COMPENSATION OF RESTRICTIONS CAUSED BY LANDMARK PRESERVATION: THE TRANSFERENCE OF DEVELOPMENT RIGHTS IN THE MUNICIPALITY OF SÃO PAULO

COMPENSAÇÃO DE RESTRIÇÕES CAUSADAS POR TOMBAMENTOS DE IMÓVEIS: A TRANSFERÊNCIA DO DIREITO DE CONSTRUIR NO MUNICÍPIO DE SÃO PAULO

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ABSTRACT

This paper debates, from a fundamental rights dogmatic standpoint, the *theme* of compensation of restrictions to property rights caused by landmark preservation in Brazil. Its *objective* is to assess when and how the transference of development rights provided in the City of São Paulo's master plan should be used as a compensatory mechanism for restrictions to the development potential of urban real estate. As a *method*, we analysed qualitatively seven rulings from four Brazilian Courts of Justice about compensations of restrictions to property rights caused by landmark preservation in Brazil. The *result* achieved by this research is that the transference of development rights under the Municipality of São Paulo's legal regime, especially when not involving the transferring landmarked building's divestiture, distorts the primarily compensatory nature of the instrument regulated by the City Statute. And its main *contribution* is the demonstration that the "incentive" factors prescribed by article 24, items III to VII, of the Zoning Statute and the adoption of the transferring land's area as the calculation basis of the development potential's formula under article 125 of the master plan, both of São Paulo, are deviations of purpose.

Keywords: Fundamental property right; Development potential; Landmark preservation; Transference of development rights; Compensation.

RESUMO

Este artigo discute, do ponto de vista da dogmática dos direitos fundamentais, a *temática* da compensação de restrições ao direito de propriedade causadas por tombamentos de imóveis no Brasil. Seu *objetivo* é avaliar quando e como o instrumento da transferência do direito de construir previsto no plano diretor da cidade de São Paulo deve servir como mecanismo compensatório de restrições ao potencial construtivo dos imóveis urbanos. Como *método*, foram analisadas qualitativamente sete decisões judiciais de quatro tribunais brasileiros sobre compensação de restrições causadas por tombamentos de imóveis.. O *resultado* alcançado por este trabalho é de que o regime jurídico paulistano da transferência do direito de construir, especialmente quando não envolve a alienação do imóvel tombado cedente, deturpa a natureza primariamente compensatória do instrumento regulado pelo Estatuto da Cidade. E sua principal *contribuição* é a demonstração de que os fatores de "incentivo" previstos no art. 24, incisos III a VII, da Lei de Parcelamento, Uso e Ocupação do Solo e a adoção da área do terreno cedente como base de cálculo da fórmula do potencial construtivo passível de transferência do art. 125 do Plano Diretor Estratégico, ambos do Município de São Paulo, são desvios de finalidade.

Palavras-chave: Direito fundamental de propriedade; Potencial construtivo; Tombamento; Transferência do direito de construir; Compensação.

INTRODUCTION

The legal regime of *property rights*, a fundamental right enshrined in art. 5, item XXII, of the Constitution of the Republic of 1988 (CR), is not monolithic, comprising a set of several institutes related to different types of goods.[1] Among these various institutes, there is land ownership, especially urban property, with an unmistakably unique profile. The general regime of urban property is outlined by arts. 182 and 183 of the CR and by the general guidelines of urban policy established by Law 10,257, of July 10, 2001 (City Statute – ECi), while its specific regime, in each municipality, is outlined by the master plan and the legislation from this arising.

A particular expression of this diversity of regimes is the legal protection given to the constructive potential of urban property, evidenced through the transfer of the right to build (TDC). Legal instrument of urban policy affirmed in art. 35 of the ECi, TDC is the option, foreseeable in municipal law based on the master plan, for the owner of urban, private or public property, to exercise the constructive potential of his property in another location, or to dispose of it by means of a public deed, when the asset is necessary for the purposes of: implementation of urban and community facilities; preservation of historical, environmental, landscape, social or cultural interest; or execution of land tenure regularization programs, urbanization of areas occupied by low-income population and social housing.[2]

The main premise of this article is the legal autonomy of the constructive potential in relation to urban property, even if the former is linked to the latter. From the differentiation between the property right of the constructive potential and the urban property right, the article will be able to bring a new approach to an old theme of urban law: the compensation for restrictions to the property right caused by urban real estate tipping.

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[1] GRAU, Eros Roberto. **A ordem econômica na Constituição de 1988**, 16. ed. São Paulo: Malheiros, 2014, p. 236.

[2] The TDC dates back to the notion of created soil, ratified in the Embu Charter, the conclusion of a series of seminars held in 1976, according to which “every building above the single coefficient is considered created soil, whether it involves occupation of airspace or substructures”. -ground". Also according to the Charter, “the owner of a property subject to administrative limitations, which prevent the full use of the single building coefficient, may dispose of the unusable portion of the right to build” and, “in the case of a listed property, the owner may dispose of the right to build corresponding to the built-up area or to the single building coefficient”, cf. AZEVEDO, Álvaro Villaça et. al. Carta do Embu. In: **O solo criado**: anais do seminário. São Paulo: Fundação Prefeito Faria Lima, 1976, p. 169-170.

The *subject* of this article is, from the point of view of the dogmatics of fundamental rights, the use of TDC as a mechanism to compensate for restrictions on property rights caused by property tippings, taking as a reference the legal regime of TDC without the sale of the property. listed as a transferor currently in force in the city of São Paulo.

The *objective* of this work is to identify when and how the Public Power must compensate the restrictions on the property right of the constructive potential caused by the tipping of properties through TDC.

The *justification* of this investigation is the finding that there is a great discrepancy in the treatment given by the jurisprudence, sometimes even within the same court, to the restriction of the property right through tipping, which generates deep legal uncertainty and casuism in the application of the right.

To demonstrate this oscillation, a qualitative analysis will be made of two judicial decisions of the Federal Supreme Court (STF), two of the Court of Justice of the State of São Paulo (TJSP), two of the Court of Justice of the State of Minas Gerais (TJMG) and one from the Court of Justice of the State of Santa Catarina (TJSC). The judgments were selected from the jurisprudence repository of their respective courts, by combining the following search terms: “tumbling”, “constructive potential” and “indemnity”.

The assessment of the constitutional adequacy of compensation for restrictions on listed properties will be carried out based on the external theory of fundamental rights, in the version of such theory developed by authors such as ROBERT ALEXY and VIRGÍLIO AFONSO DA SILVA, which will be developed in the next topic. To this end, the following definitions will be adopted: (I) scope of protection is the extension of goods and interests that are prima facie protected by fundamental rights norms and whose embarrassment, affectation or elimination depends on an express constitutional foundation; (II) intervention is the embarrassment, affectation or elimination of goods or interests protected by fundamental rights norms; (II.1) restriction is the intervention adequately based on the CR; (II.2) violation is the intervention not substantiated or inadequately substantiated in the CR; (III) factual support, which comprises the scope of protection, the intervention and the absence or inadequacy of the constitutional basis for the intervention, is the material presupposition for the occurrence of the legal consequence foreseen in the norms of fundamental rights - generally, the requirement of cessation of non-constitutionally grounded intervention; (IV) scope of effective guarantee is the extension of the scope of protection after restriction; and (IV) essential content is the minimum and unrestricted scope of protection, determined on the basis of a process of balancing means and ends with third-party rights or trans-individual interests.

1. 1. THEORY OF FUNDAMENTAL RIGHTS, PROPERTY RIGHTS AND CONSTRUCTION POTENTIAL

1.1. 1.1. Scope of protection and types of intervention in property rights

The *external theory version* [3] here accepted part of the premise that the norms of fundamental rights have, in general, the structure of principles. Unlike rules, which are species of norms that guarantee rights and duties definitively, principles are species of norms that guarantee rights and duties only *prima facie*.[4]

From this premise, the external theory advocates the autonomy between the law and the restrictions. According to this path, fundamental rights, if viewed without any restriction, have a broad scope of protection, that is, all goods and prima facie interests protected by fundamental rights standards are included in their scope of protection. The extension of the scope of protection of a certain fundamental right, in this model, consists of the content of this right.

There is not always an equivalence between the scope of protection of a fundamental right and its effective exercise. The path between the scope of protection of a fundamental right and its scope of effective guarantee, in most cases, occurs through its restriction. The latter, for the external theory, is always external – hence the name – to a certain fundamental right, not interfering with its content, only its exercise.[5]

Restrictions can basically occur in two ways: (I) when the Legislative Power decides, through the law, how conflicts with fundamental rights of third parties or with trans-individual interests constitutionally protected are resolved; (II) when the Judiciary resolves conflicts involving fundamental rights that have not been decided or were not correctly decided by the Legislature.[6]

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[3] The external theory is opposed to the internal theory, which rejects the autonomy between law and restriction, arguing that fundamental rights would already be born with immanent limits. For the internal theory, the scope of protection of fundamental rights would be equivalent to their scope of effective guarantee and, therefore, they would assume the structure of rules, cf. CANOTILHO, José Joaquim Gomes. **Estudos sobre direitos fundamentais**, 2. ed./1. ed. Coimbra/São Paulo: Coimbra Editora/Revista dos Tribunais, 2008, p. 191-216. This article supports the external theory, but does not aim to develop the criticisms directed to the internal theory.

[4] ALEXY, Robert. **Teoria dos Direitos Fundamentais** (tradução de Virgílio Afonso da Silva), São Paulo: Malheiros, 2017, p. 83 e ss.

[5] "Restrictions, whatever their nature, have no influence on the content of the law, being able only, in the concrete case, to restrict its exercise, which can be argued that, in a collision between principles, the principle that has to yield in favor of another has not affected its validity and, above all, its prima facie extension" (free translation), SILVA, Virgílio Afonso da. O conteúdo essencial dos direitos fundamentais e a eficácia das normas constitucionais. **Revista de Direito do Estado**, n. 4, 2006, p. 38.

[6] VIRGÍLIO AFONSO DA SILVA ENCOMPASSES THESE TWO HYPOTHESES OF PATH BETWEEN THE SCOPE OF PROTECTION AND THE SCOPE OF EFFECTIVE GUARANTEE OF FUNDAMENTAL RIGHTS WITHIN THE EXPRESSION "CONCRETE CASE": "THE EXPRESSION 'CONCRETE CASE' CAN MEAN TWO DIFFERENT THINGS: (1) "CONCRETE CASE " CAN MEAN, IN THE WAY IT CAN ALSO BE UNDERSTOOD IN ITS NON-

The way in which external theory understands the conceptual framework of fundamental rights provides the practical advantage of requiring an express constitutional foundation whenever the broad scope of protection of a given fundamental right is intervened. For the purposes of this article, the terms restriction and regulation will be used to refer to any reduction in the scope of protection of fundamental rights, by means of law or judicial decision, which has adequate constitutional justification. That is, both a norm that, for example, establishes the legal regime for urban property, and one that intervenes in the property right to restrict its individual exercise for reasons of collective interest, are seen as norms that intervene in actions and behaviors. that were prima facie authorized by the property right and, therefore, need to constitutionally support the legitimacy of this intervention.

The equivalence between restriction and regulation in the act of conformation of fundamental rights through interventions in their spheres of protection expresses a double dimension of restrictions. In the wake of GOMES CANOTILHO, norms that intervene in a constitutionally adequate way in the scope of fundamental rights can be, at the same time, restrictive and constitutive of fundamental rights.[7] Therefore, the differentiation that matters for this work is, in fact, between restrictions and violations.

As with most of the norms that govern other fundamental rights, the constitutional norms on urban property provide only a prima facie conformation of the legal interests included in the scope of protection of such right, being necessary that other legal norms come to be evaluated in order to to provide the final conformation of this protection.[8]

TECHNICAL SENSE, THE DECISION OF A SPECIFIC CASE BY THE JUDICIARY (THE MOST USUAL EXAMPLE IS THE COLLISION BETWEEN FREEDOM OF THE PRESS AND THE RIGHT TO PRIVACY, HONOR OR IMAGE); (2) BUT 'CONCRETE CASE' CAN ALSO MEAN SOMETHING LESS CONCRETE, OR, AT LEAST, MORE DISTANT FROM WHAT IS USUALLY UNDERSTOOD BY IT, SINCE IT POINTS, IN THIS SECOND SENSE, TO A DECISION BY THE LEGISLATOR ABOUT THE COLLISION BETWEEN FUNDAMENTAL RIGHTS . SUCH A LEGISLATIVE DECISION, IF ON THE ONE HAND IT IS MORE ABSTRACT THAN A JUDICIAL DECISION, IS NOT WITHOUT ITS CONCRETE DIMENSION, SINCE THE LEGISLATOR IS NOT CONCERNED, IN THESE CASES, WITH THE GENERAL AND ABSTRACT IMPORTANCE OF TWO FUNDAMENTAL RIGHTS, BUT THEIR RELATIVE IMPORTANCE IN A HYPOTHETICAL SITUATION. AN EXAMPLE OF THIS MEANING WOULD BE, AMONG OTHERS, THE LEGISLATIVE ACTIVITY THAT CREATES A CRIMINAL TYPE OF SLANDER (CP, ART. 138). THE 'CONCRETE', AT THIS POINT, IS NOT A SPECIFIC CASE THAT HAPPENS IN REALITY, BUT THE HYPOTHETICAL SITUATION, DESCRIBED AND 'RESOLVED' BY THE LEGISLATOR IN A CERTAIN SENSE - IN FAVOR OF HONOR, TO THE DETRIMENT OF FREEDOM OF EXPRESSION -, WHICH PRESUPPOSES A DECISION ABOUT A RIGHT AND ITS RESTRICTIONS", OP. CIT. P. 39 (FOOTNOTE 58).

[7] "(...) the law that restricts freedom of expression and artistic creation in the form of the right to caricature, to defend the rights to personality, is certainly a restrictive law of a right, but it is, at the same time, a law protecting other rights. The theory of prima facie rights with which the external theory works today leaves this relationship of collision undisturbed precisely because, with the idea of prima facie rights and that of definitive rights, it allows us to reconstruct the task of the legislator as a task of balancing irreducible to a caricature. of the 'limiting legislator' enemy of rights" (free translation), CANOTILHO, José Joaquim Gomes. **Estudos sobre direitos fundamentais**, 2. ed./1. ed. Coimbra/São Paulo: Coimbra Editora/Revista dos Tribunais, 2008, p. 208.

[8] "As with several fundamental rights, the property right includes limitations and slowdowns in its application in the name of other values also protected by the constitutional text" (free translation), LEAL, Roger Stiefelmann.

In the case of property rights, the need for legal norms to give more concrete contours to the legal assets protected by it assumes greater relevance because its scope of protection is characterized as strictly normative. Fundamental rights with strictly normative scopes of protection differ from rights in which the configuration of such scopes can occur without the necessary normative mediation. As an example, even though constitutional norms guarantee only prima facie protection to rights such as life, freedom to come and go or freedom of assembly, most forms of exercising such rights pre-exist any legal norm. The fact that individuals necessarily move and gather when living in society makes it easier to define which behaviors are or are not included in the scope of prima facie protection established by the constitutions for such rights.

The manifestations of the exercise of the right to property, in turn, are constituted in their fullness by what the legal norms provide. As MENDES and BRANCO argue, "it is the legal order that converts simple possession into property"[9]. The exercise of rights with a strictly normative scope of protection requires, to a greater extent, that protection and configuration norms come to define what is or is not included protected by this right.

Using as a reference the double dimension of the norms that restrict fundamental rights mentioned above, it can be said that, in the cases of fundamental rights with a strictly normative scope of protection, there is a preponderance of the constitutive dimension over the restrictive dimension. For no other reason, some authors even claim that, in the case of rights with a strictly normative scope of protection, there is a real duty for the Legislature to legislate in order to effectively guarantee the protection of such rights through the materialization of their content. [10]

The fact that the Legislature plays a fundamental role in defining the assets and interests included in the scope of protection of property rights does not exempt it from observing the minimum constitutional parameters in its constitutive action. That is to say, although it is correct to say that the Legislature has greater freedom of conformation for the constitution of fundamental rights of a strictly normative scope, respecting limits imposed by the scope of protection of other rights, observing the degree of intensity and the extension of the constitutive norms continues being essential.

A propriedade como direito fundamental: breves notas introdutórias. **Revista de Informação Legislativa**, v. 194, 2012, p. 53.

[9] MENDES, Gilmar Ferreira; BRANCO, Paulo Gustavo Gonet. **Curso de direito constitucional**, 14. ed. São Paulo: Saraiva, 2019, p. 290.

[10] "The property right, although inserted in the scope of freedom rights, requires specific action by the legislator. Unlike some freedoms that, prima facie, dispense with specific legislative intervention to determine their legal configuration and consequent exercise, property requires regulatory complementation aimed at its conformation" (free translation), LEAL, Roger Stiefelmann. A propriedade como direito fundamental: breves notas introdutórias. **Revista de Informação Legislativa**, v. 194, 2012, p. 64.

Using the theoretical tools of the external theory of fundamental rights to analyze the central object of the article, it can be said that, from the moment that urban legislation and master plans begin to intervene in urban policy, the Legislative Power determines the scope of effective guarantee of the urban property right. This intervention developed by urban legislation must, therefore, be constitutionally founded. If there is adequate constitutional grounds, it will be a restriction to the fundamental right. If the constitutional grounds for the restriction are insufficient, the restriction shall be classified as a violation.

Understanding the practical requirements that the theory of fundamental rights imposes to the restrictive urban norms of the urban property right, it will be demonstrated how the norms that regulate the tipping of urban properties can be reconstructed as interventions in the property right. The intervening state act that will have its constitutionality evaluated from the theory of fundamental rights is, above all, the norm of the Legislative Power that governs the procedure by which the Executive Power can effect the tipping of real estate. It will be in this dimension that the laws on the use of TDC of the Municipality of São Paulo, in the context of tipping, will be evaluated, for example.

However, in addition to the analysis of legislative acts on tipping, the understanding of the property right as a fundamental right subject to interventions will also serve to assess the correctness of Executive and Judiciary acts that institute or ratify tipping. Insofar as an administrative or judicial act relating to tipping must necessarily be based on specific legislative norms, it is the legal regime established by such norms that should be the main focus of this work. This does not, however, prevent judicial decrees or decisions from also being subject to scrutiny that assess whether or not such state acts legitimately interfere with the fundamental right to property.

Seeing the legal regime of tipping as a set of interventional rules, and not just configuring property rights, will be an essential step in discussing compensation for restrictions on property rights caused by property tipping in Brazil.

1.2. Norms that regulate the tipping of urban properties and collisions involving fundamental rights

Collisions of fundamental rights do not only occur when their holders exercise them in a colliding way, as in the legal relations of neighborhood law, but also when a certain fundamental right is restricted in order to promote *transindividual interests that are constitutionally protected*.[11] The discussion in this article fits into this last kind of collision of fundamental rights.

The tipping is a mandatory and prohibitive rule, introduced in Brazilian law by Decree-Law (DL) 25, of November 30, 1937, based on the Constitution of the Republic of 1937, more precisely in its art. 122, nº 14, which referred to the law the determination of the content and limits of the property, and in its art. 134, which determined to the Nation, States and Municipalities the duty to protect and care for historical, artistic and natural monuments, and landscapes or places particularly gifted by nature.

The Constitutions of 1946, 1967 and 1969 maintained the duty to protect the Brazilian cultural heritage prescribed in art. 134 of the 1937 Constitution, only changing the mention of territorial entities, to use the generic expression "Public Power". And the CR further explained the purpose of the listing as a legal instrument for the promotion and protection of Brazilian cultural heritage (art. 216, § 1º)[12], keeping it under the common material competence of the three spheres of government (art. 23, inciso I)[13].

Based on the broad model of the scope of protection adopted by the work, the tipping is an intervention in the right of property, as it hinders the exercise of the owner's faculties of disposal and construction. Seeking to promote the preservation of cultural heritage, federal, state and municipal norms that regulate the tipping represent restrictions to the scope of protection of the urban property right provided for in the CR.

There is no doubt that the public interests that the tipping seeks to promote are constitutionally founded. According to VIRGÍLIO AFONSO DA SILVA, the fact that the CR itself expressly foresees that a certain institute may intervene in a fundamental right implies a "reduction of the

[11] Cf. DIMOULIS, Dimitri; MARTINS, Leonardo. **Teoria Geral dos Direitos Fundamentais**, 4.ed. São Paulo, Atlas, 2012, p. 124.

[12] "Art. 216. [...] § 1 The Government, with the collaboration of the community, will promote and protect the Brazilian cultural heritage, through inventories, records, surveillance, tipping and expropriation, and other forms of precaution and preservation." (free translation)

[13] "Art. 23. It is the common competence of the Union, the States, the Federal District and the Municipalities: [...] III - to protect documents, works and other assets of historical, artistic and cultural value, monuments, natural landscapes notables and archaeological sites;" (free translation)

argumentative burden that the legislator has when creating laws restricting fundamental rights".[14] However, this reduction in the burden of justification for the intervention concerns only the definition of the constitutionally protected objective that underlies the intervention, not achieving a reduction in the burden of justification in relation to the extent and intensity with which the intervention can occur.

In other words, the fact that the CR expressly authorizes interventions in urban property that seek to promote the preservation of Brazilian cultural heritage tends to make it easier for the Legislative Power to restrict property rights for this purpose. The indication of this purpose does not guarantee, however, that, in the pursuit of these constitutionally legitimate objectives, any intervention in the urban property right is authorized. It is also necessary to examine the extent and intensity with which the intervention occurs, in order to know whether it will be classified as a restriction or a violation.

It is obvious that the identification of the legality of the objectives pursued by interventions in fundamental rights is important, but methods of conflict resolution, such as proportionality, place the centrality of the analysis in the degree of intensity and extent of the interventions evaluated.

Understanding the importance of analyzing the extent and intensity with which urban property interventions occur is central to this investigation. It is not discussed whether tipping is a legitimate instrument of urban policy, but how compensation for restrictions caused by property tipping is currently treated in Brazil. Within the dynamics of the legal regime of tipping, evaluating the compensation to the owner who has his property listed allows analyzing the exact extent to which his property right was affected.

If adequate compensatory mechanisms are provided for by legislation, there is a greater probability that the intensity of the intervention will be reduced and, consequently, that the intervention in the urban property right will be considered a restriction. On the other hand, if the urban legislation provides for insufficient compensatory mechanisms, the intensity of the intervention in the property right becomes greater, which increases the chances of a given intervention being considered a violation.

As mentioned in the introduction, the aim of this article is to scrutinize a specific legal regime for compensation for property tipping, namely the TDC provided for by the Municipality of São Paulo. Before analyzing in detail whether the São Paulo legal regime of the TDC constitutes a compensatory

[14] SILVA, Virgílio Afonso da. Os direitos fundamentais e a lei: a constituição brasileira tem um sistema de reserva legal?. In: SOUZA NETO, Cláudio Pereira de; SARMENTO, Daniel; BINENBOJM, Gustavo. (Org.). **Os vinte anos da constituição federal de 1988**. Rio de Janeiro: Lumen Juris, 2009, v. 1, p. 615.

mechanism capable of making the interventions to the property right caused by tipping legitimate, it will be necessary to demonstrate that the constructive potential constitutes an autonomous property right of the urban property right.

2. 2. THE CONSTRUCTIVE POTENTIAL AS A PROPERTY RIGHT AUTONOMOUS FROM THE URBAN PROPERTY LAW

If it was ever possible to maintain that the scope of protection of the right of land ownership contemplated the faculty to build, based on the view that the legal power of use, enjoyment and disposition of the thing (art. 524 of the Civil Code of 1916, corresponding to the current article 1.228 of the Civil Code of 2002 - CC) "comprises the power to transform, build, benefit, in short, with all works that favor its use or increase its economic value"[15], this idea can no longer be accepted from the CR.

With the introduction of the chapters on urban policy (arts. 182 and 183) and agricultural and land policy (arts. 184 to 191), the CR explicitly split the legal regime of land ownership into urban and rural properties. It is the master plan, as a basic instrument of urban development and expansion policy (art. 182, § 1), which delimits the urban perimeter, indicating the location of the urban area and, when applicable, the urban expansion area.[16]

The right to build thus becomes a legal-public permission for the exercise of college[17] to build attributed to the owner of the urban property[18] that satisfies the urban costs foreseen in the legislation and observes the urban indices established by the plans, especially the master plan.

[15] MEIRELLES, Hely Lopes. **Direito de construir**, 7. ed. atualizada por Eurico de Andrade Azevedo et. al. São Paulo: Malheiros, 1996, p. 27.

[16] For further development of this point, cf. CUSTODIO, Vinícius Monte. Princípio da reserva de plano: comentários ao acórdão do Recurso Extraordinário 607.940/DF. **Fórum de Direito Urbano e Ambiental – FDUA**, ano 19, n. 110. Belo Horizonte: Fórum, mar./abr., 2020, p. 58-68.

[17] "It is common to say that the subjective right is facultas agendi. However, human faculties are not rights, but qualities of the human being that do not depend on a legal norm for their existence. [...] the so-called facultas agendi predates the subjective right. First, the faculty to act, and second, the permission to use that aptitude" (free translation), DINIZ, Maria Helena. **Compêndio de introdução à ciência do direito**, 19. ed. São Paulo: Saraiva, 2008, p. 248.

[18] For the sake of brevity, the term "urban property" is used, but there is nothing to prevent owners of properties located outside the urban perimeter, in an urban expansion zone or in a specific urbanization zone, from holding building rights (art. 3 of Law 6,766, of December 19, 1997, which provides for the subdivision of urban land).

The urban plan does not concretely attribute building rights, but abstractly, constructive potentials, which only become those when, observing the urban indexes, the owner discharges the urban burden of his property, contributing to the balance and financing of urban infrastructure.[19]

For this reason, the inadequacy of the term "transfer of the right to build" is objectionable, since the object of this instrument is not the right to build (concrete), but the constructive potential (abstract). This nomenclature is adopted in this work, however, as a matter of legal and doctrinal consecration.[20]

The utilization coefficient (art. 28, § 1 of the ECi) is the urban index which, multiplied by the area of the urban property, determines its constructive potential, or buildable area, normally expressed in square meters. The basic utilization coefficient regulates the basic (free) constructive potential of the urban property, while the maximum utilization coefficient regulates the maximum (onerous) constructive potential.

The basic utilization coefficient is a fundamental parameter for urban planning, but it has neither an urban nor a fiscal character, but an equalizer of rights. Its adoption in municipal urban planning contributes to the realization of the principle of fair distribution of benefits and burdens arising from the urbanization process.[21]

The higher the Municipality sets the property utilization coefficient, the greater the economic value of the urban property, substantially determined by that.[22] However, this increase cannot be disproportionate, as it tends to increase the demand for community and urban equipment by the population occupying these places.[23]

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[19] "The urban plan does not, by itself, attribute building rights, but constructive potential. The potentials defined by the urban indexes of the plan are transformed into rights to build after the fulfillment of urban planning obligations, through which the owner contributes to finance the city's infrastructure. [...] It is the fulfillment of the urban burden that allows the owner to incorporate the right to build provided for in the plan to his lot" (emphasis in the original), PINTO, Victor Carvalho. **Direito urbanístico**: plano diretor e direito de propriedade, 3. ed. São Paulo: Revista dos Tribunais, 2011, p. 263.

[20] Interestingly, although the São Paulo master plan calls this instrument of transfer of the right to build, its Table 1 (Definitions) correctly defines "the instrument that allows the transfer of unused constructive potential in the lot or plot to other plots or plots" as transference. of constructive potential.

[21] BACELLAR, Isabela; FURTADO, Fernanda; RABELLO, Sonia. Transferência do direito de construir: panorama de regulamentações municipais e parâmetros essenciais para a implementação. **Brazilian Journal of Development**, v. 5, n. 9. Curitiba, set. 2019, p. 13.987.

[22] MARTIM SMOLKA presents data that the increase in utilization coefficients generate great value additions to the property, cf. **Implementing value capture in Latin America**: policies and tools for urban development. Cambridge: Lincoln Institute of Land Policy, 2013, p. 5-7.

[23] Cf. GRAU, Eros Roberto Aspectos jurídicos da noção de solo criado. In: **O solo criado**: anais do seminário. São Paulo: Fundação Prefeito Faria Lima, 1976, p. 135-136.

The constructive potential is a legal asset, because it is an object of human interest and is protected by law; it is a heritage asset, because it can be estimated economically; it is an intangible asset, because it is devoid of materiality, not being confused with the building; and it is a principal good, because it exists in itself, not being an accessory to urban property.[24]

Despite the constructive potential being an autonomous property right, it remains linked to the urban property for which it was calculated. This apparently contradictory idea of "bound autonomy" is not foreign to Brazilian law, as it is also found in mineral resources and hydraulic energy potentials in relation to land ownership[25], as well as in the real right of slab in relation to the base construction[26], for example.

When it regulates the coefficient of basic use, at the same time that the plan restricts the scope of protection of urban property, it makes the basic constructive potential autonomous, which is also a subjective right of the owner. The constructive potential, when implemented in the lot, ceases to exist as a main asset, passing, through artificial accession, to the quality of an accessory asset of the urban property.[27]

When it regulates the maximum utilization coefficient, although it also restricts the scope of protection of urban property, the plan does not grant its owner a subjective right to the maximum constructive potential, but a mere expectation of right. This is because the additional constructive potential, which varies between the basic and maximum potential, under the terms of current federal legislation, only enters the patrimonial sphere of the owner of the urban property through an onerous grant of the right to build, certificates of additional construction potential (in consortium urban operations) or TDC.[28]

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[24] Cf. APPARECIDO JUNIOR, José Antonio. **Direito urbanístico aplicado**: os caminhos da eficiência jurídicas nos projetos urbanísticos. Curitiba: Juruá, 2017, p. 155-163.

[25] CR: "Art. 176. The deposits, in mining or not, and other mineral resources and the potential for hydraulic energy constitute property distinct from that of the soil, for the purpose of exploration or use, and belong to the Union, the concessionaire being guaranteed the ownership of the product of the mining." (free translation)

[26] CC: "Art. 1.510-A. The owner of a base construction may assign the upper or lower surface of its construction so that the owner of the slab maintains a unit distinct from the one originally built on the ground. [...] § 3 The holders of the slab, an autonomous real estate unit constituted in its own registration, may use, enjoy and dispose of it." (free translation)

[27] "As stated in articles 79 and 92 of the Civil Code, unless otherwise stated, trees incorporated into the soil retain the characteristic of immovable property, as they are accessories to the main property, which is why, as a rule, the artificial accession receives the same classification/nature. legal status of the land on which it is planted" (free translation), SUPERIOR Tribunal de Justiça. **REsp 1.567.479/PR** (Quarta Turma). Diário de Justiça Eletrônico 18 jun. 2019. Rel. Min. Marco Buzzi.

[28] Since the onerous granting of the right to build (article 28 et seq. of the ECi) and the certificates of additional construction potential (art. 34 of the ECi) are not the object of this work, suffice it to say that: that grants to the owner of urban property, for areas established in the master plan, the acquisition of additional constructive potential, against a consideration to be provided by the beneficiary to the Municipality; and these are securities

A direct consequence of the understanding of the constructive potential as an autonomous right of the urban property right, with a scope of protection of specific features in relation to that of the urban property right, is that eventual interventions caused by the tipping affect not only the right to property urban development but also the owner's right to its constructive potential. In other words, it is not only the justification of intervention in the urban property right that must be evaluated when the legal regime for tipping is defined by the legislator, but also the justification of the intervention in the property right of the constructive potential.

The next topic will assess precisely how the São Paulo legal regime deals with the intensity and extent of intervention in the property right of the constructive potential when it regulated the TDC.

3. THE LEGAL REGIME FOR THE TRANSFER OF THE RIGHT TO BUILD INCIDENTS ON FILLED PROPERTIES IN THE MUNICIPALITY OF SÃO PAULO

The ECi listed the tipping of real estate or urban furniture (art. 4, item V, item "d") among the legal and political institutes of urban policy, considering it as one of the legitimizing purposes of the TDC (art. 4, item V, item “o” with article 35, item II).

According to the ECi, municipal law based on the master plan may authorize the owner of urban property to transfer the constructive potential of his property when it is necessary for the preservation of historical, environmental, landscape, social or cultural interest (art. 35, item II). As JOSÉ AFONSO DA SILVA teaches, this legal instrument was inspired by the American experience of the space adrift (“floating space”) of the so-called “Chicago Plan”. Through this instrument, the owners of properties defined by the Public Power as of historical interest cannot demolish them for the construction of more modern and higher buildings, authorizing them to sell the constructive potential of their lands to others.[29]

The TDC is regulated, in the Municipality of São Paulo, by Municipal Law 16,050, of July 31, 2014, which approves the Urban Development Policy and the Strategic Master Plan (PDE), complemented by Municipal Law 16,402, of March 22, 2014. 2016, which regulates the subdivision, use and occupation of land (LPUOS), and regulated by Municipal Decree 57,536, of December 15, 2016.

that are freely negotiable on the market, usable for the acquisition of additional constructive potential in the area of the consortium urban operation for which they were planned.

[29] SILVA, José Afonso da. **Direito urbanístico brasileiro**, 7. ed. São Paulo: Malheiros, 2012, p. 260.

The PDE authorizes the transfer of the constructive potential of urban properties, for the purpose of enabling the preservation of assets of historical, scenic, environmental, social or cultural interest (art. 123, item I), inserted in Special Zones of Cultural Preservation - ZEPEC[30] (art. 124, inciso I). When the owner transfers the construction potential without selling the transferor property to the Municipality, the transferable construction potential is calculated by the product of the area of the transferor land with the coefficient of basic use of the transferor land and with the incentive factor (art. 125) , the latter varying from 1.2 to 0.1, depending on the area of the lot (art. 24 of the LPUOS).

The PDE establishes the legal regime of TDC in its arts. 122 to 133. A first noteworthy aspect is the statement contained in art. 122 of the PDE, that the TDC will observe the provisions, conditions and parameters established in the PDE. This is an explicit conflict with the rule of art. 35 of the ECi, according to which "municipal law based on the master plan" will establish the conditions relating to the application of the TDC.

the art. 42, item II, of the ECi does not inform what would be the "required provisions" by art. 35 that the master plan must contain to support that municipal law. What is certain is that, contrary to what it did in relation to the onerous granting of the right to build (art. 30) and consortium urban operations (art. 32 to 34-A), the ECi required an additional municipal law to the master plan for the TDC, but not necessarily a specific bylaw[31], therefore, the conditions relating to the application of the TDC could be included in the LPUOS itself.

Therefore, the formal constitutionality of the provisions that bring the formulas for calculating the constructive potential, without which the TDC is inapplicable, is questionable, namely: the constructive potential that can be transferred without donation of the assigning property (art. 125); the constructive potential that can be transferred in friendly expropriations and with donation of the assignor property (art. 127); and the constructive potential to be transferred to the receiving property (art. 128).

[30] PDE: "Art. 61. The Special Cultural Preservation Zones (ZEPEC) are portions of the territory intended for the preservation, enhancement and safeguarding of assets of historical, artistic, architectural, archaeological and landscape value, hereinafter defined as cultural heritage, which may be configured as built elements , buildings and their respective areas or lots; architectural ensembles, urban or rural sites; archaeological sites, indigenous areas, public spaces; religious temples, landscape elements; urban sets, spaces and structures that support intangible heritage and/or uses of socially attributed value. Single paragraph. Properties or areas listed or protected by Municipal, State or Federal legislation are classified as ZEPEC."

[31] A "specific" law is one that is characterized by being monothematic and directed to a specific situation, which only takes care of one subject, cf. SUPREMO Tribunal Federal. **ADI 64-1/RO** (Tribunal Pleno). DJe 22 fev. 2008. Rel. Min. Cármen Lúcia.

Strictly speaking, there is no TDC with the donation of transferor property, as the latter is "the contract in which a person, by liberality, transfers goods or advantages from his patrimony to that of another" (art. 538 of the CC). The donation is a unilateral legal transaction, as there is no consideration (synalagma) from the beneficiary. Even if the donation is subject to a charge, the bonus and the burden are not equivalent, otherwise the contractual liberality would be mischaracterized. In addition to being unilateral, the donation is a free legal transaction, because it only generates economic advantages for one of the parties, the donee.[32] In such a case, it takes care of a true purchase and sale contract whose consideration by the buyer (Municipality) consists of the issuance of the title representing the constructive potential that can be transferred in favor of the seller, which makes a lot of difference for tax and registration purposes.[33]

With respect to the TDC regime for listed properties without alienation of the assigning property to the Municipality, the formula in art. 125 of the PDE deserves some comments.

Until the entry into force of the PDE, art. 219, item I, of Municipal Law 13,430, of September 13, 2002, allowed transferring the difference between the constructive potential used and the maximum constructive potential of listed properties (art. 219, item I). With the entry into force of the PDE, the basis for calculating the transferable construction potential became the area of the transferor land and its rate was the basic utilization coefficient, in addition to the incidence of an incentive factor equal to 1.0. Furthermore, the issuance of the certificate of transfer of construction potential of the listed properties was conditioned to proof of the state of conservation of the assignor property (art. 129).

As a result, the transferable potential of properties located in areas that allow for higher building densities was reduced, while at the same time favoring owners of smaller properties, in which there is usually no basic building potential left. The structuring of the current São Paulo legal regime clearly sought to encourage a greater global participation of small properties listed in TDC operations, to the detriment of large ones, probably assuming that the owners of the latter are better able to carry out the restoration or conservation works of their listed properties.[34]

[32] FARIAS, Cristiano Chaves de; ROSENVALD, Nelson. **Curso de direito civil**, 9. ed. Salvador: JusPodivm, v. 4 (Contratos), 2019, p. 821.
[33] Cf. APPARECIDO JUNIOR, José Antonio. op. cit., p. 173.
[34] Cf. PERETTO, Flavia Taliberti et. al. Quando a transferência de potencial construtivo virou mercado: o caso de São Paulo. In: **XV Seminário de História da Cidade e do Urbanismo**. A cidade, o urbano, o humano. Rio de Janeiro, set. 2018, p. 6-7.

This can be inferred from the conjunction of art. 129 of the PDE with art. 24 of LPUOS, which redefined, with the consent of art. 133 of the PDE, depending on the size of the lots, the incentive factor of the TDC formula, in the following terms: 1.2 for properties with a lot area of up to 500 m² (item I); 1.0 for properties with a plot area greater than 500 m² up to 2,000 m² (item II); 0.9 for properties with a plot area greater than 2,000 m² up to 5,000 m² (item III); 0.7 for properties with a plot area of more than 5,000 m² up to 10,000 m² (item IV); 0.5 for properties with a plot area greater than 10,000 m² up to 20,000 m² (item V); 0.2 for properties with a plot area greater than 20,000 m² up to 50,000 m² (item VI); and 0.1 for properties with a plot area greater than 50,000 m² (item VII). Recovering the definition proposed in the introduction, it will be argued that this regulation makes the TDC insufficient to compensate for restrictions caused by tipping in some cases, activating the factual support of the property right of the constructive potential. This conclusion is supported by at least four reasons.

First, TDC is not an urban instrument of social justice, but of commutative justice.[35] Differently from the onerous grant of the right to build, which explicitly aims at recovering the investments of the Public Power that have resulted in the appreciation of urban properties (art. 31 of the ECi), the TDC of listed properties is a compensatory equalization mechanism aimed at guaranteeing the fair distribution of trans-individual benefits (the preservation of cultural heritage for present and future generations) and individual burdens (the economic emptying of property rights in relation to the remaining fraction of the basic constructive potential of the listed property) resulting from the urbanization process.

Secondly, the social function of the listed property legitimizes the Public Power to impose on the owner the duty to preserve and repair the fallen thing. Regardless of whether there is constructive potential that can be transferred, which is a finite resource, the owner of the fallen thing has the duty to carry out the conservation and repair works that it demands; if it does not have the resources to do so, it will bring the need for the works to the attention of the body or entity responsible for listing the property, under penalty of a fine corresponding to twice the damage eventually suffered by the property (art. 19 of DL 25/1937).

[35] In the tradition of the thought of Saint Thomas Aquinas, "[...] in the relations between individuals regulated by commutative justice, particularly in buying and selling, it is a matter of equating thing with thing, that is, of realizing an absolute equality", whereas, for the 19th century Thomists, "social justice consists in 'the observance of every right having the common social good as its object and civil society as its subject or term'", BARZOTTO, Luís Fernando. Justiça social, gênese, estrutura e aplicação de um conceito. **Revista do Ministério Público**, n. 50. Porto Alegre: MPRS, 2003, p. 20-26.

There are more appropriate instruments than the TDC to encourage the preservation of cultural heritage, such as fiscal and financial incentives and benefits (art. 4, item IV, item "c", of the ECi). Law 8,313, of December 23, 1991 (Rouanet Law), allows individuals and legal entities the option of applying installments of income tax, as donations or sponsorships, in direct support of projects for the conservation and restoration of buildings, monuments, public places, sites and other spaces, including natural ones, listed by the Public Powers. States can transfer resources from ICMS collection to municipalities that preserve their cultural heritage, as is done by Law 18,030, of January 12, 2009, of the State of Minas Gerais, regulated by the Deliberation of the State Council for Cultural Heritage (CONEP) 20, of December 1, 2018. And municipalities can always exempt from IPTU the listed properties and from ISS and fees for the conservation and restoration works of listed properties, as is done by Decree 28,247, of July 30, 2007, of the Municipality of Rio de Janeiro.

Third, the rule of art. 129 of the PDE violates the principle of equality, as it places owners of listed properties who have not fully exercised the basic constructive potential of their property in a manifestly disadvantaged position compared to those who have already exhausted their constructive potential. If their property is in an inadequate or unsatisfactory state of conservation, they will be notified by the municipal government to fulfill their social function, being able to defend themselves within the due legal process, including invoking possible exclusions of civil liability, such as the exclusive fact of the Administration. Owners who have not fully exercised the basic constructive potential of their property, on the other hand, will not enjoy the same privilege, since the resources from the TDC are conditioned to the recovery and maintenance of the attributes that generated the classification of the property as a ZEPEC (art. 24, § 1, of LPUOS), under penalty of a fine (§ 2) renewable every 30 days, until the measures relating to the conservation of the transferor property are communicated in writing by the owner or possessor (§ 3).

And fourth, of all the incentive factors provided for in art. 24 of the LPUOS, only that of item I truly constitutes an incentive, a bonus of 20% to the constructive potential that can be transferred to properties with a plot area of up to 500 m². The others are either neutral factors (item II), because they do not change the result of the formula, or they are reduction factors (items III to VII), because they reduce the transferable potential.

Therefore, the formula of art. 125 of the PDE is not justified as a mechanism aimed at compensating for interventions in the property right of the constructive potential.

In fact, the adoption of the transferable land area as a basis for calculating the transferable constructive potential makes it possible for listed properties that have already taken advantage of all their basic constructive potential to transfer construction potential that they do not have, subverting

the general principle of law according to which “no one can transfer more rights than he has” (*nemo plus iuris ad alium transferre potest quam ipse habet*).

So that the basis for calculating the formula in art. 125 of the PDE is not materially unconstitutional, for violating the principle of equality and the principle of prohibiting unjust enrichment, it is necessary to give it an interpretation in accordance with the Constitution[36], it being understood that “area of the transferor land” is not equivalent to the basic constructive potential of the property, but to the difference between its basic constructive potential and its total built area. Furthermore, for the same reason that the value of the works carried out on the property after the declaration of public utility of the property is excluded from the fair compensation for expropriation[37], except when it is a necessary or useful improvement made with the authorization of the expropriator (art. 26, § 1, of DL 3,365, of June 21, 1941), the area incorporated to the thing listed by supervening recall cannot be part of the calculation of the formula of art. 125 of the PDE. This is because the tipping, as well as the expropriation, for pursuing an end of public interest, cannot take into account solely and exclusively the interests of the one who suffers the restriction in the property right.[38]

Furthermore, the "incentive" factors established by art. 24, items III to VII, of the LPUOS are counterproductive, because, by reducing the constructive potential that can be transferred from listed properties to levels below the constructive potential effectively restricted by the listing, they bring to the Municipality the duty to complement in cash the compensation to the owners, under penalty of unconstitutionality for violation of the property right.

In fact, only in TDC with transfer of the property to the Municipality does it make sense to talk about incentive factors, a hypothesis in which these act as compensatory bonuses, avoiding legal disputes about the value of fair compensation and the need to spend resources from the municipal treasury.

[36] “[...] in the interpretation according to the Constitution, there is, dogmatically, the declaration that a law is constitutional with the interpretation given to it by the judicial body” (free translation), MENDES, Gilmar Ferreira; BRANCO, Paulo Gustavo Gonet. **Curso de direito constitucional**, 14. ed. São Paulo: Saraiva, 2019, p. 1.487.

[37] Precedent 23 of the STF: “Having verified the legal presuppositions for the licensing of the work, it does not prevent the declaration of public utility for expropriation of the property, but the value of the work will not be included in the indemnity, when the expropriation is carried out.” (free translation)

[38] On the consideration of the public interest of expropriation as a basis for the disregard, among others, of speculative elements and acts of the expropriated with the mere intention of raising the value of indemnities, cf. CUSTODIO, Vinícius Monte. **Um novo olhar sobre as desapropriações no direito brasileiro**. Rio de Janeiro: Lumen Juris, 2017, p. 145-151.

4. THE POSITION OF BRAZILIAN JURISPRUDENCE ON COMPENSATION FOR RESTRICTIONS CAUSED BY PROPERTY TOLDINGS

After demonstrating that the TDC discipline in the city of São Paulo does not provide a constitutionally adequate compensatory mechanism to mitigate the intensity and extent of the restrictions that the tipping legislation imposes on the property right, specifically regarding the constructive potential, this topic will evaluate judicial decisions. of four Brazilian courts that deal with the issue of compensation for property tipping.

The intention is not to present in a consolidated way the jurisprudence of certain courts on the subject, but to use decisions from different courts to discuss the plurality of understandings on the topic of compensation for tipping. Although some decisions deal specifically with restrictions that tipping imposes on the constructive potential of urban property, the central theme of the article, others will discuss the need for compensation in a broader way, considering other types of property rights.

With the exception of Civil Appeal 7,377/RJ, it should be noted that the judgments listed assess administrative acts by the Executive that apply the legislation on tipping and enforce the restriction of property rights. In other words, the discussion about compensation or indemnities to owners in most decisions will not take place in the context of analyzing the legislation on tipping, as the work has been doing so far, but in the evaluation of the administrative act itself that implements the restrictions on property. However, part of the arguments and criteria that the judgments develop to assess the legitimacy and legality of administrative acts of tipping can be transposed to the discussion on the constitutionality and legitimacy of legislation on tipping.

4.1. The position of the Supreme Court

4.1.1. Civil Appeal (ACi) 7,377/RJ [39]

On June 17, 1942, the Full Court of the STF judged the first lawsuit regarding the legal instrument of tipping. The appellants, owners of a property in Arco do Teles, at Praça XV, in Rio de Janeiro, protested against the listing of their building, considered a historic and artistic monument by

[39] SUPREMO Tribunal Federal. **ACi 7.377** (Tribunal Pleno). **Revista de Direito Administrativo**, v. 1, n. 2. Rio de Janeiro: FGV, 1945, p. 100-123.

the National Historic and Artistic Heritage Service (current Iphan), adding that: (I) the property would not, in fact, be a historical or artistic monument; and (II) that compulsory tipping, if not carried out through expropriation, violates the fundamental right to property. The violation of the property right claimed by the owners in this process refers specifically to the urban property right, that is, although it is relevant to reconstruct this historic decision of the STF, it is important to note that it still did not discuss the possible need to control interventions to the right of the potential. constructive.

As for the first argument, the court rejected it on the grounds that the technical opinion of the expert hired by the appellants was naturally partial.

Regarding the second point, which is the constitutionality of the listing made against the will of the owners, most ministers understood that the constitutionality of the compulsory listing stems from the remission of the determination of content and limits of the property to the law by art. 122, nº 14. In this line, if it is correct that the tipping strongly restricts the faculty of disposition, namely to modify, abandon or destroy the thing engraved by the obligation, it is equally certain that it does not go so far as to denature the essential content of the right of property, since the owner, in addition to the faculties of use and enjoyment, continues to be able to sell, respecting the preemptive right of territorial entities (art. 22 of DL 25/1937), and offer his property as collateral (art. 22, § 3). Since the fallen thing remains in the possession of the owner, only he is responsible for conserving it, there would be no need to talk about mandatory expropriation.

4.1.2. Regimental Appeal (AgR) in RE 361.127/SP [40]

On May 15, 2012, the Second Panel of the STF judged an interlocutory appeal filed in an extraordinary appeal by the State of São Paulo against the judgment of the TJSP, which fully upheld the decision on the merits of the action for compensation for indirect expropriation filed by the owners, due to the " special and extraordinary character of the listing of the property".

According to the vote of the rapporteur, Min. Joaquim Barbosa, unanimously followed, "it is not just any tipping that gives rise to the duty to indemnify: it is necessary to demonstrate that the owner suffers a special, peculiar damage to the property right". In addition, he maintained that, "if an entire street or an entire neighborhood is the target of listing, it is very difficult for the owner of one of the properties to claim the damage necessary for the configuration of indirect expropriation".

[40] SUPREMO Tribunal Federal. **RE 361.127 AgR/SP** (Tribunal Pleno). DJe 01 ago. 2012. Rel. Min. Joaquim Barbosa.

Finally, he concluded that “the specialty of interest reached by the listing is clear”, since, being “one of the only properties on Avenida Paulista remaining from the golden age of coffee”, there would have been an emptying of the property right by the listing. And, invoking the terms of the sentence, he corroborated that it is a “practically absolute restriction, since the most useful thing, in the face of material interests, would be the construction of other very modern buildings”.

4.2. The position of the TJSP

4.2.1. ACi 424.402-5/5-00[41]

On April 26, 2006, the Ninth Chamber of Public Law dismissed the appeal of the Municipality of Santos against the sentence of the 2nd Court of Public Finance of Santos, in an annulment action combined with a request for indemnification, which had maintained the listing of the plaintiffs' property. of the action, but condemning the Municipality to pay R$ 886,073.04, by way of compensation, for the loss of the potential to build the material asset.

Although he recognized the existence of a legal provision for the compensation of the owners, through TDC, for the tipping, the rapporteur stressed, without further consideration, that this would not be the best solution for the case.

According to him, tipping, a precautionary measure for cultural heritage, supported by art. 216 of the CR and in the infra-constitutional legislation, imposes obligations to do, not to do and not to do, which does not automatically give rise to compensation for the owner. This would only be applicable in case of significant and proven damage, otherwise the duty to protect cultural heritage by the Public Administration would be unfeasible.

In the case of the case, however, the tipping “affected the property right related to the property, with a consequent decrease in its economic potential, when compared such a restrictive situation with that of the surrounding properties, which do not support any limitation”. Taking into account, above all, the “destination and privileged location” of the property, the tipping caused “a situation of inferior use of the land on which the construction is located, a fact demonstrated by the legislative permission to build 13,925 m² compared to the built area of only 2,170 m²”.

[41] TRIBUNAL de Justiça do Estado de São Paulo. **ACi 424.402-5/5-00** (Nona Câmara de Direito Público). DJ 10 maio 2006. Rel. Des. Sidnei Beneti.

Therefore, it considered that the grounds were sufficient, although exceptional, to the point of making the indemnification due, having been unanimously followed by the other judges.

4.2.2. ACi 0006714-61.2008.8.26.0562[42]

On April 28, 2014, the Tenth Chamber of Public Law unanimously granted an appeal by the Municipality of Santos against the judgment of the 2nd Court of the Public Treasury of Santos, in an action for annulment of listing, which had maintained the listing of the property of the authors of the action, representative of the eclectic residential architecture of the 1920s, a period of urban expansion provided by the coffee trade in Santos, but condemning the Municipality to pay material compensation of R$ 57,618.24 for the emptying of the property's economic content.

In his vote, the rapporteur pointed out that the authors did not specify the damages or material losses concretely borne by them, and that their claim for compensation would be “only as a result of the generic effects of the tipping”, on “future and uncertain facts, such as possible receipt of rentals or use of all constructive potential of the property”.

Still in his vote, the rapporteur asserted that the owner "should not be obliged to bear the burden of historic conservation alone", however he considered that "the tipping carried out neither empties the property in a significant way, nor is it exempt from compensation".

He pointed out that the administrative act of listing itself allowed the owner to carry out modifications, including the construction of a new building, provided that the modifying project was in harmony with the listed property and in accordance with the legislation in force. In addition, he recalled that the municipal legislation contemplates the exemption of IPTU and ISS from future works of recovery of listed properties, as well as the compensation through the TDC.

Finally, it ruled that “eventual compensation to be claimed could come from alteration or construction that is disapproved — and, therefore, causes an effective decrease in the right to property”.

[42] TRIBUNAL de Justiça do Estado de São Paulo. **ACi 0006714-61.2008.8.26.0562** (Décima Câmara de Direito Público). DJ 30 abr. 2014. Rel. Des. Marcelo Semer.

4.3. The position of the TJMG

4.3.1. ACi 1.0000.00.178603-7/000[43]

On December 19, 2000, the Second Civil Chamber, unanimously, partially amended the sentence of the 1st Court of the Municipal Treasury of Belo Horizonte, in an ordinary action claiming the declaration of nullity of the tipping over the plaintiffs' property and the payment of compensation for the Municipality of Belo Horizonte due to restrictions on the right to build imposed by the administrative act.

First, the rapporteur rejected the idea of basing the decision on the validity of the listing based on its legal nature, whether administrative limitation or easement, because “the damage to the owner cannot [...] its consequence”. Therefore, regardless of the legal nature, there would be a duty to indemnify for the partial emptying of the economic content of the property whenever the political entity causes injury to the individual (principle of strict liability).

Then, it maintained the declaration of nullity of the listing for lack of adequate motivation, because, despite “the existence of a deep study on the historical, artistic and cultural heritage of the Municipality of Belo Horizonte”, such document “does not individually turn to the listed property, failing to emphasize its historical, cultural or scenic value”.

And, finally, it partially reformed the sentence regarding the condemnation of the municipality to pay compensation for the tipping, since the actual damage caused was not demonstrated. On the other hand, it maintained the condemnation of the Municipality of Belo Horizonte to indemnify the authors for the loss of the constructive potential of the property, since the reduction of the maximum utilization coefficient when the listing was still in force, "caused evident damage to the authors, by removing them from the the prerogative of making use of the old norms on the subject”.

[43] TRIBUNAL de Justiça do Estado de Minas Gerais. **ACi 1.0000.00.178603-7/000** (Segunda Câmara Cível). DJ 09 fev. 2001. Rel. Des. Pinheiro Lago.

4.3.2. ACi 1.0000.00.271919-3/000[44]

On December 5, 2002, the Third Civil Chamber confirmed, in a unanimous vote, the sentence of the 4th Court of the Municipal Treasury of Belo Horizonte, in an ordinary action for compensation, which ordered the Municipality of Belo Horizonte to compensate the authors in R$ 50,500 .00, corresponding to 50% of the total depreciation of your property due to the tipping effect.

Recalling the doctrine of Hely Lopes Meirelles, the rapporteur stated that “registration is not confiscation”, but “preservation of goods of interest to the collectivity imposed by the Public Power for the benefit of all”. For this reason, he concluded, “one or some individuals cannot be sacrificed in their right to property without the corresponding compensation for the damage caused by the tipping”.

And, as the expert evidence in the case records showed that the act of tipping "caused a loss in the constructive potential of the land", it resulted in a loss of the market value of the property, which should be compensated.

4.4. A posição do TJSC[45]

On June 23, 2020, the Fifth Chamber of Public Law granted an appeal by the State of Santa Catarina to amend the sentence of the 2nd Court of the Public Treasury of Joinville, in a declaratory action of an administrative act cumulated with a request for compensation, which had condemned the State de Santa Catarina to indemnify the authors for the damage caused by the tipping of the property, in the amount of R$ 2,509,820.61.

The expert evidence attested that “with the tipping, there is a loss of the constructive potential of the land” and that “the devaluation index suffered by the property in question [was] approximately 53.79%”. However, the judges understood that this devaluation "is just a marketing issue", as the property does not completely lose its economic potential, and can be leased.

[44] TRIBUNAL de Justiça do Estado de Minas Gerais. **ACi 1.0000.00.271919-3/000** (Terceira Câmara Cível). DJ 21 fev. 2003. Rel. Des. Isalino Lisbôa.
[45] TRIBUNAL de Justiça do Estado de Santa Catarina. **ACi 0047116-17.2005.8.24.0023** (Quinta Câmara de Direito Público). DJe 13 jul. 2020. Rel. Des. Artur Jenichen Filho.

The rapporteur's vote, citing court precedents, asserted that the tipping of the property does not cause dispossession nor does it remove the right to exercise the faculties relating to the property, it only restricts the right to build, which is not enough to support the plaintiff's indemnification claim. . In addition, compensation is only admissible when the tipping causes the “emptying of the economic value of the property”, not confusing constructive limitation with impediment of profit (economic exploitation of the property).

5. CRITICISM OF SELECTED JURISPRUDENCE

Based on the jurisprudence of the STF, there are no doubts about the constitutionality of tipping, a legal instrument that the Public Power can use to promote and protect Brazilian cultural heritage. The court understands tipping as an intense form of restriction on the owner's faculty of disposal, which does not violate the essential content of the property right, since the owner of the thing continues to be able to use and enjoy it, as well as to dispose of it and offer it in Warranty. Thus, the elements of factual support would not be present, which would demand the cessation of an intervention not based or inadequately based on the CR.

In line with what was discussed in topic 1.1, the STF seems to recognize that the scope of protection of the property right is strictly normative and with that it grants a wide freedom for the Legislator to configure restrictions on such right in order to fulfill his duty to protect the patrimony. Brazilian culture. Although this space of legislative conformation is wide, it is not unlimited, finding its limit in the essential content of the property right. This position of the STF is in line with the argument that, in addition to having a constitutionally protected purpose, the legal regime for tipping must also pay attention to the extent and intensity of the restriction it imposes on the right to property. The problem, as will be seen, is the criteria that the STF (not) develops to assess whether a given restriction is legitimate or not.

The STF maintains that it is not just any listing that generates a duty to indemnify, citing that, if, for example, an entire street or neighborhood is listed, the characterization of the specialty or peculiarity of the damage borne by the owner is greatly mitigated. Based on this specialty criterion, it upheld the compensatory claim of the owners of that property on Avenida Paulista, which is one of the last remnants of the golden age of coffee, for having emptied the right to property.

However, the conceptual confusion between the specialty and the abnormality of the restriction of property rights is notorious.

The fact that an intervention is special – understood as one that affects one or more landowners, without affecting the majority of landowners under the sphere of competence of the organ or public entity promoting the listing – does not mean that it is abnormal – thus understood as one that, exceeding the costs of living in society, (I) makes the ongoing use of the asset unfeasible, considered as a whole, (II) makes any potential use of the asset unfeasible, when idle, or (III) nullifies its economic value. And vice versa.

Therefore, the geographic scope adopted by the STF is questionable, that is, "an entire street or neighborhood", for the purpose of moving away from the specialty of the intervention imposed by the tipping of the property. As a material competence common to the three spheres of government, the municipal tipping would restrict the entire municipality, the state the entire state and the federal the entire country in order to remove the special character of the restriction.

It is worth remembering that the "fair distribution of benefits and burdens arising from the urbanization process" general guideline of urban policy (art. 2, item IX, of the ECi), a specific manifestation of the principle of equality (art. 5 of the CR) in urban law , It is a double way path.

On the one hand, police power[46] legitimizes the Public Power to restrict the owner's disposal and construction faculties, by means of tipping, for a cause of cultural, historical, artistic, landscape or archaeological interest; and the social function of property legitimizes the imposition on the owner of the duty to conserve and repair, for present and future generations, the fallen thing. On the other hand, this individual sacrifice in favor of the collective benefit must be the object of compensatory equalization among the other inhabitants of the municipality, state or country, depending on the territorial entity promoting the tipping.[47]

The abnormal nature of the intervention caused by the tipping of a property results from its intensity on the property right: if the intervention only affects the owner's faculty of disposal, the use of the property is not made unfeasible nor does its economic value be annulled, resulting in a

[46] Código Tributário Nacional: "Art. 78. Considera-se poder de polícia atividade da administração pública que, limitando ou disciplinando direito, interêsse ou liberdade, regula a prática de ato ou abstenção de fato, em razão de intêresse público concernente à segurança, à higiene, à ordem, aos costumes, à disciplina da produção e do mercado, ao exercício de atividades econômicas dependentes de concessão ou autorização do Poder Público, à tranqüilidade pública ou ao respeito à propriedade e aos direitos individuais ou coletivos."

[47] "[...] sempre que os direitos dos cidadãos comportarem restrições em favor da coletividade, tem o Estado o dever moral de impor ao cidadão a forma menos onerosa de restrição, o que [...] pode se traduzir pela disciplina e aplicação da transferência do direito de construir", MONTEIRO, Yara Darcy Police; MONTEIRO, Egle dos Santos. Transferência do direito de construir. In: DALLARI, Adilson de Abreu; FERRAZ, Sérgio (coord.). **Estatuto da Cidade**: Comentários à Lei Federal 10.257/2001, 4. ed. São Paulo: Malheiros, 2014, p. 294-304.

restriction ; if the intervention, in addition to reaching the owner's faculty of disposal, reaches the basic constructive potential of the property, there is a (partial) emptying of its economic value, in which a violation takes place.

The jurisprudence of the STF recognizes, characterized by the specialty of the intervention, the duty of compensation due to the “emptying of the property right” of the constructive potential, a “practically absolute restriction” or, in the terms of the definitions presented, a violation of the property right.

This consideration of the loss of constructive potential due to the tipping as the basis of the indemnity claim was also accepted, as exceptionally, in the judgment of the Ninth Chamber of Public Law of the TJSP. Interpreting the decision, it can be said that the fractional collegiate of the TJSP evaluated that the elements of the factual support of the plaintiffs' property right would be present, that is, there would be an illegitimate intervention in the scope of protection of this right, which should be stopped. The fact that the neighboring properties did not support any intervention and the “destination and privileged location” of the plaintiffs' property contributed particularly to the granting of the plaintiff's claim in that area. Strangely, the possibility of compensating the plaintiffs through TDC was rejected by the judges, even though there is a legal provision for this, on the grounds that “this is not the best solution for the case”.

Contrary to this judgment, the possibility of other forms of compensation — such as exemption from IPTU and ISS for recovery works, and the TDC itself — corroborated the decision of the Tenth Chamber of Public Law of the TJSP, which removed the duty of the Municipality of Santos to indemnify the authors for the tipping of their property. For the judges, the generic allegation of the impossibility of using the entire constructive potential of the property and the possibility of building new constructions in the unregistered part of the property, provided that they are in harmony with the listed property, would also rule out the possibility of condemning the municipality of Santos.

It is certain that the person who, by unlawful act, causes damage to another, is obliged to repair it (art. 927 of the CC). However, lawful acts that cause unfair damage also require compensation for the injured party. Not every fact that is harmful to the interest of a third party is unfair damage; only harmful facts that, according to a balance of interests in light of constitutional principles, are qualified as such.[48]

[48] FARIAS, Cristiano Chaves de; ROSENVALD, Nelson; BRAGA NETTO, Felipe Peixoto. **Curso de direito civil**, 6. ed. Salvador: JusPodivm, v. 3 (Responsabilidade Civil), 2019, p. 249-250.

As an example, "the deterioration or destruction of someone else's thing, or the injury to the person, in order to remove imminent danger", excluding illegality known as a state of necessity (art. 188, item II, of the CC), when “the injured person, or the owner of the thing [...] are not guilty of the danger”. In the state of necessity without the victim's fault, the balancing of interests, performed abstractly by the legislator, creates the agent's duty to indemnify. When the balance of interests is not resolved directly at the legislative level, the task falls on the judge in the face of the concrete case.

In this sense, as we have seen, the case law of the TJMG - contrary to the case law of the TJSC - understands that the intervention to the basic constructive potential by tipping, despite being unequivocally lawful, causes unfair damage to the owner of the property, which must be compensated. In other words, the TJMG understands that the elements of the factual support of the property right of the constructive potential may be present in cases of tipping. There is no need to speak here of a mere harmful fact, since the act of tipping is a direct intervention in the essential content of the property right of the constructive potential. In the same way that the partial expropriation of a property economically empties the property right in relation to the fraction of the land affected by the patrimonial ablation, the partial restriction of the basic constructive potential by means of tipping economically empty the property right in relation to the remaining fraction of the bacis constructive potential.[49]

It is true that legal entities governed by public law are liable regardless of fault for the damages that their agents, in that capacity, cause to third parties (art. 37, § 6, of the CR), and the compensation must be measured by the extent of the damage (art. 944 of the CC). However, not all damage imposed by the Government - in this case, the act of tipping - to the property of others must be compensated in cash, since this is a specific guarantee of expropriations (art. 5, item XXIV, of the CR).

Thus, considering the primarily compensatory purpose of the TDC, it is perfectly possible to indemnify the interventions to the property right of the constructive potential resulting from tippings through it, at least for the tipping promoted by municipal entities. At this point, attention is drawn to the fact that the Ninth Chamber of Public Law has considered TDC to be unreliable to compensate for the sacrifice borne by the owners, even though it is supported by the ECi, while the Tenth Chamber of Public Law has removed the claim of indemnification of the authors, among other arguments, precisely because of the provision, in Santos legislation, of compensation for tipping through TDC.

[49] “O tombamento só dispensa indenização quando não impede a utilização do bem segundo sua destinação natural, nem acarreta o seu esvaziamento econômico”, MEIRELLES, Hely Lopes. Tombamento e indenização. **Revista de Direito Administrativo**, n. 161. Rio de Janeiro: Fundação Getúlio Vargas, jul./set., 1985, p. 2.

Finally, it remains to face the question of the moment for the exercise of the compensatory claim for interventions to the property right caused by real estate tipping. According to Decree 20,910, of January 6, 1932, approved by the CR[50], "the passive debts of the Union, States and Municipalities, as well as any and all rights or actions against the federal, state or municipal Treasury, whatever their nature, expire in five years from the date of the act or fact of which originate" (art. 1). Therefore, owners of listed properties can demand TDC for restrictions on property rights caused by the listing within five years from the date of restriction of constructive potential.

However, even when the claim is deducted in the meantime, the jurisprudence differs about the appropriateness of compensation if the property is acquired after the tipping. Although it is not an indirect expropriation, because there is no administrative possession in the tipping, the analogy with the jurisprudence on indirect expropriation is possible, since in both cases the action has a *real nature*.[51]

A portion of the jurisprudence understands that, "whoever acquires property after the entry into force of a rule that governs the right to property, from an environmental or urban perspective, cannot collect compensation, on the pretext that indirect expropriation has occurred", presuming, in absolute way, that the limitations levied on the good were known to the buyer and that the price "incorporated the eventual economic consequences of the encumbrance imposed".[52]

Another part understands that "the new owner of the property is subrogated to all the rights of the original owner, including the right to any compensation due by the State", regardless of whether the disposal of the property took place after the administrative takeover by the Public Power.[53]

Faced with the uproar, the First Section of the Superior Court of Justice (STJ) unanimously decided to allocate a special appeal to the rite of repetitive appeals to put an end to this controversy (Repetitive Theme 1004).[54]

The reason lives with the current, which understands that the subrogation of the new owner of the property in all rights of the original owner is appropriate.

In the first place, as it is not a personal right, but a real right, the mere exchange of ownership of the thing does not exempt the Public Power from indemnifying for the indirect expropriation. Otherwise, illicit enrichment and confiscation of assets would be recognized as principles of law.

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[50] Cf. SUPREMO Tribunal Federal. **AI 775.217/SP** (Decisão monocrática). DJe 06 jun. 2011. Rel. Min. Cármen Lúcia.
[51] SUPREMO Tribunal Federal. **ADI 2.260 MC** (Tribunal Pleno). DJ 02 ago. 2002. Rel. Min. Moreira Alves.
[52] Cf., por todos, SUPERIOR Tribunal de Justiça **REsp 573.806/SP** (Segunda Turma). DJe 02 maio 2011. Rel. Min. Herman Benjamin.
[53] Cf., por todos, SUPERIOR Tribunal de Justiça **AgRg no Ag 155.441/PR** (Segunda Turma). DJ 13 out. 1997. Rel. Min. Ari Pargendler.
[54] Cf. SUPERIOR Tribunal de Justiça. **ProAfR no REsp 1.750.624/SC** (Primeira Seção). DJe 17 dez. 2018.

Second, by preventing unjust enrichment of the buyer, the prohibition of subrogation inflicts unfair damage on the seller, who: (I) will dispose of the thing at a price below its market value, bearing alone, at the sacrifice of his personal patrimony, a diffuse benefit; or (II) he will be trapped for years in a legal battle, without being able to dispose of his property, under penalty of patrimonial devaluation, to receive compensation that, after all, will not put him in an equal position, as it will be deducted from the contractual legal fees.

Thirdly, the prohibition of subrogation is ineffective, as it can be circumvented with the simple filing of an action for damages before the disposal of the asset. As "the alienation of the thing or of the disputed right by an act between vivo, in a private capacity, does not change the legitimacy of the parties" (art. 109 of the Civil Procedure Code - CPC), if the Municipality does not consent to the procedural succession of the alienator by the acquirer (art. 109, § 1), the latter may intervene in the process as a joinder of the former (art. 109, § 2), who will be his procedural substitute. In the end, "the effects of the sentence pronounced between the original parties extend to the acquirer" (art. 109, § 3).

And fourthly, it is a general principle of law that, "where the law does not distinguish, it is not up to the interpreter to distinguish" (*ubi lex non distinguisht nec nos objectore debemus*). the art. 109 of the CPC did not differentiate between free disposal and onerous disposal for purposes of procedural succession. Therefore, it is contrary to the spirit of the law to differentiate the compensatory claim of the one who acquired the property after the listing, based on the acquisition modality, for example, purchase and sale and donation.

Consequently, in a reasoning analogous to that of compensation for indirect expropriation, the fact that the owner has acquired the property after the listing is irrelevant to guarantee the right to the TDC, provided that his claim is formalized against the Municipality within the five-year statute of limitations.

CONCLUSION

This article sought to identify when and how TDC should compensate for restrictions on the property right of the constructive potential of urban properties. To accomplish this task, two judgments from the STF, two from the TJSP, two from the TJMG and one from the TJSC were analyzed.

When the restriction is both special and abnormal, case law seems to agree that the owner is entitled to compensation. Therefore, compensation would not be appropriate, for example, if a master plan decides to demolish an entire city, nor if the property that has been demolished has already exhausted its basic constructive potential. However, the courts are not objective as to what is to be understood by a "special" restriction or what is to be understood by an "economic emptying of property".

It is possible to refine this doctrine, assuming that restrictions on the property right caused by tipping will have a special character if they affect one or more owners, without affecting the generality of individuals under the sphere of competence of the organ or public entity promoting the tipping. And the restrictions will have an abnormal character, economically emptying the property, if, in addition to reaching the owner's faculty of disposal, they reach the basic constructive potential of the property.

However, in the judgments, in addition to the discrepancy of positions, pointed out in the selected jurisprudence of the TJSP, regarding the use of TDC as a compensatory measure for the restriction of the basic constructive potential of listed properties, further developments on how the Public Power should compensate for the owners by restrictions caused by tipping.

Considering that the TDC is an urban instrument of commutative justice, a compensatory equalization mechanism aimed at guaranteeing the fair distribution of trans-individual benefits and individual burdens arising from the urbanization process, it is perfectly possible to indemnify the restrictions caused by tipping through it, at least for tippings promoted by municipal bodies or entities.

However, the São Paulo legal regime of the TDC, not involving the sale of the property listed as transferor, distorts the compensatory nature of the instrument regulated by the ECi, to promote a purpose of social justice that is not its responsibility.

Symptomatic of this purpose deviation are the "incentive" factors provided for in art. 24, items III to VII, of the LPUOS and the adoption of the transferor land area as a basis for calculating the formula for the constructive potential that can be transferred in art. 125 of the PDE. This legal structure, instead of equalizing the sacrifices borne by the owners of listed properties with the rest of society to the exact extent of the restrictions imposed by the listing, penalizes the owners of properties with an area

greater than 2,000 m² and privileges the owners of properties of up to 500 m² in fulfilling the social function of its properties.

This ideological contamination of TDC has as a consequence unwanted side effects for public policy on cultural heritage. The first of these is the (unnecessary) expenditure of budget resources to compensate landowners whose basic constructive potential has been restricted and not properly compensated through TDC. The second is the unsustainability of this public policy in the long term, since the use of irreproducible revenue to defray an ongoing expenditure is not financially healthy. And the third of them is the unjust enrichment of owners whose properties have already exhausted their basic constructive potential.

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