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SQUATTING OR INVASION OF PRIVATE LAND OR PROPERTY? THE ARGUMENTATIVE STRATEGY OF JUDICIAL POWER ON DECISIONS INVOLVING OCCUPYING LAND WITHOUT LEGAL CLAIM

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ABSTRACT

The objective of this paper was to fathom how many contradictory decisions about the outcome of the same case are reached in a system of explicit rules. The dialectic method was used to approach decisions previously selected by Purposive non-probability sampling concerning squatting of abandoned properties. As a starting point for the dialectic bias, this study used the dissimilarity between the theoretical common sense of legal experts and the critical knowledge by Warat, along with his critique of the epistemology of concepts and the analysis of the syllogism by Katharina Sobota as presentation style of the court decision. As a result, it was concluded that the theoretical common sense of legal experts disguises strategies of speech. The decision is developed so as to convey a sense of comprehensiveness and logical coherence, failing to disclose that what actually fuels the interpretation of these actions is either the inflexible defense of a liberal property in which the owner is the absolute master of the power legally assigned to him or the defense of the social function of the estate. Despite many advances, the current political arena supports the upkeep of the former. Thus, there is no consensus in the decision-making process of lawsuits about squatting private property: the abandoned estate either "allows entrance" or "does not allow it". The trespassers are either squatters or occupants.

KEY WORDS: Squatting. Invasion. Estate. Abandoned property. Social function of the property.

INTRODUCTION

The judiciary has daily faced repossession actions in abandoned properties, or whose abandonment is the main reason for the action. This type of action is not something recent and, even

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vol. 13, nº 4. ISSN 2317-7721
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in times of pandemic, many actions continued to be directed to the judiciary, seeking the repossession of properties that are designated as – sometimes occupied, sometimes invaded. This dichotomy between invasion and occupation reveals much more than it might seem.

This article seeks to understand how, in a system of explicit rules, there are so many contradictory decisions about entering abandoned properties, and how the elaboration of the expressions invasion *versus*. occupation and empty property *versus*. abandoned property, for the same legal fact, demonstrate that, beyond from a logical conclusion, there is a discursive exercise to rationally transform the decision. Even public and private property gains distinctions that are not found in the text of the law, but which reinforce its political sense.

Accordingly, this work analyzes, in the first part, the pretension of the truth or the myth of the scientificity of law and how this elaboration contributes to a decision model that hides its contradictions; on the other hand, the second chapter demonstrates, through the analysis of judicial decisions, how they are constructed to give a sense of completeness and logical coherence. Thus, what property is, how it is guaranteed and who should be protected is what is often not explained in this legal discourse.

Just to clarify, as this study does not intend to be an exhaustive analysis of decisions involving this theme, the sampling procedure was used, as it "é uma parte essencial do procedimento científico[3]" (BARROS; LEHFELD, 2005, p.57). Thus, in this study, non-probabilistic sampling was used, since, in this case, "a chance de cada elemento da população ser incluído na amostra é desconhecida[4]" (MOURA; FERREIRA; PAINE, 1998, p. 59). Because this study is based on a dialectical nature, the intentional non-probabilistic sample was used, which occurs in cases where, "na opinião do pesquisador, tem, *a priori*, as características específicas que ele deseja ver refletida na sua amostra[5]" (MOURA; FERREIRA; PAINE, 1998, p. 60).

Thus, the decisions to be analyzed will be designated as D1, D2, D3, D4, D5, D6 to maintain a uniform treatment of data throughout this work. Thus, there is a table which will include the case number, the court and the designation to be used in the text.

DESIGNATION	PROCESS NUMBER	COURT|JUDGE OR RAPPORTEUR
D1	Civil Appeal No. 13217451	TJ/PR. Rapporteur: Fernando Paulino da Silva Wolff Filho
D2	Innominate Appeal in Special Court No. 20040510087275	TJ/DF. Rapporteur: Judge João Batista Teixeira
D3	Repossession Action No. 0045635-59.2011.8.26.0053	TJ/SP. Judge Luís Fernando Camargo de Barros Vidal

[3] Is an essential part of the scientific procedure. (Free translation)
[4] The chance of each element of the population being included in the sample is unknown. (Free translation)
[5] In the researcher's opinion, it has, a priori, the specific characteristics that he wants to see reflected in the sample. (Free translation)

vol. 13, nº 4. ISSN 2317-7721
DOI: 10.12957/rdc.2021.52949

D4	Interlocutory Appeal No. 223532851.2015.8.26.0000	TJ/SP. Rapporteur: Judge Álvaro Torres Junior
D5	Civil Appeal No. 1007824.78.2015.8.26.0127	TJ/SP. Rapporteur Spolador Dominguez
D6	Special Appeal No. 1.296.964 - DF (2011/0292082-2)	STJ. Minister Rapporteur Luís Felipe Salomão

1 A BRIEF OVERVIEW ON THE JUDICIAL DECISIONS IN REPOSSESSION OF ABANDONED PROPERTIES

There is a dispute taking place in the segregated city, the dispute for their places and one of these is the abandoned properties. This dispute occurs on the factual level, with its occupations and invasions, and on the legal level with the legal meaning of abandoned property, which will imply decisions sometimes protecting this property, sometimes 'evicting' its invaders.

In 2009, for example, the Court of Justice of Minas Gerais (TJ/MG) in Civil Appeal No. 100240586459530011, determined the repossession of property that, despite the recognized breach of the social function of the property, was invaded by the Movimento dos Sem Terra (MST - Landless Movement).

However, in 2012, the 3rd Public Finance Court of São Paulo in the Repossession Action No. 0045635-59.2011.8.26.0053 did not grant the repossession required by the Municipality, despite the embezzlement carried out by the Frente por Luta por Moradia (Front for Struggle for Housing), as it understood that there was a collision of rights between property and housing, understanding that housing in this case should be protected.

In 2017, the Federal Court of the 2nd Region in the Repossession Action No. 0012600-97.2017.4.02.5001, kept the occupants of a property, considering that the abandonment of the building for years and the absence of forecast use justified the maintenance of the owners in the property located in the center of Vitória-ES.

On May 10, 2020, the TJ/SP in the judgment of Civil Appeal n. 1069964-30.2018.8.26.0100, determined that the invaders were to be removed from the property, extracting the following excerpt from the vote

> ainda que hipoteticamente se admitisse o descumprimento da função social da propriedade, tal fato não autorizaria a autotutela por parte dos réus, uma vez que muitas outras pessoas, talvez até mais necessitadas, carecem de moradia e estariam sendo alijadas de tal direito pela mera atuação célere dos invasores, sendo que o dever de garantir tais direitos conforme sua necessidade incumbe ao Estado e não ao indivíduo "motu próprio"[6].

[6] Even if, hypothetically, non-compliance with the social function of property was admitted, this fact would not authorize self-protection by the defendants, since many other people, perhaps even more needy, lack housing

vol. 13, nº 4. ISSN 2317-7721
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On March 2, 2016, in the judgment of Public Civil Action No. 0000288-77.2014.8.26.0447, the 13th Chamber of Public Law of the TJ/SP, considered that, despite being irrelevant the good faith of the occupants regarding the public good, as this does not induce possession in favor of a private individual, that exercises mere detention over it, and that the fundamental right to housing does not authorize the invasion of public property, but by using the criteria of proportionality and weighting, in the collision between fundamental rights, it is a duty the Municipality to relocate families to vacate the public area.

But on May 6, 2020, even with the pandemic scenario, this did not prevent the property invaded by a group of families from being reintegrated, despite any allegation of risk of contagion and the contradiction to the government's own measure of "staying at home"[7].

From these decisions and actions that were filed, some questions are implied: after all, did people invade or occupied the property? Was the property empty or abandoned? Does failure to fulfill the property's social function authorize entry into the property? Does property law guarantee non-use of property? And finally, is there a difference between public ownership and private ownership when it comes to the abandonment of property?

The plaintiffs of all the actions described claimed that the property was invaded - there was a confiscation and hence the right to claim the repossession, but the defendants claimed that they did not ousted, they only occupied the property that was abandoned, so there was, in fact, dispossession, so it would not fit the repossession. Just to stay in this moment in the clash between the dispossession and occupation.

and would be excluded from such a right by mere swift action of the invaders, and the duty to guarantee such rights according to their needs lies with the State and not with the individual "motu proprio". (Free translation)

[7]Refers to case No. 1001115-49.2020.8.26.0451 of the 4th Civil Court of the Judicial District of Piracicaba. In a decision considering the request for reconsideration, in view of the state of health emergency, the judge upheld the reinstatement injunction, claiming in part of her decision that "Finally, it is certain that the pandemic situation does not, by itself, prevent the compliance with urgent acts, as in the present case, especially in view of the information contained in the records that the number of families in the place is small. On the other hand, postponing compliance with the order to an indeterminate date will allow the continuation of the constant movement existing in the place for irregular demarcation of lots and construction of shacks, in addition to allowing other families to settle on the site, which will effectively contribute to the spread of contamination by the coronavirus." (Free translation). The case had a lot of repercussion in the media, and was even the subject of an article in Carta Capital: FERREIRA, Allan Ramalho. O estado veste o traje da morte: a reintegração de posse e a pandemia. A negação de direitos é a faceta mais visível do processo de criminalização da população sem-teto e sem-terra no Brasil. (Carta Capital, São Paulo, 06/11/2020. Available on:https://www.cartacapital.com .br/blogs/br-cidades/o-estado-veste-o-traje-da-morte-a-reintegracao-de-posse-ea-pandemia/. Accessed on June 27, 2021)

vol. 13, nº 4. ISSN 2317-7721
DOI: 10.12957/rdc.2021.52949

But after all what does the law say? In a legal system with an abundance of norms like ours, heir to a positivism that believes in the completeness of the order and its logical system (pyramid), there is a belief that the law is constituted by explicit norms. (SOBOTA, 1996).

After all, knowing what the norm is, it will be enough to deduce from its major premise, including the minor premise, to put an end to the conclusion.

But what would be the major premise in these cases? Property is lost through abandonment (major premise); João entered an abandoned property (minor premise); soon João occupied the property, and since the occupation is not an illicit act, he must remain in the property (conclusion).

But what about when the act is considered unlawful? – Property is lost through abandonment (major premise); João entered a property that was not abandoned (minor premise), so João's entrance was illicit and, being a dispossession, should it leave the property (conclusion)?

And when property is public, how should we understand entry in the face of abandonment? – There is no possession of public goods (major premise); João entered a public property that was abandoned (minor premise), therefore, not being the possessor, João must leave (conclusion)?

What may not be so clearly understood is that the use of this apparent syllogism is a strategy of this discursive game, in the use of this norm. There is an implicit elaboration of the major premise, thus believing that everything is just a simple conclusion.

The syllogism, as stated by Sobota (1996, p. 254), is not a method of decision, but a style of presentation of the legal decision, which builds this illusion of certainty.

The discursive or rhetorical strategy is omitted, everything seems to be a logical and coherent construction and the moral also emerges to reinforce this apparent legal argument, after all, on the one hand, invading is something criminal, it leads us to the idea of violence, which should be repelled and dismissed. Just as abandonment is something heedless, it reveals a lack, which cannot be tolerated.

But it is not recognized, as Warat (1982, p. 49) points out, the political sense of normativity, through a scientific discourse that jurists elaborate in the name of truth, the official legal epistemology hides legal truths, as they demand the clarification of power relations, which form domains of knowledge and subjects as effects of power and knowledge itself.

2 THE LEGAL DISCOURSE STRATEGY AND ITS TRUTH CLAIM IN THE CONSTRUCTION OF THE CONCEPTS OF INVASION AND OCCUPATION OF IMMOVABLE PROPERTY

Warat (1982, p. 50) states that " a ortodoxia epistemológica reduz as significações a conceitos, trata-se, segundo o autor, de uma demarche conceitual, que procura colocar, fora de dúvida e fora da política, a fala da ciência[8]".

[8] Epistemological orthodoxy reduces meanings to concepts, it is, according to the author, a conceptual demarche, which seeks to place, beyond doubt and outside politics, the speech of science. (Free translation)

vol. 13, nº 4. ISSN 2317-7721
DOI: 10.12957/rdc.2021.52949

The search for a scientific character of law required a construction that would give it axiological neutrality, systematic completeness, exactness in language and in the interpretation of facts and norms.

Legal positivism still enjoys, in our tradition, great prestige. It is a fact that any lawyer, any law student, any professional still reads "positivism" as a normative science of law. However, mainly from the traumatic experience of the post-World War II period, a general reformulation of some of these bases of positivism began to be necessary, since situations in the factual world cannot all be anticipated by law and dealt with based on objective rules applicable by mere subsumption. In addition, the emphasis given to a principled dimension, marked by the clear intrusion of elements linked to the prevailing notions of justice and morality definitely puts the classic version of legal positivism in check.

Therefore, legal positivism is put under suspicion and sometimes imprints a negative image on those who defend it. From a certain point, to be a positivist is to be an uncritical thinker, without social and moral concerns. Positivism is the science of law, fair or unfair, and it is up to the applicator to simply apply it. This is due, to a large extent, to the great criticism suffered by this system in law, mainly for having been appointed as responsible for the legitimacy of oppressive legal regimes such as the Nazi regime.

However, what could be an opening for the discussion of the scientificity or not of law, does not happen. It is worth saying that the Law is irreparably marked by this search for certainty, for a system that allows us to anticipate the decision – by applying the rules.

Thus, we often fail to notice the discursive strategies that are presented in the texts in a disguised way, either through linguistic constructions or through the construction of a decision that leads us to the construction of images that produce this illusion of certainty.

Warat (1982, p.49), very clearly, suggests that there is a political sense of normativity and that the official legal epistemology, let's call it positivism here, seeks to disguise it through the scientificity of the discourses that jurists elaborate in the name of truth.

Accordingly, he proposes that the decisive step, for the elaboration of a critical discourse, is to be taken first by replacing the conceptual control with the understanding of the system of meanings and, second, by introducing the theme of power. (WARAT, 1982, p. 50).

Official epistemology or positivism with its closed logic influences the jurist to be seen as an operator of legal texts and not as an operator of social relations.

In this reality, we find the syllogism as the best discursive strategy: everything seems to follow from the norm; which is a consequence of the interpretation of the norm.

vol. 13, nº 4. ISSN 2317-7721
DOI: 10.12957/rdc.2021.52949

The concepts, as pointed out by Warat (1982, p.53), are constructed by reason as an attempt to remove from ideas their links with ideological or metaphysical representations and with their relations with power. It is important to verify that the concepts are also used strategically.

An important semantic question that needs to be addressed here is - what is an abandoned property? Abandonment of property is treated in the Civil Code as a cause of property loss. Property is lost through abandonment, as established in art. 1,275, III, of the Civil Code. But how to characterize the loss and what is the relationship of the loss with the occupation and invasion of properties?

The theme, abandonment of property, which is the main object of the repossession actions, is treated superficially and secondary by almost all civilists. Most of them do not go beyond a page of their manuals to deal with this subject, there is no relationship between this topic and the social function of property itself, and even more so with the social function of the city, as provided for in the Federal Constitution (CF 1988).

However, the number of repossession actions, in which property owners claim their property has been occupied or invaded, is immense. In the State of São Paulo alone, in a survey carried out in the TJ/SP jurisprudence search system, we had, in 2019 alone, 4,026 judgments with the theme "Reintegration of property occupation" and 1,112 judgments with the theme "Reintegration of property invasion". And in the year 2020, despite the pandemic, we had 4,219 judgments for the topic "Repossession of property occupation", and for the topic "Reintegration of property invasion", 1,120 judgments.

The repossession action is the great legal instrument chosen by the owner to regain possession of his/her property, despite the allegation of abandonment, which could lead to using the claim action, where, in principle, possession would not be discussed and, therefore, there would be less risk of the claim of lack of possession tampering the right of the owner. For the same year 2019, the search for the theme "Claiming action occupation of abandoned property" returned only 56 judgments and for the year 2020, 74.

Hence, both public and private property are frequently invaded or occupied, whether by individuals, groups, or social movements.

This theme is highlighted by newspapers, as it is often the target of violent struggles to recover the property. There are also bills to criminalize social movements that occupy real estate as if they were terrorists[9] and yet the most civilists can do is to say that abandonment is a unilateral act requiring the owner's intention.

[9]We have some bills in the Chamber of Deputies that seek to criminalize the act of occupation of real estate, some even proposing amendments to the anti-terrorism law, such as bill 9,604/2018 authored by Deputy Jerônimo Goergen (PP/RS), which includes § 3 to art. 2 of the aforementioned law, the text of which makes its

vol. 13, nº 4. ISSN 2317-7721
DOI: 10.12957/rdc.2021.52949

In these actions, property and possession are confronted, which still highlights the lack of housing in cities, since this possession is exercised by housing.

The reduction of the theme of the abandonment of property by civilists to a mere concept of a unilateral act with the intention of abandoning it, with the intention of no longer having it with them, does not allow discussing the political meaning of this construction, it suppresses the ideas, as revealed by Warat (1982, p. 53), "seus vínculos com as representações ideológicas e com suas relações com o poder[10]".

This concept of abandonment as a unilateral act with the intention of abandoning only justifies and reinforces liberal property, defunctionalized, as an individual right of its owner who exercises his bundle of powers in an absolute manner.

Proof of this is that even today we find highly respected authors, civilists, whose manuals are adopted in many Universities in Brazil, who, in addition to stating that abandonment is a unilateral act that requires intention, affirm that disuse and neglect are not abandonment.[11]

This occurs even with the fact that the Federal Constitution (CF) establishes, in its art. 182, §4, that is authorized for the municipal government, through a specific law for the area included in the master plan, to require, under federal law, the owner of unbuilt, underutilized or unused urban land, to promote its proper use, under penalty of suffering the sanctions established in its items, including expropriation.

Alexandre Bernardino Costa and Rafael de Acypreste (2018, p. 1824-1867), analyzing the proposed repossession actions against the homeless workers movement (MTST- movimento dos trabalhadores sem teto) in the period between 2001 and 2014 in all states in Brazil where the movement acts, concluded, in a deep analysis of decision data, that the Judiciary disregards the social interest underlying the processes, to protect property in its liberal and absolute format..

purpose clear: "§3 The provisions of the previous paragraph do not apply to the hypothesis of abuse of the right to articulate social movements, aimed at concealing the nature of acts of terrorism, such as those involving the occupation of urban or rural properties, with the purpose of causing social or generalized terror". (Free translation) In addition to this, there is also PL nº 10.010/2018 authored by Deputy Nilson Leitão (PSDB/MT), PL 9,858/2018 authored by Deputy Rogério Marinho and PL 5,327/2019 authored by Deputy José Medeiros.

[10] Its links with ideological representations and with its relations with the power". (Free translation)

[11] "[...] mere disuse does not matter in abandonment; fundamental is its combination with the psychic element, in the pursuit of the real interest of the owner to dispose of the property." (FARIAS; ROSENVALD, 2019, p. 541). "The owner's conduct is characterized, in this case, by the intention (*animus*) of no longer having the thing for himself. Simple negligence does not constitute abandonment, which is not presumed" (GONÇALVES, 2012, p. 333). "One of the reasons for the difficulty in assessing the intention to abandon the immovable property is the fact that it is contained in the power of use guaranteed by art. 1,228 of the Civil Code the right not to use the property [...]." (MELO, 2015, p. 209). "The owner leaves the thing with the intention of no longer having it with him, giving rise to the concept of *res derelicta*, in the face of dereliction." (TARTUCE, 2015, p. 210). " (Free translation)

vol. 13, nº 4. ISSN 2317-7721
DOI: 10.12957/rdc.2021.52949

Also a survey coordinated by Betânia de Moraes Alfonsin (2016), in the Court of Justice of Rio Grande do Sul, in the period 2011-2015, concluded that, although 15 years have passed since the publication of the City Statute, it has revealed a timid reception of the new urban legal order in court decisions involving research with key words such as "master plan", "right to the city", "social function of urban property", reinforcing what the authors call the "proprietary model", followed by the idea that the realization of social rights is not a task for the Judiciary, but for the Executive.

What will define the loss of property and the right to occupy it is ideological – it is not conceptual – but the epistemology of concepts does not allow discussing the political meaning of legal knowledge, since "os conceitos são construídos pela razão como uma tentativa de suprimir das ideias seus vínculos com as representações ideológicas ou metafisicas e com suas relações com Q poder[12]" (WARAT, 1982, p.53).

This is what does not appear in the decisions and that the jurists' theoretical common sense dispenses with: the deepening of the conditions and relationships that such beliefs mythologize. Knowledge becomes purified by reason.

3 THE STRATEGY OF THE RATIONAL-BASED DISCOURSE FROM THE ANALYSIS OF JUDICIAL DECISIONS ON OCCUPATION / INVASION OF ABANDONED PROPERTY

The court decisions that involve the discussion about entering abandoned properties reveal an ambiguity: sometimes the fact is considered an occupation, sometimes an invasion; now the property is abandoned, now it is just empty; now it is a question of a legitimate entry, now of a dispossession.

There is a construction, so to speak, of a syllogism, which is implicit in the conclusion reached by the court decision: if the property is abandoned, then the act of entering it is an occupation and, therefore, it is legitimate; but if the property is only empty, momentarily unoccupied, this act is an invasion and therefore it is illegitimate; if the property is public, there is no possession, but detention; if the property is public and possession is not possible, it is irrelevant that it is abandoned.

But how to distinguish whether the property is abandoned or empty? And this distinction stems from an explicit norm? And why public property possession is not possible? Why is abandonment irrelevant to the public property? Who built these concepts? There is a set of beliefs that even start from norms that do not exist, but which, when applied, seem to be extracted from it.

As proposed in this study, we will seek to demonstrate that, behind an apparently well constructed syllogism, there is, as Warat (1982, p.55) points out, an institutional appropriation of

[12] The concepts are constructed by reason as an attempt to suppress from ideas their links with ideological or metaphysical representations and with their relations with Q power. (Free translation)

vol. 13, nº 4. ISSN 2317-7721
DOI: 10.12957/rdc.2021.52949

concepts, producing versions of theories adjusted to beliefs, representations and to the interests legitimated by the institutions.

In addition to the perfectly constructed rational discourse, in which rules are rules and principles are principles, in which there is only a single answer, behind formulas that seek certainty, there is a discursive strategy (rhetoric) in legal discourse, which seeks exactly the purpose for which it has always existed: to represent a truth!

The separation of concepts from their producing theories allows for the constitution of a system of truths, which is not linked to content, but rather to legitimizing procedures, which are crucial for social consensus. (WARAT, 1982, p. 55)

It is not noticed that there is an institutional appropriation of concepts, to exercise the power of meanings. This is present in the performance of these professionals and in the construction of these decisions.

The use of concepts, disconnected from their producing theories, allows the constitution of a system of truths that is not linked to content, but to legitimizing procedures, which are decisive for social consensus.

We know that all argumentation is rhetorical, even scientific argumentation. But not only that. It is not just a rhetorical use of these expressions: occupation and invasion. Words, we know, carry meanings, which, in general, are in the dictionary. But beyond that, words, with use, can be permeated with different meanings that are constructed from the contexts in which they are used and who uses them. Of course, when saying that the property was invaded or when saying that it was occupied, different meanings are involved.

But the terminology used reveals that, after all, there is no innocence in the language of law! Occupation and invasion seek to represent concepts, to constitute a system of truths. If the plaintiff claims that his/her property has been invaded, it will soon have to be reinstated, as there has been a dispossession. If the defendant claims that he occupied it, it must be kept, as the property was abandoned.

But is there a legal meaning to these expressions? Does the legislator differentiate between legal consequences? If the property is occupied, rather than invaded, will the legal treatment be different? Is there a difference between an empty property and an abandoned property? Between a public and private property? Between occupation and invasion?

On May 10, 2017, the newspaper A Gazeta, in its online version, published the following article: "Juiz autoriza permanência de famílias que ocupam prédio no Centro de Vitória[13]". This was the

[13] Judge authorizes the permanence of families occupying a building in the center of Vitória. (Free translation)

vol. 13, nº 4. ISSN 2317-7721
DOI: 10.12957/rdc.2021.52949

content of the preliminary injunction rendered in Action for Repossession n. 0012600-97.2017.4.02.5001 filed by the Union against the occupants.

Among the speeches, the Union claimed that the building was invaded by members of the Movimento Nacional de Luta pela Moradia (National Movement for the Struggle for Housing) and others and requested the repossession of the property. In turn, the movement claimed that they did not invade it, but that they occupied the property that had been abandoned for over 10 years.

On the other hand, on September 19, 2017, the G1 portal reported that a building that had been abandoned for more than 4 years was invaded by drug users and homeless people, giving the following title to its article "Prédio com obra parada há anos é invadido em Jardim Camburi, Vitória[14]". (ALVARENGA, 2017).

What makes these cases different?

In both, the building – the object of the discussion – was admittedly abandoned. In the first, property was public and, in the second, private, but the first was treated as an occupation and the second as an invasion.

This clash has been taking place all too often. We have been watching daily news of abandoned properties that have been occupied by groups of people.

Some time ago, on November 7, 2011, a public property belonging to the City of São Paulo was occupied by members of homeless movements. They claimed that the property was abandoned, and the City filed the repossession action n. 0045635-59.2011.8.26.0053, claiming that there was no abandonment and that the property had been invaded.

The lower court decision recognized the right of these occupants to remain in the property, but the decision of the higher court did not see it that way and determined the eviction of the property, considering that there was an invasion of the public property, as shown below:

> POSSESSÓRIA. Capital. Bem público. Imóvel desapropriado e em seguida invadido por um grupo de pessoas. Direito à moradia. Projeto de implantação da Escola Circo Piolim. 1. Bem público. Posse. Os imóveis foram desapropriados para implantação de serviço de interesse público afeto à Secretaria Municipal da Cultura; são bens públicos dominiais que afastam a posse ou direito de terceiros. Comprovado o arrombamento, a invasão e o uso privado do bem, sem fundamento em lei ou contrato, a concessão da reintegração imediata na posse é de rigor. 2. Colisão de direitos. O direito à moradia e o direito de propriedade não são colidentes; são complementares, uma vez que um e outros são exercidos na forma da lei. Inexistência de dispositivo ou princípio constitucional que assegure a apropriação privada de bem público para satisfação imediata de interesse particular, ainda que meritório. 3. Realocação dos moradores. Descabe condenar o município a realocar os moradores. É providência que ofende a separação dos poderes, implica em gastos públicos cuja precedência cabe ao

[14] Building with works stopped for years is invaded in Jardim Camburi, Vitória. (Free translation)

vol. 13, nº 4. ISSN 2317-7721
DOI: 10.12957/rdc.2021.52949

> executivo definir e onera o erário com uma despesa a que não deu causa. Improcedência. Recurso do Município e reexame providos para julgar a ação procedente[15].

Note that the decision emphasizes the invasion of the property and thus places the occupants as ousters, without legal protection.

The preliminary injunction in case No. 0012600-97.2017.4.02.5001, proposed by the Union in the face of the Movimento Nacional de Luta por moradia (National Movement for the Fight for Housing), kept the occupants of the property, considering the abandonment of the property many years ago and, as public property, conditioned the removal of residents as long as these people were placed in housing offered by the Government:

> É certo que a posse real e a propriedade da União sobre os bens públicos é tutelada pelo Código Civil, e merece proteção jurisdicional. Ocorre que, no caso, entendo ser possível relativizá-la provisoriamente, em face do direito de moradia, ante a já ressaltada relevância deste na hipótese concreta. Soma-se a isso o fato de que o bem público ora discutido encontra-se trancado desde o ano de 2010 (fl. 07), sem qualquer afetação para a concretização das finalidades públicas, sendo tal fato público e notório, de forma que a manutenção provisória dos indivíduos no local não prejudicará a execução de serviços públicos.[16]

[15] POSSESSION. Capital. Public good. Property expropriated and then invaded by a group of people. Right to housing. Project to implement the Circo Piolim School. 1. Public good. Possession. The properties were expropriated for the implementation of a public interest service related to the Municipal Department of Culture; they are public property that removes the possession or rights of third parties. Once the burglary, invasion and private use of the property has been proven, without basis in law or contract, the granting of immediate reintegration into possession is strictly enforced. 2. Collision of rights. The right to housing and the right to property are not in conflict; they are complementary, since one and the others are exercised in accordance with the law. Inexistence of a constitutional provision or principle that ensures the private appropriation of a public asset for the immediate satisfaction of a private interest, even if meritorious. 3. Relocation of residents. It is wrong to order the municipality to relocate the residents. It is a measure that offends the separation of powers, implies public expenditures whose precedence falls to the executive to define and encumbers the treasury with an expense that it did not cause. Dismissal. Municipality's appeal and re-examination granted to judge the action well founded. (Free translation)

[16] It is true that the real possession and ownership of the Union over public assets is protected by the Civil Code, and deserves jurisdictional protection. It so happens that, in this case, I understand that it is possible to provisionally relativize it, in view of the right to housing, given its already highlighted relevance in the concrete hypothesis. Added to this is the fact that the public property discussed herein has been locked since 2010 (page 07), without any affectation for the achievement of public purposes, this fact being public and notorious, so that the provisional maintenance of individuals in the place will not harm the performance of public services. (Free translation).

The decision determined the Federal Government and the occupants that: "c) Make efforts so that the eviction of the property takes place in order to preserve the constitutional rights of the people who are there, and these must be relocated to suitable places for their dignified survival. In detail, the Union and the Movement may request the support of other public bodies and entities, in particular the Municipality of Vitória and DPU and MPF. d) Bring to the file a coordinated eviction plan, with forecast dates for eviction and relocation of families who do not really have a home, in aid, if applicable, from the Municipality of Vitória and DPU and MPF, among other bodies". (Brazil. Federal Regional Court (2nd Region). 3rd Civil Court. Repossession Action No. 0012600-97.2017.4.02.5001 (2017.50.01.012600-0). Judge Luís Fernando Camargo de Barros Vidal. Vitória,

vol. 13, nº 4. ISSN 2317-7721
DOI: 10.12957/rdc.2021.52949

The clash is always put this way: on the one hand, the allegation of invasion; on the other, that of occupation | on the one hand, the claim of vacating the property; on the other, that of abandonment | on the one hand, the allegation of dispossession; on the other, that of occupation | on the one hand, the public good; on the other, the private good.

We occupy different discursive spaces when we choose to use expressions, because this changes according to what we want to bring to the convincing process.

Proof of this is that the Movimento dos trabalhadores sem teto (MTST - Homeless Workers' Movement) repudiates the word invasion for its actions. Its leader Guilherme Boulos, in an interview on the newspaper O Estado de São Paulo, on July 6, 2014 (PEREIRA) and, also, in a video produced by Mídia Ninja, entitled "Por que ocupamos" (Why we occupy), calls 'occupation' the action of the movement, seeking to distinguish the act of invading and the act of occupying:

> Invadir, como costuma usar aqui o Estado, se referiria a você entrar em um lugar que já está ocupado por alguém. Invadir é o que os Estados Unidos fizeram no Iraque. Chegar com tropas e matar. É o que Israel faz na Palestina, na Faixa de Gaza, na Cisjordânia. Isso é invadir. Ninguém vai chegar na tua casa e dizer: estamos entrando aqui. Isso é invadir. Isso o MST não faz. Ocupar é tomar lugares ociosos.[17]

But why this need to linguistically differentiate these acts? Why enter someone else's property can be invaded or occupied? Is there a difference between abandoned or empty property? Is there a difference between entering a public or private property when the property is abandoned?

Note that these decisions make little or no reference to the norm, there is no deduction from a legal text that makes this conclusion follow. In fact, the concept is built for the conclusion, as it is the decision that imposes the construction of the concept and not the other way around (but we will leave this to be concluded later, when protecting liberal property, the concept becomes "entering property is dispossession", but, by protecting possession and the social right to housing, the concept becomes "if the property is abandoned, occupation is a lawful act").

If there is no explicit norm, as interpreters want, if there are no principles for a collision between them to justify a consideration, then what field are we in?

2012https://eproc.jfes.jus.br/eproc/controlador.php?acao=acessar_documento&doc=50157643893738731193 1605886699&evento=501576438937387311931605940714&key=219193ed6665ac6222e160d65d4b4c54c398 4079bcbcdcbcdcb4c543984079bcdcbc. Accessed on: July 13, 2020.

[17]Invading, as the State usually uses here, would refer to you entering a place that is already occupied by someone. Invading is what the United States did in Iraq. Arrive with troops and kill. This is what Israel does in Palestine, in Gaza, in the West Bank. This is to invade. Nobody will come to your house and say: we are entering here. This is to invade. This the MST does not do. To occupy is to take up idle places. (Free translation) BOULOS, Guilherme. Por que ocupamos? Midia Ninja. YouTube. Available on: https://www.youtube.com/watch?v=H8-O2_JuILo. Accessed on 20 Aug. 2021.

vol. 13, nº 4. ISSN 2317-7721
DOI: 10.12957/rdc.2021.52949

See the summary of this decision, which we will call D1:

> AÇÃO DE REINTEGRAÇÃO DE POSSE. IMÓVEL PÚBLICO DE USO COMUM. [...]. AJUIZAMENTO DE DEMANDA POSSESSÓRIA QUE PRESCINDE DE PRÉVIA INSTAURAÇÃO DE PROCEDIMENTO ADMINISTRATIVO. UTILIZAÇÃO DOS ELEMENTOS COLHIDOS NO PROCEDIMENTO APENAS COMO ELEMENTOS DE INFORMAÇÃO. TEORIA DA DESCOBERTA INEVITÁVEL POR FONTE INDEPENDENTE EM CIDADE DE GRANDE PORTE, AO LADO DE UM VIADUTO. TITULARIDADE PÚBLICA DO IMÓVEL E ESBULHO PELO RÉU. FATOS INCONTROVERSOS. DESCASO DO MUNICÍPIO PARA COM SEU IMÓVEL. OMISSÃO QUE CONFERE AOS VIZINHOS E CIDADÃOS INTERESSADOS A POSSIBILIDADE DE CUIDAR E REALIZAR A MANUTENÇÃO NECESSÁRIA DO BEM PÚBLICO DE USO COMUM, DESDE QUE PRESERVADA A FINALIDADE PÚBLICA PRÓPRIA DO IMÓVEL. SITUAÇÃO QUE NÃO SE CONFUNDE COM O EXERCÍCIO DE POSSE DE MANEIRA EXCLUSIVA POR PARTICULARES SOBRE O IMÓVEL PÚBLICO. DEFORMAÇÃO DA FINALIDADE PÚBLICA DO IMÓVEL. OCUPAÇÃO COM EXCLUSIVIDADE QUE AFASTA A POSSIBILIDADE DE USO COMUM DO BEM. OCUPAÇÃO INDEVIDA. APELAÇÃO DESPROVIDA. 1. [...] 2. [...] 3. O fato do Município proprietário não tomar os cuidados necessários para a manutenção do terreno, ainda que por anos, não autoriza os vizinhos ou quem quer seja a ingressar no imóvel público de uso comum e passar a possuí-lo com exclusividade. Não existe um direito de invadir o terreno público, mesmo frente ao abandono do proprietário em relação aos cuidados básicos com o imóvel. 4. O que existe, isto sim, é a possibilidade dos vizinhos ou interessados tomarem as providências adequadas para impedir que o desleixo do ente público proprietário em relação ao terreno abandonado prejudique sua saúde, tranquilidade ou a utilização adequada de seus próprios imóveis - como carpir o local, revitalizá-lo ou fazer sua manutenção -, com posterior ressarcimento, a depender do caso, pelo proprietário do imóvel abandonado (ente público) dos valores dispendidos para tanto, por meio do instituto da gestão de negócio alheio sem mandato (arts. 868 a 870 do CCB)[18].

[18] REPOSSESSION ACTION. PUBLIC PROPERTY FOR COMMON USE. [...]. FILING OF POSSESSORY CLAIMS WHICH WILL WAIVE THE PREVIOUS ADMINISTRATIVE PROCEDURE. USE OF THE GATHERED ELEMENTS IN THE PROCEDURE ONLY AS INFORMATION ELEMENTS. THEORY OF INEVITABLE DISCOVERY BY INDEPENDENT SOURCE IN A BIG CITY, NEXT TO A VIADUCT. PUBLIC OWNERSHIP OF THE PROPERTY AND DISPOSSESSION BY THE DEFENDANT. DISPUTE FACTS. THE MUNICIPALITY'S NEGLECT TO PROPERTY. OMISSION THAT GIVES INTERESTED NEIGHBORS AND CITIZENS THE POSSIBILITY OF CARING FOR AND CARRYING OUT THE NECESSARY MAINTENANCE OF PUBLIC GOODS IN COMMON USE, PROVIDED THAT THE PUBLIC PURPOSE OF THE PROPERTY IS PRESERVED. SITUATION THAT IS NOT TO BE MADE UP WITH THE EXCLUSIVE POSSESSION OF PUBLIC PROPERTY BY PARTICULARS. DEFORMATION OF THE PUBLIC PURPOSE OF THE PROPERTY. OCCUPATION WITH EXCLUSIVITY THAT REMOVES THE POSSIBILITY OF COMMON USE OF THE PROPERTY. UNDUE OCCUPATION. APPEAL UNPROVIDED. 1. [...] 2. [...] 3. The fact that the Municipality-owner does not take the necessary care to maintain the land, even for years, does not authorize neighbors or anyone else to enter the public property of common use and start to own it with exclusivity. There is no right to invade public land, even in the face of the owner's abandonment of basic care for the property. 4. What does exist, however, is the possibility for neighbors or interested parties to take the appropriate measures to prevent the negligence of the public entity in relation to the abandoned land from jeopardizing their health, tranquility or the proper use of their own properties - such as treat the place, revitalize it or maintain it -, with subsequent reimbursement, depending on the case, by the owner of the abandoned property (public entity) of the values spent for that, using the institute of management of others' business without a mandate (Arts. 868 to 870 of the CCB). (Free translation)

vol. 13, nº 4. ISSN 2317-7721
DOI: 10.12957/rdc.2021.52949

There are a series of implicit references in this legal discourse, many premises are implicit, as well as implicit are several norms, which, in the general analysis, lead us to an idea of explicitness, when they are neither explicit nor implicit.

What sentences are extracted from this decision:

a. A property that has not been taken care of for years does not imply that it has been abandoned.
b. Abandoned property does not authorize entry.
c. It is not possible - even in the face of abandonment - the exercise of ownership with exclusivity by third parties.
d. There is no right to invade public property, even if abandoned.
e. Neighbors and interested parties have the right to take adequate measures to prevent neglect of public property, which could harm their health and tranquility.
f. Neighbors can be reimbursed by the owner of the property (public) for expenses with its conservation.

It is curious that there is no reference to the legal norm, it is never mentioned, or even explained. However, reading the decision gives us a sense of completeness and logical coherence, as if there were deductions drawn from a legal text.

And, more than that, these deductions seem to be universal, as if they were derived from an explicit legal norm that would necessarily lead to that conclusion.

But analyzing other decisions involving the same factual situation – entering someone else's property – it is clear that the conclusion is different, but the discursive strategy is the same.

Sobota (1996) suggests that, in everyday legal rhetoric, it is a legal characteristic of the norms used that they only exist in the sphere of allusion or implication.

Indeed, the first advantage, according to the author, is that if judges and lawyers do not verbalize the alleged major premises, they can hide the inconsistency of the entire regulatory system. The second advantage, in turn, is that a speaker can modify the alleged meaning of the norm and adapt it to each situation. The third advantage is that tacit norms can form a link between the archaic world of emotional, non-verbalized regularities and the verbalized rationality of the classical West. (SOBOTA, 1996, p. 55)

See, in this second decision, called D2:

> INGRESSO EM IMÓVEL ABANDONADO. AUSÊNCIA DO VÍCIO OBJETIVO DA CLANDESTINIDADE. PUBLICIDADE DA AÇÃO. POSSE JUSTA. ESBULHO DESCARACTERIZADO. FUNÇÃO SOCIAL DA POSSE. DIREITO CONSTITUCIONAL À MORADIA. DIGNIDADE DA PESSOA HUMANA. 1. Nas ações possessórias veda-se a discussão de domínio, já que a causa de pedir e o pedido devem versar exclusivamente sobre posse, independentemente da alegação de propriedade ou de outro direito sobre a coisa. 2. No juízo possessório, portanto, não poderá o juiz conhecer da alegação, em defesa, do direito de propriedade (exceção de domínio), operando-se assim, uma total separação, no direito vigente, entre *ius possessionis* e *ius possidendis*. 3. O ingresso público e ostensivo em imóvel abandonado, no qual o atual possuidor constrói sua residência concedendo ao

vol. 13, nº 4. ISSN 2317-7721
DOI: 10.12957/rdc.2021.52949

> bem função social, descaracteriza o vício objetivo da clandestinidade e afasta, consequentemente, a alegação de esbulho. 4. Em circunstâncias tais, a posse insere-se entre os direitos da personalidade, na medida em que concede efetividade ao direito social à moradia (artigo 6º da Constituição Federal) e oportuniza ao cidadão, acesso a bens vitais mínimos capazes de conferir dignidade à pessoa humana (artigo 1º, inciso III, da Constituição Federal), fomentando consequentemente, o desenvolvimento da entidade familiar. 5. Recurso conhecido e provido. Sentença reformada[19].

The sentences that are extracted from this decision are:

a. Entering abandoned property is legitimate.
b. Entering an abandoned property, in a public and ostensive way, does not characterize dispossession.
c. It is not possible to discuss property in the possessory court.
d. Possession is one of the rights of personality
e. When possession in abandoned property is aimed at family residence, it meets the social right to housing (Art. 6 CF)
f. Housing is a social right that guarantees access to the minimum vital goods capable of conferring dignity to the human person.

Note that, again, there is no reference to an explicit legal norm from which to draw the conclusion of the decision. But, again, it seems that everything acquires a logical and coherent consistency and, although there is no reference to this explicit legal norm, several implicit norms emerge, as well as the advantage, pointed out by Sobota (1996), of the speaker modifying the meaning of the norm, adapting it to each situation. Note that, in D1, the abandonment of the property is not a reason for entry, on the contrary, entry into an abandoned property characterizes invasion; on the other hand, in decision D2, the abandonment of the property authorizes its entry and, as this entry is public and ostensible, it does not characterize dispossession and also, when the possessor builds his/her residence there and meets the social right to housing, it must be maintained in the property, as it fulfills its social function.

Furthermore, as the third advantage pointed out by Sobota, there is the construction of a "sentimental" link between fact and norm. After all, in D2, there is recourse to moral feelings, as there

[19] ADMISSION TO ABANDONED PROPERTY. ABSENCE OF THE OBJECTIVE VICE OF CLANDESTINITY. PUBLICITY OF THE ACTION. FAIR POSSESSION. DISCHARACTERIZED DISPOSSESSION. SOCIAL FUNCTION OF POSSESSION. CONSTITUTIONAL RIGHT TO HOUSING. DIGNITY OF THE HUMAN PERSON. 1. In possessory actions, discussion of domain is prohibited, since the cause of the claim and the request must be exclusively about possession, regardless of the claim of ownership or other right over the thing. 2. In the possessory court, therefore, the judge cannot hear the allegation, in defense, of the right to property (domain exception), thus operating a total separation, in the current law, between *ius possessionis* and *ius possidendis.* 3. Public and ostensible entry into abandoned property, in which the current owner builds his residence, granting the property a social function, mischaracterizes the objective vice of clandestinity and, consequently, rules out the allegation of dispossession. 4. In such circumstances, possession is one of the rights of the personality, as it grants the social right to housing (Article 6 of the Federal Constitution) and provides citizens with access to minimum vital goods capable of conferring dignity to the human person (article 1, item III, of the Federal Constitution), thus promoting the development of the family entity. 5. Known and provided Appeal. Reformed sentence. (Free translation)

vol. 13, nº 4. ISSN 2317-7721
DOI: 10.12957/rdc.2021.52949

is the valuation of housing in the property of others – but abandoned – over the protection of abandoned property.

In a country with so many homeless people living on the streets, the appeal to this humanitarian feeling is a rhetorical, discursive strategy, very important for the construction of this concept.

See how, in several decisions, this element gains more prominence than the reference to the legal texts from which these conclusions seem to be drawn.

In this excerpt of the 1st degree sentence, handed down by the court of the 3rd Court of the Public Treasury of São Paulo, which we will call D3, this element is highlighted:

> O poder público municipal encontra-se em inescusável mora com a realização do direito social fundamental de habitação, e pretende destinar um conjunto de prédios para a instalação de equipamento cultural que poderia ser alocado numa lona, e posterga uma solução razoável para a situação de privação de direitos do conjunto da população que ali acode, recusando-se a qualquer forma de diálogo construtivo, dando assim, ensanchas para que o comportamento dos requeridos seja considerado como de exercício do direito fundamental de resistência por meio do qual questionam a injustiça da opção administrativa e sua desconformidade com a precedência e a prevalência do direito fundamental. **Neste panorama, a propriedade pública aflora desfuncionalizada, e sua posse se afigura capenga, cedendo àquela dos requeridos porque assentada no melhor título jurídico que é o direito social à habitação, não havendo que se protegê-las à conta de uma certidão imobiliária. A dimensão publicística do conflito exige solução diversa da proteção possessória do direito privado, e autoriza o acolhimento da exceção do contrato social não cumprido**.[20]" (own highlights)

But this same element is not considered in this other decision (D4), which, on the contrary, uses it, but rejects it, as there is the impression of a cold, insensitive decision.

> AGRAVO DE INSTRUMENTO – NÃO CONHECIMENTO POR DESCUMPRIMENTO DO ART. 526 DO CPC – INADMISSIBILIDADE – AUSÊNCIA DE PREJUÍZO DO CONTRADITÓRIO DA PARTE ADVERSA – REJEIÇÃO DA PRELIMINAR ARGUIDA

[20] The municipal government is inexcusably late with the realization of the fundamental social right to housing, and intends to allocate a set of buildings for the installation of cultural equipment that could be allocated on a tarpaulin, and postpones a reasonable solution to the situation of deprivation of the rights of the population as a whole, refusing any form of constructive dialogue, thus allowing the defendants' behavior to be considered as the exercise of the fundamental right of resistance through which they question the injustice of the administrative option and its non-compliance with the precedence and prevalence of the fundamental right. **In this panorama, public property appears to be defunctionalized, and its possession appears lame, yielding to that of the defendants because based on the best legal title, which is the social right to housing, without having to protect them on account of a real estate certificate. The publicity dimension of the conflict requires a different solution from the possessory protection of private law, and authorizes the acceptance of the exception of the non-fulfilled social contract**. (Free translation)

vol. 13, nº 4. ISSN 2317-7721
DOI: 10.12957/rdc.2021.52949

> PELA AGRAVADA. JUSTIÇA GRATUITA - PEDIDO PENDENTE DE APRECIAÇÃO EM PRIMEIRO GRAU NOS AUTOS DA AÇÃO PRINCIPAL – NÃO CONHECIMENTO DA MATÉRIA, SOB PENA DE SUPRESSÃO DE INSTÂNCIA. POSSE – LIMINAR EM AÇÃO DE REINTEGRAÇÃO DE POSSE – CABIMENTO – **Réus são integrantes do "Movimento dos Sem Teto", cuja ilegal ocupação de áreas se sustenta invariavelmente na surrada composição teórica da "função social da propriedade" - Teoria que não elimina o princípio constitucional de proteção à propriedade - É a lei, não a vontade de um grupo de pessoas, que estabelece os mecanismos para se impor sanção à propriedade que não cumpre a função social – Ocupação do imóvel por várias famílias humildes – Irrelevância - Questão social que deve ser solucionada pelas autoridades competentes e não torna lícita a ocupação** - A Constituição Federal, embora consagrando a finalidade social da propriedade (cf. art. 184), não derrogou as normas de proteção ao direito de posse - Fato social não deve ser resolvido pelo particular, mas pelo Poder Público, que o faz, de ordinário, mediante tributação progressiva da propriedade ou desapropriação. Recurso conhecido em parte e desprovido na parte conhecida.[21]" (own highlights)

Regarding public property, it is clear that the construction of a strategic concept is necessary to justify an ideological reading of public property and, as pointed out by Warat (1982, p.53), to ideally resolve the conflict between theory and practice, ignoring the political value of knowledge in praxis, in this way the professional jurist is not seen as an operator of social relations, but rather as a technical operator of legal texts, even if the legal texts do not even say that, but, in this way, the illusion of pure professional activity is created.

This is evident in the summary of this decision D5, as can be seen below:

> AÇÃO DE INDENIZAÇÃO POR DANOS MORAIS E MATERIAIS CONSTRUÇÃO IRREGULAR EM ÁREA PÚBLICA Demolição determinada - Bem público que não induz posse a favor do particular, que sobre ele exerce mera detenção - Irrelevância de boa-fé - Utilização de critérios de proporcionalidade e ponderação, na colisão entre direitos fundamentais Indevida indenização por quaisquer danos - Natureza de construção irregular em área pública, o que não configura posse, nem autoriza benfeitorias, por mera inércia do Poder Público Dano material indevido - Dano extrapatrimonial que não se configurou, vez que

[21] INTERLOCUTORY APPEAL - NON-KNOWLEDGE FOR NON-COMPLIANCE WITH ART. 526 OF THE CPC - INADMISSIBILITY - ABSENCE OF DAMAGES OF THE ADVERSE PARTY'S CONTRADICTORY - REJECTION OF THE PRELIMINARY BROUGHT BY THE APPELLATE. FREE JUSTICE - REQUEST PENDING FIRST DEGREE APPRECIATION IN THE FILES OF THE MAIN ACTION - LACK OF KNOWLEDGE OF THE MATTER, UNDER PENALTY OF SUPRESSION OF INSTANCE. POSSESSION – INJUNCTION IN ACTION FOR REINTEGRATION OF POSSESSION – APPROPRIATENESS – **Defendants are members of the "Movement of the Homeless", whose illegal occupation of areas is invariably supported by the well-worn theoretical composition of the "social function of property" - Theory that does not eliminate the constitutional principle of property protection - It is the law, not the will of a group of people, which establishes the mechanisms to impose sanctions on property that does not fulfill its social function - Occupation of the property by several humble families - Irrelevance - Social issue that must be resolved by the competent authorities and does not make the occupation lawful** - The Federal Constitution, although enshrining the social function of the property (cf. art. 184), did not derogate from the rules of protection to the right of possession - Social fact should not be resolved by the private individual, but by the Public Authority, which does so, usually, through progressive taxation of property or expropriation. Resource known in part and unprovided in the known part. (Free translation)

vol. 13, nº 4. ISSN 2317-7721
DOI: 10.12957/rdc.2021.52949

> a conduta da Municipalidade não apresenta nexo de causalidade a ensejar o resultado danoso vivenciado pelo autor, que, por si, edificou em área pública, sem autorização, restando sujeito, portanto, aos riscos inerentes a tal ato - Sentença de improcedência mantida - Precedentes Apelo desprovido[22]".

What sentences are extracted from this decision:

a. There is no possession of public property.
b. The occupation of public property is considered detention.
c. The good faith of the occupants is irrelevant.
d. As detention, there is no right to indemnity for accessions and improvements.
e. The occupation of public property is a risk assumed by the occupant that does not guarantee compensation.

In turn, in decision D6, changing the prevailing legal position until then, it understood that possession of public property is possible, when the dispute occurs between private parties.

> BEM PÚBLICO DOMINICAL. LITÍGIO ENTRE PARTICULARES. INTERDITO POSSESSÓRIO. POSSIBILIDADE. FUNÇÃO SOCIAL. OCORRÊNCIA. 1. Na ocupação de bem público, duas situações devem ter tratamentos distintos: i) aquela em que o particular invade imóvel público e almeja proteção possessória ou indenização/retenção em face do ente estatal e ii) as contendas possessórias entre particulares no tocante a imóvel situado em terras públicas. 2. A posse deve ser protegida como um fim em si mesma, exercendo o particular o poder fático sobre a res e garantindo sua função social, sendo que o critério para aferir se há posse ou detenção não é o estrutural e sim o funcional. É a afetação do bem a uma finalidade pública que dirá se pode ou não ser objeto de atos possessórias por um particular. 3. A jurisprudência do STJ é sedimentada no sentido de que o particular tem apenas detenção em relação ao Poder Público, não se cogitando de proteção possessória. 4. É possível o manejo de interditos possessórios em litígio entre particulares sobre bem público dominical, pois entre ambos a disputa será relativa à posse. 5. À luz do texto constitucional e da inteligência do novo Código Civil, a função social é base normativa para a solução dos conflitos atinentes à posse, dando-se efetividade ao bem comum, com escopo nos princípios da igualdade e da dignidade da pessoa humana. 6. Nos bens do patrimônio disponível do Estado (dominicais), despojados de destinação pública, permite-se a proteção possessória pelos ocupantes da terra pública que venham a lhe dar função social. 7. A ocupação por particular de um bem público abandonado/desafetado - isto é, sem destinação ao uso público em geral ou a uma atividade administrativa -, confere justamente a função social da qual o bem está carente em sua essência. 8. A exegese que reconhece a posse nos bens dominicais deve ser conciliada com a regra que veda o reconhecimento da

[22] INDEMNITY ACTION FOR MORAL AND MATERIAL DAMAGES IRREGULAR CONSTRUCTION IN A PUBLIC AREA Determined demolition - Public property that does not induce possession in favor of the private person, who only holds detention over it - Irrelevance of good faith - Use of proportionality and weighting criteria, in the collision between fundamental rights undue indemnity for any damages - Nature of irregular construction in a public area, which does not constitute possession, nor does it authorize improvements, due to the mere inertia of the Public Authority. Material damages undue – Extra-patrimonial damage that has not been configured, instead that the conduct of the municipality presents no causal link to assess the harmful result experienced by the author, who, for himself, built in a public area, without authorization, therefore, remaining subject to the risks inherent to the act – Unfounded sentence maintained – Precedents. Appeal unprovided. (Free translation)

vol. 13, nº 4. ISSN 2317-7721
DOI: 10.12957/rdc.2021.52949

> usucapião nos bens públicos (STF, Súm 340; CF, arts. 183, § 3°; e 192; CC, art. 102); um dos efeitos jurídicos da posse - a usucapião - será limitado, devendo ser mantido, no entanto, a possibilidade de invocação dos interditos possessórios pelo particular. 9. Recurso especial não provido"[23].

From this decision, we can extract the following sentences:

a. When the private person enters public property, this is an invasion.
b. There is no possession of a private person over the public authorities.
c. There is possession of public property between private individuals.
d. There is possession of public property that is not assigned to a public service.
e. This possession is only recognized when there is a dispute between private parties and not between the private person and public authorities.
f. The social function is the normative basis for conflicts related to possession, as long as the possession dispute is between private parties and not between the private person and the public authorities.

What is noticed is that there is no coherence as a whole, there are discursive constructions, to make a given court decision coherent and logical. There is a constructed truth that makes use of this positivist apparatus, through these syllogisms, creating the illusion of a pure professional activity. It seems, as we've said, that all you do is apply the norm, even if you don't have a norm!

If the property was abandoned, then entry was an occupation and not an invasion, therefore it is lawful; if the property is not abandoned, then entry was an invasion, therefore dispossession is illegal; if the property is public, there is no possession but detention, but if the dispute over the public property is between two individuals, it is possible to speak of possession and social function.

[23] DOMINICAL PUBLIC GOOD. DISPUTES BETWEEN INDIVIDUALS. POSSESSORY INTERDICT. POSSIBILITY. SOCIAL FUNCTION. OCCURRENCE. 1. In the occupation of public property, two situations must have different treatments: i) that in which the individual invades public property and seeks possession protection or indemnity/retention against the state entity and ii) possessory disputes between individuals regarding the property situated on public land. 2. Possession must be protected as an end in itself, with the individual exercising the factual power over the *res* and guaranteeing its social function, and the criterion for assessing whether there is possession or detention is not the structural but the functional. It is the allocation of the property to a public purpose that will tell whether or not it can be the object of possessory acts by a private person. 3. The jurisprudence of the STJ is consolidated in the sense that the individual has only detention in relation to the Public Power, not considering possessory protection. 4. It is possible to handle possession interdictions in litigation between private parties over dominical public good, since between them the dispute will be related to possession. 5. In light of the constitutional text and the intelligence of the new Civil Code, the social function is the normative basis for the solution of conflicts relating to possession, giving effect to the common good, with scope in the principles of equality and dignity of the human person . 6. In the assets of the State's available patrimony (dominical), deprived of public destination, possessory protection is allowed by the occupants of the public land that may give it a social function. 7. Private occupation of an abandoned/disaffected public property - that is, not intended for public use in general or for an administrative activity -, confers precisely the social function of which the good is essentially lacking. 8. The exegesis that recognizes possession of dominical goods must be reconciled with the rule that prohibits the recognition of adverse possession in public goods (STF, Súm 340; CF, arts. 183, § 3; and 192; CC, art. 102); one of the legal effects of possession - adverse possession - will be limited, although the possibility of invoking the possessory interdictions by the individual must be maintained. 9. Special appeal not provided. (Free translation)

vol. 13, nº 4. ISSN 2317-7721
DOI: 10.12957/rdc.2021.52949

But this syllogism does not appear explicitly in the decision, even so because there is no rule that makes it explicit. So, we will notice that decisions create this illusion of certainty, hiding many of these premises, which become only implicit, without even referring to legal texts (1st advantage), adapting the meaning of the law to each situation (2nd advantage) and still resorting to tacit norms, to moral content, which will establish this link between emotion and western reason (3rd advantage).

IN SEARCH OF CRITICAL KNOWLEDGE: AN ATTEMPT OF CONCLUSION

Throughout this article, we seek to demonstrate that common sense in the name of the scientificity of legal discourse builds truths, but it is necessary to recognize the limits, silences and political functions of official epistemology if we are to seek critical knowledge of law. (WARAT, 1982, p. 49)

We demonstrate, from the lessons of Sobota (1996), that one of the discursive strategies of judicial decisions involving the entry of people into vacant properties with the intention of housing is the apparent construction of a legal syllogism, leaving implicit the legal norms that are established as premises.

But what would then be these legal norms from which these contradictory conclusions are deduced in a general analysis, but coherent in a particular analysis? The first standard to be mentioned is art. 1,275, III, of the CC, which establishes the loss of property through abandonment.[24]

Still on abandonment, art. 1,276 of the CC foresees the possibility of collection by the government under the conditions established therein:

> O imóvel urbano que o proprietário abandonar, com a intenção de não mais o conservar em seu patrimônio, e que se não encontrar na posse de outrem, poderá ser arrecadado, como bem vago, e passar, três anos depois, à propriedade do Município ou à do Distrito Federal, se se achar nas respectivas circunscrições.
> § 1º O imóvel situado na zona rural, abandonado nas mesmas circunstâncias, poderá ser arrecadado, como bem vago, e passar, três anos depois, à propriedade da União, onde quer que ele se localize.
> § 2º Presumir-se-á de modo absoluto a intenção a que se refere este artigo, quando, cessados os atos de posse, deixar o proprietário de satisfazer os ônus fiscais[25].

[24]"In addition to the causes considered in this Code, property is lost: III- by abandonment." BRAZIL. Law No. 10,406, of January 10, 2002. Establishes the Civil Code. Available at: <http://www.planalto.gov.br/ccivil_03 /leis/l7783.htm>. Accessed on: Jan 27, 2019.

[25] The urban property that the owner abandons, with the intention of no longer keeping it in his patrimony, and which is not in the possession of someone else, may be collected, as a vacant property, and be transferred, three years later, to the property of the Municipality or that of the Federal District, if it is located in the respective

vol. 13, nº 4. ISSN 2317-7721
DOI: 10.12957/rdc.2021.52949

In none of the decisions selected here, there was reference to these legal articles, however the discussion about abandonment and entry into the property of others was present.

D1 expressly ruled that the abandonment of a property does not authorize entry by third parties, which is an illegal act.

On the other hand, D2, in the opposite sense, established the right of the possessor to occupy an abandoned property and remain there, when its purpose is housing.

The right to housing was mentioned in some of these decisions. This social right is provided for in art. 6 of the Federal Constitution (CF): Social rights are education, health, food, work, housing, transport, leisure, security, social security, protection of maternity and childhood, assistance to the destitute, in the form of the Constitution.

The CF also provides for the social function of property (art. 5, XXIII) and the right to property (art. 5, XXII).

Another legal norm, which is implicit in some of these decisions, is the concept of unfair possession of art. 1,200 of the CC: "É justa a posse que não for violenta, clandestina ou precária[26]".

Another law that seems to be inferred from the decisions is art. 1,210 of the CC: The possessor has the right to be kept in possession in case of disturbance, reinstated in the case of dispossession, and insured against imminent violence, if he is justly afraid of being molested. Complemented by the art. 560 of the CPC: The possessor is entitled to be kept in possession in case of disturbance and reinstated in case of dispossession.

But all these norms do not lead to a syllogism in which one can, applying the major premise (norm) and the minor premise (fact), deduce their conclusion.

With regard to public property, there is no rule that differentiates it from private property, other than the impossibility of taking it. What is the rule that defines the occupation of a public property as detention and not possession?

Note that, in D5, there is no reference to the legal text, only a concept is built and an ideological interpretation of public property is deduced from it to benefit public authorities.

Every legal construction on the detention of public good is made univocally by the courts and repeated as a legal belief, at best trying to compare it with some kind of detention. But neither in D4,

districts. § 1 The property located in the rural area, abandoned under the same circumstances, may be collected, as a vacant property, and be transferred, three years later, to the property of the Union, wherever it is located. § 2 The intention referred to in this article will be assumed in an absolute way, when, after ceased the acts of possession, the owner fails to meet the tax burdens. (Free translation)

[26] It is fair the possession that is not violent, clandestine or precarious. (Free translation)

vol. 13, nº 4. ISSN 2317-7721
DOI: 10.12957/rdc.2021.52949

nor in D5, reference is made to art. 1,198 or 1,208 that establish in the CC the possibilities of detention.[27]

Concepts have a purpose, which is to suppress the political sense of the knowledge of Law, they are, as Warat states, constructed by reason as an attempt to suppress from ideas their links with ideological representations. Its strategic use in praxis is not analyzed, which is exactly what happens, there is a strategic game, in which these concepts are reappropriated and converted into meanings. (1982).

So, going back to the question at the beginning of this text: what is the difference between occupying and invading? Is it legal or not to occupy an unoccupied property? Should the possessors remain on the property, as their right to housing must be guaranteed? In a legal system of positivist construction, there is always a search for the norm. What does the law say? It is precisely because of the search for a norm that can lead to an answer, that the court decision is presented in the form of a syllogism, so it seems that everything is just a deduction, when it is a well-designed construction that uses several rhetorical strategies.

In this text, we propose to analyze the choice of certain expressions (occupation vs. invasion; empty property vs. abandoned property) – which will reflect concepts shaped to justify that objective.

Thus, if I intend or understand that an abandoned property does not fulfill its social function and that, therefore, the possession exercised there must be protected, I develop this linguistic game, making these constructions, which are not a consequence of the legal text, as the norm is not explicit.

See the case of abandonment of property – the central point of our problem. The norm says: property is lost through abandonment. But that doesn't solve the situation of the occupants, of those who entered there. At least not at first.

In order to conclude that their possession must be protected, to the detriment of the property that was abandoned, there is a whole other elaboration, of several other norms, which are implicit in the decision, in addition to the use of social and moral values.

Likewise, when one wants to protect property, despite its abandonment, abandonment is not made explicit, using expressions such as empty, unoccupied property; it reinforces the illicit nature of entering someone else's property and also uses social values, such as the violence of the invasion, the negative image of these groups that carry out such acts.

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[27]"Art. 1,198. A holder is considered to be one who, finding himself in a dependent relationship with another, retains possession on behalf of the other and in compliance with his orders or instructions." "Art. 1,208. Acts of mere permission or tolerance do not induce possession, nor do violent or clandestine acts authorize their acquisition until after the violence or clandestineness has ceased". (Free translation) BRAZIL. Law No. 10,406, of January 10, 2002. Establishes the Civil Code. Available at: Available at:https://www.planalto.gov.br/ccivil_03/LEIS/2002/L10406.htm. Accessed on: July 19, 2020.

vol. 13, nº 4. ISSN 2317-7721
DOI: 10.12957/rdc.2021.52949

Finally, as this positivist idea is very strong among us, one of the main methods of positivism is the deductive method from which syllogisms are extracted, which lead us to this illusion of certainty. Therefore, the court decision is also constructed rhetorically as a syllogism.

Reading it seems to lead us to deduce that conclusion, however, as observed by Sobota (1996, p.57), the norms used in the judicial decision process are mostly allusions, sometimes filled with information about social reality, but, sometimes also reduced to a general attribution, which can be filled with inexpressible feelings, casual statements of values and achievements also casual of traditional estimation models.

Thus, to conclude with Warat, the limits, silences and political functions of official epistemology must be revealed, so it is necessary to know and understand the political meaning of normativity, if we do not want an apoliticized knowledge of Law.

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vol. 13, nº 4. ISSN 2317-7721
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