessidade de concessão de liminar com imposição de suspensão imediata dos efeitos de parte da Emenda Constitucional nº 95/2016, para que o "novo regime fiscal" por ela imposto não fosse aplicado à área de saúde pública em razão da pandemia da COVID-19. Neste ponto demonstraram a preocupação da diluição das políticas urbanas constituídas ao longo das últimas quatro décadas, cujo ponto culminante foi a extinção do Ministérios das Cidades em 2018. Nos dados do documento apresentado ao STF, a diminuição dos recursos destinados a essa pasta, que em 2016 já era de 70% (INESC, 2020b, p. 67), serviu de referência para a incidência dos ajustes aplicados por conta da Emenda, o que teria comprometido a execução de recursos orçamentários aplicáveis à programas de mobilidade, porquanto produzindo consequências como periferização, segregação espacial e diminuição da qualidade de vida urbana.

[21] Em razão desta mudança estrutural no contexto dos gastos públicos, instituída pela Emenda Constitucional nº 95, Ações Diretas de Inconstitucionalidade (ADIs nºs 5658, requerente o Partido Democrático Trabalhista; nº 5680, requerente o Partido Socialismo e Liberdade; e nª 5715, requerente o Partido dos Trabalhadores) foram interpostas junto ao Supremo Tribunal Federal, sob a relatoria da Ministra Rosa Weber, nas quais apontadas a inconstitucionalidade material da referida alteração normativa. Naquelas ações os demandantes alegaram em face da nova norma o fato de que ela teria sido formulada em discrepância do impedimento pétreo de, por emenda, se abolir garantias constitucionais como saúde e educação, e ainda impor, em detrimento destas mesmas garantias pétreas, severos retrocessos sociais naquelas áreas, cuja responsabilidade de zelo se acharia pactuada pelo país também em normas internacionais.

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Senate, it would present a strong vocation to exacerbate the country's poverty levels, because, once the austerity practices already adopted in recent years were constitutionalized, it provoked an even greater increase in poverty. budget disparity seen since 2014 between social spending and the rollover of the external debt. In the case of the promotion of decent housing, for example, the report cited above shows that, between 2014 and 2017, there is a difference of less than 60% in these investments, to the detriment of an increase of more than 50% in interest payments and amortizations and 334% more in debt refinancing (OXFAM-BRASIL, 2017, p. 04).

The increase in financial expenses and the decrease in primary expenses[22], especially discretionary ones, directly impacted the scenario of housing policies aimed at low-income sectors. In the now extinct Minha Casa Minha Vida Program (lanes 1 and Entities), in 2016, the public spending strategy was to slow down investments, which began to prioritize the hiring of units for tiers 1.5, 2 and 3, these with it guaranteed a higher return in terms of profitability for the market, the so-called "more expensive money" (AMORE, 2015, p.21), which demands a return and charges interest.

According to data from the National Housing Secretariat (BECKER, 2017), the values of budgets executed in the Program, in 2015 and 2016, were, respectively, R$ 16.5 billion and R$ 6.9 billion. The visible fall in the budget for public policies, which was already a trend of the Temer government, with the so-called Spending Ceiling PEC, now became institutionalized.

Such an unconstitutional state of affairs only rescues the importance and responsibility of the Judiciary Power to keep Brazilian society minimally bound by the Federal Constitution, protecting not only the threat of damage to constitutionally positive rights, but also guaranteeing the effectiveness of those installment rules in order to rescue constantly the nature and option of the Constitutional Charter for social well-being.

6. FINAL CONSIDERATIONS

What inspires the study of the right to housing in the dimension of its fundamentality is the fact that the theme of decent and socially sustainable housing has become part of the urban agenda of the planet and, for this reason, it was included in solemn declarations of scope. world (UNBR, 2015).

[22] Segundo dados de pesquisa do INESC, de 2016 para 2017, nas despesas primárias (gastos com investimentos públicos, com pessoal e custeio da máquina pública), operou-se uma redução geral de 14%, enquanto que, no que tange às despesas financeiras (amortização, serviços e remuneração da dívida interna e externa, além de outros gastos de ordem financeira), houve no país um aumento de 46%, passando assim de R$ 381 bilhões em 2016 para R$ 557 bilhões em 2017 (INESC, 2017)

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The overload of urban infrastructure, far from being a circumstantial distortion, reveals itself, despite the norm that regulates the subject in kind, a structural problem. And the scenario tends to worsen when the process of eradicating the public housing stock is recognized in order to create opportunities for the free circulation of financial capital, a practice crystallized by the granting of housing credit, driven by subsidy programs for the acquisition of housing (a example of the Minha Casa Minha Vida and Casa Verde e Amarela programs), parallel to the decline of state investments in the housing sector.

The processes of removals, evictions and repossessions that are so much publicized on a global and local scale symptomatic of this reality. People are removed from their already consolidated housing, subjected to official intentions of security, beautification or sanitation of the city, or even the protection of the private property of third parties, in which they are displaced from the territories where they develop their social-affective networks of community belonging, when they cannot provide for their housing needs by entering housing finance programs, they are placed on a waiting list for public rental concessions, which is not always carried out to their satisfaction.

A fundamental criterion of the research undertaken was that, once an analytical model of the fundamental right to housing was outlined, the principle of human dignity was taken as the starting point of analysis, this being thought of as a parameter of an absolute substantial nature, by which establishes a system of preference between norms (rules and principles), pointing to the direct promotion of living conditions that ensure a minimum well-being which, in turn, references fundamental legal positions that categorize the social right to housing as a complete fundamental right.

What can be concluded is that the right to housing cannot be analyzed without taking into account its humanitarian, collective, libertarian and service nature, nor can the contradictions that gravitate around the debate on the issue of its judicial imposition. basic premise that this is a right to provision in the strict sense, that is, that it can be opposed by its holder against the State when it does not have the resources to obtain it from third parties or even from the market.

It should always be considered, on behalf of the Democratic State of Law that harmonizes the entire constitutional logic, that the judge's activity will always be guided by the Federal Constitution and, furthermore, the nature of social rights as fundamental, as binding, has been defined once the prescription of paragraph 1 of article 5 of the Federal Constitution, the judiciary may not, under the cover of the reserve of the possible and shielded by the prohibition of invasion of competences, refrain from seeking practical information of a technical nature about the option policy adopted by the other powers, capable of creating obstacles to its effective materialization, for this purpose, exercising the most necessary judgment, giving flow to the practical realization of

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what is undeniably a right.

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