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Conquered cities: the ascending dogmatic of indirect expropriation in urban occupations

Cidades conquistadas: a dogmática ascendente da desapropriação indireta em ocupações urbanas

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Abstract

Starting from the disciplinary concerns about the obsolescence and loss of normative autonomy of Civil Law, this article aims to establish, from a concrete case about the indirect expropriation of an occupied urban land, the concept of "ascending dogmatics" as an alternative to theoretical procedures that seek only in the constitutionalization or publicization of Private Law the mechanisms of its updating. It then demonstrates the power that would be implied in a recovery, for Civil Law, of one of its most traditional tasks: the encoding and recoding of everyday relationships.

Keywords: Civil Law; Urban occupations; Indirect expropriation; Codification; legal dogmatics.

Resumo

Partindo das preocupações disciplinares sobre a obsolescência e a perda de autonomia normativa do Direito Civil, este artigo tem como objetivo estabelecer, a partir de um caso concreto sobre a desapropriação indireta de um terreno urbano ocupado, o conceito de “dogmática ascendente” como alternativa aos procedimentos teóricos que buscam apenas na constitucionalização ou na publicização do Direito Privado os mecanismos de sua atualização. Demonstra-se então a potência que estaria implicada numa retomada, para o Direito Civil, de uma de suas tarefas mais tradicionais: a codificação e a recodificação das relações cotidianas.

Palavras-chave: Direito Civil; Ocupações urbanas; Desapropriação indireta; Codificação; Dogmática jurídica.

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1. Civil Law in the city, or from obsolescence to ascendancy

Whether seen from the perspective of social time or space, the "city" as such is a challenge to the dogma of Civil Law.

However, this does not mean that the "city" stops growing. The same urbanization process that nurtures it deterritorializes the previously consolidated ways of life (DELEUZE; GUATARRI, 2004, p. 143 ff.)[1] , indiscriminately and uncritically referred to as "traditional" – one speaks generically of "traditional property", "traditional commerce", "traditional family" and many others, as if the distribution and meaning of these concepts had always been uniform –, in order to reterritorialize subjects, their relations, their practices and their meanings in different strata, according to an evidently ever-increasing complexification of social division of labor, which confronts in the urban space – stage of unpredictable encounters – a myriad of inequalities and differences.

The maxim “where there's smoke there's fire” seems acceptable, and concerns about superstructural compatibility, so to speak, arising in the face of indications of infrastructural change, seems prudent. No longer, however, are the scorched-earth fetishes – analytical and institutional reactions that, rushed by the time of money and the pace of traffic, and perhaps encouraged by sincere desires for renewal, see in everything (or, worse, anything) obsolescent disruptions and Copernican revolutions to convert, in a flash, durable schemes into mere museum curiosities.

It is not so much about the likeliness of the diagnoses, as macroscopic and comprehensive as they are, but about the adequacy of therapies. These have been based only on partial descriptions of the relationships that appear on the streets and in the markets. From the "abstract sociality" fought by the *blasé* individual – who, in a forced stoicism, isolates himself to preserve his own spirit, founding urban "non-places" (AUGÉ, 2005, p. 65 ff.) –, to the "consumerization of life" (BAUMAN, 2008, p. 8 ff.) faced by *homo oeconomicus* – submitted as he is to the fragility and the fugacity of all things –, one ceases to see any continuity, adaptation, re(production) or resistance (better: re-existence) in

[1] According to Guatarri and Rolnik (1996, p. 323): "Territory can deterritorialize itself, that is, open itself up, engage in lines of escape, and even go off course and destroy itself. The human species is immersed in an immense movement of deterritorialization, in the sense that its 'original' territories are uninterruptedly undone by the social division of labor, by the action of universal gods that go beyond the frameworks of tribe and ethnicity, by the mechanic systems that take it ever more rapidly across material and mental stratifications." The concept can be understood as the relation of pertinence between subjects and a social region to which corresponds a code that is proper to it (DELEUZE; PARNET, Claire, 1998, p. 104 ff.).

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changes, as well as the "extended socialities" of "making the city" (AGIER, 2015, p. 19 and ff.). And, what is more serious, it ignores, in the name of the supposed massification and standardization of the abstract whole, the concrete diversity of the parts that is at the foundation of the urban experience. Hence, the institutional attempt to respond to unpredictability, uncertainty and, perhaps, insecurity beyond the risk (BAUMAN, 2005), of these new flows and events, makes the Law, as a social instrument, reduce itself, in the teleological displacement of ethics (that is proper to it[2]) towards the mere discipline and administration of conflicts[3], to one of the mechanisms of the Administrative Power and systems that "colonize the world of life" (HABERMAS, 1997, p. 57-119).

Against such a backdrop, it is not surprising that evident and normalized attempts, often honest though salvationist, have been made to capture reality (DELEUZE; GUATARRI, 1997, p. 97 ff.) with the technique of Civil Law and its long-established categories (such as "person", "property", "legal transaction", "contract", "family", "liability", etc.), in a top-down movement, similar to the attempt of the Administrative Power, subsuming the social world to models that often no longer take into account its current degree of diversity, much less the types of conflicts generated by this diversity – raising, since then, fair questions about the legitimacy of this regulation: what type of "person" does Civil Law refer to? What is the form of life that it presupposes? What are the economic and social relations that it chooses to protect, and why? Who, after all, is excluded from Civil Law?

The resulting criticism has been, somewhat erratically, sometimes developed and sometimes addressed through the "politicization" of Civil Law. By "politicization", however, we generally do not mean that this branch of Law was previously above, beneath or beyond politics – for it has always been about citizens' rights and the boundaries between their legal spheres vis-à-vis the power of the State. Nor is it meant to imply that Civil Law until then dedicated itself to the protection of private spheres from

[2] In this sense, Gustav Radbruch (1997, p. 124-125) evaluates that alongside "justice", law would also pursue the "good", the ultimate ethical value. In his words: "Note that when we formulate the problem of the end of law, we do not refer to the *empirical* ends that here or there may have provoked the appearance of this or that positive right, but to the meta-empirical end, in the light of which (*sub specie æterni*) the right will have to be appraised. The answer to this question, however, can only be given after we know which of the values, next to that of justice - of those to which absolute validity must be attributed, as well as to the latter - right is called upon to serve. We can limit ourselves to pointing here, once again, the traditional triptych of all ultimate values that we already know - that of the ethical, logical and aesthetic values, of the good, the truth and the beautiful - since it will immediately be recognized that law can only be called upon to serve one of these values and, in particular, the ethical value of Good".

[3] This is one of Foucault's main theses about modern law in "*Discipline and Punish*" (2014).

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within them – since it not only has always served as a substratum for economic and social activities, but also seems to have always developed on the contact surfaces between the values of the *polis* and domestic values (one might say that Civil Law itself is but a surface effect at this interface). In the end, and obviously, we do not intend to indicate any "partisan" character for the current Civil Law.

Instead of all this, the aforementioned "politicization" means in the first place simply the elicitation of the properly political meaning of legal norms and the effects they give rise to, through the description of their functional role in the (re)production of certain prescribed patterns for the political community; and, second, the conditioning of the exercise of rights (in a subjective sense) to the fulfillment of these functionalities. We speak exhaustively and repeatedly about "public order", "social function" or the "social-economic function" of property, contracts, and business, about prohibition of the "abuse" of active legal positions, illegality of "antisocial" or "dysfunctional" behavior in the exercise of rights, etc. And up to this point, we make virtuous progress. However, this solution, again, has been seen by the hegemonic literature from a hierarchical-subordinate perspective, "from the top down" or "from the systems to the world of life". And, in this way, perhaps because the expedient is simpler and more economical, Civil Law, as a branch of Law that acts on the daily life of the common citizen, finds itself "colonized" by other disciplines, without the Civil Law experts themselves (*recte: a* good part of them) noticing or caring about the size of the betrayal that the expedient conflates. In this sense, much has been said about "constitutionalization"[4] or "publicization"[5] of Private Law, or even about a certain "Civil-Constitutional Law"[6] , whose innocent surface meaning – that Civil Law, as any other regulatory set that claims to be "legal" within a political community, should seek validity grounds in the Constitution of that community, as the norm whose position is the highest in the normative pyramid – not rarely hides the opportunistic apanage of a "dogmatics of absence", according to which Civil Law, in order to make sense in contemporaneity – or rather, in the parroted "post-modernity" –, would

[4] For the best exposition in the literature of the models of constitutionalization, see: AFONSO DA SILVA, 2015.
[5] On this and regarding property, specifically, see the exemplary position of Borges (1998): "With the enactment of the 1988 Constitution, the right to property ceases to have its exclusively privatistic regulation, based on the Civil Code, and becomes a private right of public interest, with the rules for its usage being determined by Public Law and Private Law. This process of publicizing property rights is fundamental for the implementation of the legislation concerning the protection of the environment, which imposes limits on the exercise of that right".
[6] LOTUFO, 2002; MORAES TEPEDINO, 1993; PERLINGIERI, 2002; TEPEDINO, 1999. For a critique of the dogmatics of property proposed through the assumptions of the "Constitutional-Civil Law", see, for all: RODRIGUEZ JÚNIOR, 2012.

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need to be "completed" or "presentified" by other disciplines, capable of "overmodernizing" it.

It is not, of course, the case of censuring these analyses, depreciating the brilliance of their authors, standardizing their arguments, ignoring their hermeneutic usefulness, or questioning their aptitude for convincing other legal practitioners and scholars of the Law. If problems with the exclusivity of this position were only that of the autonomist pride of the discipline, or even that of the professional positions of those who specialize in it, we could judge them to be innocuous or transitory. Nevertheless, it is worth asking: what about the citizen? What space is relegated to him in this scheme? If Private Law, in general, and Civil Law, in particular, are those whose function, in social division of legal work, is to provide the common person with mechanisms for the expression of his autonomy, then would it not be denying him legal agency, "jurisgenesis" [*i. e.* the ability to create a rule], and even the much proclaimed dignity, to always climb up the normative pyramid, always leaving one's gaze fixed on its summit, and never spying on, much less taking seriously, what is produced at its base?

The paradox that is reached starting from such broad assumptions seems to be this: the "post-modern" mechanism of presentification of Civil Law, at least virtually and tendentially, renders outdated, mere "survival", the very private autonomy on which the discipline was erected, and on which it depends.

But could this sentence not be inverted, and this prophecy not reveal itself as self-fulfilling only by the action of its believers, if we turned the problem upside down and took seriously what is done at the base of the pyramid – *i.e.,* in the streets and squares – , where Law is effectively lived as a daily relationship? Would we find autonomy in the "world of life", or rather, the jurisdiction of sociality, as a mere museum piece – or, on the contrary, would we find reasons to reexamine the Civil Law under another light, seeking again in it its transformative potential?

The general hypothesis we intend to outline here is that it is to a *immovability* of the idea of a *Code*, at the same time static and statist, and so intertwined with the (legal) project of modernity[7] and the development of Civil Law in recent centuries, that the "city" resists: the *habitus* (BOURDIEU, 2007, p. 337 ff.), the ways of being, feeling, perceiving, acting and interacting in the urban environment do not and cannot find representativeness in watertight, pre-defined, presupposed and definitivized formulas –

[7] Cf. BOURDIEU, 1986; SIEBENEICHLER ANDRADE, 1997; SAVIGNY, 1946.

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and, of course, much less in those formulas that are accused, to more or less deaf ears, of being dated, partial and/or excluding. In other words, it is not against Civil Law itself that the "city" insurges – on the contrary, it seems to request it, as autonomy or “jurisgenesis” of sociality –, but against the contingent form that a certain dogmatic, philosophical, and, above all, political project has granted to it, which now seems to need revision, or even reversal.

Being able, *ex ante*, to be confirmed or disproved, any hypothesis must address the world in search of what it lacks at the time of its elaboration. Given the diversity of the world – I was going to say "worlds," plural –, one can imagine that an interpretative hypothesis for relations (between human beings and between human beings and other beings), if it does not want to be discarded for its inadequacy, will find, in each case in which an attempt is made to prove it, a distinct background of reality, an individual and concrete manifestation of what it is only in general and abstract terms.

Elsewhere (FERNANDES JR., 2021), I confronted this same hypothesis with relations established by the socio-spatial regulation of certain neighborhoods, in general inhabited by upper-middle and upper classes, between their inhabitants, these inhabitants and the physical space they inhabit, and between this place and the "city" as a whole. The object of that investigation, more precisely, was the effective conflicts between, on the one hand, conventional urbanistic restrictions of private allotments, which in the past had been declared in a unilateral and receptive legal transaction of a Lot Development Project, by a developer, with the consent of the municipal authorities; and, on the other hand, supervening urbanistic laws that, expressly or tacitly, had the power to derogate from conventional restrictions in order to protect other interests – sometimes general ones, sometimes those of the real estate market. "Garden neighborhoods" of the city of São Paulo were chosen as a privileged example for that research and, besides the specific cases in which urbanistic conflicts were manifested – in which they and other urbanistic allotments throughout the State of São Paulo were involved –, it was also the object of analysis the history of these neighborhoods and the political forces that acted, on one side or the other, before, during and after the disputes that involved them.

Some things became evident there. First, such struggles were usually raised by the residents of these neighborhoods, which, organized in the form of local associations, emerged, as a collectivity, as a preserving (and often conservative) force. These collectives found themselves capable of, in addition to symbolizing the socio-spatial

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relations they were engaged in, also translating their claims for the continuation of their way of life into the language of Law, through the manifest path of Civil Law – its concepts, its technique – in order to claim a place in the debate that was then being held on the destiny of the city in general, and of their neighborhood in particular, inaugurating, within this political-urbanistic dispute, a properly legal conflict, *i. e.*, in a grammar that contrasted Private Law and Public Law. Eventually – and this is the most interesting – this legal conflict was shaped by the confrontation between two types of arguments, both legally possible and judicially admissible, whose natures, or ways of elaboration, were absolutely distinct, namely: (1) on the one hand, the discourses of the municipality or of elements of the real estate market, which were composed of arguments that started from general and abstract legal concepts, and from theories about their meanings, to propose the normatization of the urban fabric through legal enforcement; and (2), on the other hand, the discourses of neighborhood associations, which were mostly integrated by arguments that started from the symbolization of lived life to seek the meanings of general and abstract legal norms that would regulate the city. These two types of arguments, since they were always properly juridical (with all that this means), were called, respectively, *descending dogmatics* and *ascending dogmatics***.**

Descending dogmatics manifested themselves by the *deduction* of concrete solutions from abstract and generic concepts, notions, rules or principles already established in the past, proceeding by a logical movement that was properly described as being "top-down". At the same time they followed the logic of Administrative Power and systems, they represented the way that had become more common to "make the Law" since Modernity and the Age of Codifications (WIEACKER, 1980, p. 365 ff.) – whose modern-day unfoldings are embodied in the collapse of Civil Law as such, given the establishment of epistemological, normative and political assumptions such as those of the "Civil-Constitutional Law".

Ascending dogmatics, on the other hand, started from everyday life – of which local customs and usages are only the most scholastic examples – to determine the practical meaning, that is to say, individual and concrete, of those same concepts, notions, norms or principles of Law, in order to request protection for the ways of life that produce them *by* and *for* themselves in a given territory. Through these dogmatics, the common people tried to take back the legal agency that the descending procedures robbed them of, no longer being mere recipients or consumers of the norms previously enshrined in

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Law: they invented, reinvented, interpreted and reinterpreted the regulations, attributing to them meanings that seemed to us legal theorists creative, but that were no more than what was consonant with their interests and closest experiences (CERTEAU, 1998, p. 38 ff.) – pure "common sense". "Good faith", "social function", "good practices" etc. were no longer moral corollaries, established from ideal models never lived; they took back their proper ethical character inside day-to-day social situations: how did people, in that square, negotiate? How did people there deal with reciprocal neighborhood interference, and what was, after all, harmful interference in the context of the neighborhood? The intention to update the meanings of the Code was not accomplished by hermeneutics that seeks this novelty in a higher hierarchical level – it returned to life, from where the Law arose and where it is effectively practiced; where Law is not theory, but sociality, that is, relationship. This is why it was possible to say that the ascending dogmatics acted, properly, "from the bottom up", by *induction,* and, with justice, it is fair to say that they *overlapped the facts to the norm*, instead of *subsuming the facts to the norm*.

The passage from one mode to the other – from descendent to ascendant – seemed to require at least two displacements of the notion of "politicization" that was ventured above.

The first displacement was institutional and, in this sense, "politicizing" also meant "to be controversial", or promoting the confrontation of distinct, and often contrary, rational discourses, implementing, at a stroke, the most basic condition of a radical democratic process, as well as the dignity of Law of being, par excellence, the language of this process, stripping it of its colonizing excesses and restoring it to its manifestly agonistic character. Hence the recognition that opposing but equally legal claims may be mobilized in the competent debate arenas, with the purpose of convincing the audience of citizens, administrators, legislators and/or judges, prevailing the one with the best grounds (at least until the next clash), without the loser being deprived of its legality.

Then, if the "politicization" initiated by "constitutionalization", by "publicization" or by "Civil-Constitutional Law", seeks to make other normative spheres intervene in Civil Law, in a hierarchical manner, from a macropolitical perspective of the systems against the world of life, it was necessary, for the ascendant dogmatics, on the contrary, that the "politicization" be re-signified to attend to the micropolitical perspective through which different ways of life reterritorialized themselves in the city –

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i. e. to the ways in which they existed and coexisted and interacted and conflicted with each other, always meeting each other. The immediate consequence of this was that, instead of seeking the legitimation of Civil Law in political-normative terms only by the submission and coherence of its norms to the formal Constitution, the ascendant dogmatics had to seek this legitimation also in the practices for whose protection it was required by city dwellers. Thus, the focus of discursive production is no longer exclusively historical – a rule that, despite having been positively enacted in the past, must always be applied anachronistically in the present, preserving itself, to the detriment of the differences that have since been elicited – but also geographic – in the sense that the cartography of relations, in the form that people give to it in their daily lives, begins to dialogue with the preceding categories, or becomes capable of erecting new categories, closer to the context in question. This means considering that the secular Napoleonic gesture of revoking customs in favor of totalizing Codes (Ehrlich, 1986, pp. 17-18) has been overcome: Civil Law resumes its millennial task of permanently codifying and recoding itself[8]. It was the verbal form versus the noun form.

All this, as I showed in that previous research, was valid for what can be called "*situated cities*" – neighborhoods or urban portions that want to keep the socio-spatial legal *status* or regulation they already have, but which are threatened by the onslaughts of Administrative Power and systems. Nevertheless, does it also apply to "*conquered cities"* – neighborhoods or urban portions that aim at a new socio-spatial legal *status* or regulation, in spite of Administrative Power and systems?

The argument that we intend to develop in the remainder of this text answers this question affirmatively – and does so, once again, by empirically testing the general hypothesis that the problem of obsolescence of Civil Law is, in fact, the problem of immovability of the substantivized idea of the Code. The practical case, increasingly common in the cities and courts of the country, that will be used to demonstrate it gravitates around what is conventionally called, in a perhaps not very technical manner, "indirect expropriation" – a legal institution that emerges from the consideration, on the part of the Judiciary, that it is "impossible" to grant a possession order to remove families from an urban property where they live due to an occupation that can be originally qualified as illegal, despite the recognition that the plaintiff holds the right to possession (*ius possessionis*) of the area.

[8] On the subject, see: SACCO, 1983.

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This example is quite opposite, if not contrary, to that of the "garden neighborhoods", both with respect to the intended legal purpose and with respect to the social conditions of production of the conflict. However, as will be indicated below, the same bottom-up procedure is carried out, in both cases, to attribute meaning to the same general categories of Civil Law, and this with the aim of inaugurating, in the bosom of a socio-political conflict, a genuine legal confrontation vis-à-vis the Administrative Power and/or systems. In either case, this is what matters: to see how Civil Law is managed from the "bottom up", from the world of life to systems, in order to contrast with top-down legal arguments, serving, at the same time, as an instrument of struggle and resistance, and as a mechanism for agonistically conducting the conflict.

2. Transformations of time and space in the conquered city

An actual case heard by the Fourth Panel of the Superior Court of Justice (BRASIL, 2016) gathers all the characteristics that could be listed as typical in the description of cases on indirect expropriation of urban occupations[9].

Compiling the records of this process, one can see that it was originally a repossession suit, filed in the district of Uberaba, involving a plot of land on the margins of the Uberaba-Campo Florido highway, composed of the remaining area of another property, which had been subject to a previous real estate transaction.

In the complaint, the plaintiff – a corporate entity, organized as a limited liability company, engaged in the activity of real estate developer – was able to prove, at least *prima facie,* through documents that would later be complemented by testimonial evidence, all the requirements of article 927 of the 1973 Code of Civil Procedure for the granting of a repossession order, namely: (1) previous possession of the property; (2) trespass practiced by the defendants; (3) date of trespass; and (4) loss of possession.

The initial complaint states that the defendants – all of them natural persons, supposedly self-identified as activists of the "Landless Workers' Movement" (MST) –, around October 5, 2000, invaded the property, despite the fact that it was surrounded by barbed wire and given in loan to cattle ranchers who, according to the plaintiff, were

[9] Here we resort to the idea of "concrete type" as defined in: LARENZ, 2012. p. 655-659. I have demonstrated the usefulness of this category for the purposes of empirical legal research in: FERNANDES JR., 2019b; 2018a.

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engaged in "rudimentary dairy cattle farming" – and, consequently, had direct possession of the area, while the legal entity that owned the property had indirect possession of it. Police reports, letters and reports in the case records also showed that the company had tried to resist the invasion, requesting the intervention of the Military Police, which had negotiated a deadline with the occupants for their peaceful departure – something that, until the date of filing of the lawsuit, however, had not occurred.

There was sufficient evidence of the likelihood of the plaintiff's allegations, so that the judge, acknowledging a *periculum in mora,* on November 29, 2000, issued a preliminary injunction for immediate repossession. However, as later reported by Judge Carlos Luiz Gomes da Mata, of the Court of Appeals of Minas Gerais (2010):

> "(...) it is verified in the records that there was no relevant State support to fulfill the judicial order issued, as verified in the certificate of the bailiff (...) and in the Military Police's own letter (...); these facts have led the judge (...) to issue an order (...) establishing that the Honorable President of the Court of Justice, the Honorable Inspector of Justice of Minas Gerais and the Honorable Prosecutor's Office be notified.

The explanations for the Military Police's failure to comply with the order, however, have been diverse in these documents: from the certainty that it would be necessary to use force against civilians, to the risk of casualties, these are reasons that are soon pasteurized in the form of State negligence, or the "accomplice State".

Timely summoned and mobilized with their attorneys, the occupants integrated the legal-procedural relationship and filed an interlocutory appeal against the preliminary injunction. Despite the fact that the appeal arguments about those families having nowhere to go and about their need for housing and work were not taken into account, they nevertheless managed to suspend the repossession order, by decision of the Court of Justice of Minas Gerais, on the grounds that "the Plaintiff (…) did not have full possession of the area", given the alleged appearance of abandonment that the property had until the date of occupation.

Strangely enough, the legal entity that filed the lawsuit did not appeal the solution of the interlocutory appeal and the defendants remained on the land during the entire discovery phase of the lawsuit – which would drag on until 2009.

In the meantime, in addition to filing of various petitions – those of the kind that only keep the process alive –, the occupants "fought", as they would say, *in loco*. And this, initially, is transposed, in the case records, by way of the expert report, in which photos

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from various dates, taken during aerial surveys by the Military Police and stored in their archive, are compared. According to the expert:

> "The surveyed area 'A' up to 1984 did not contain invasions (...). In 2000, parts of this area were invaded initially by gypsies [*sic*] with canvas tents and, in 2002 (...) streets were opened and physical buildings were put up. On July 10, 2007, when the survey began, we found that parts of the surveyed area contained streets and public improvements: electricity grid and street lighting, sewage network, water network with branches and connections with individual hydrometers (...) and buildings with numbers supplied by the Uberaba Municipality.

It was clearly a process of urbanization in full swing: the "invading" buildings (houses, shops, etc.) had been established by individual and/or collective efforts of the occupants, and their demands for public policies and urban improvements, and the conquest of them through pressure on the government, had caused the State itself to become, so to speak, also an “invader”: streets, squares and public facilities, water, sewage, and electricity systems – all these now belonged to it, at least virtually. To the point where, according to the expert:

> “In the surveyed area (…) of 310,400 square meters, there are areas occupied to date by the federal, state and municipal government, with highways, highway interchanges and streets, and a large number of residential and commercial houses located on public roads (…). An area of 220,010 square meters is occupied by private individuals.”

The consequence was that, of the procedural acts carried out by the defendants, there was only the news that the process of expropriation of the land by the Municipal Government of Uberaba had been initiated – something that, as the plaintiff claimed, the municipality had subsequently given up.

When the Municipality was summoned, it did not even contest the lawsuit, alleging that it could not be considered a defendant because it had no interest in the case. As to whether or not it had expropriated the area, however, its answer was that the expropriation process it had actually carried out – and which it had not given up on – did not involve the invaded part of the land, but another part of it, which had been cleared and ended up being (likewise, but formally) urbanized.

The defendants did not accept this answer, which must have seemed like a challenge to them. When called upon to answer the question, the expert proved them right, confirming the City's role as the "State in charge" by indicating that the invaded area

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had been expropriated by Municipal Decree n. 4.920 of 2004, which was revoked, a few months later, by Municipal Decree n. 368 of May 2005.

In the probable explanations that could be offered by the defendants about the conduct of the Municipality, the political parties' causes would perhaps take on greater importance, although they were procedurally inadmissible in those circumstances. Decree n. 4.920/2004 was enacted during the administration of Odo Adão, of the Brazilian Social Democratic Party (PSDB), who had been elected vice-mayor with Marcos Montes Cordeiro, of the Liberal Front Party (PFL), in 2000, and took office, still in 2004, when the former mayor stepped down, as he was invited by then governor Aécio Neves (PSDB) to take on the position of Secretary of State for Social Development and Sports of Minas Gerais. In the 2004 municipal elections, however, the ruling coalition, composed of PSDB and PFL, besides the Democratic Labor Party (PDT) and the Green Party (PV), had suffered a crushing defeat, with the election of the opposition candidates in the first round, with 67.21% of the votes. The mayor-elect, Anderson Adauto, of the Liberal Party (PL), had then issued municipal Decree n. 368 of 2005 – his candidacy was said to have interested, if not the plaintiff itself, at least the local sector of its economic activity. In contrast with public interest reasons, the withdrawal would thus respond to occasional governmental interests – or rather, to the interests of this government's alliance with real estate capital, an alliance that effected the “marriage” between Administrative Power and economic system, so to speak.

Nevertheless, once the discovery phase of the procedure had been completed, the case was sent to the trial court for judgment. By that time, in 2009, however, the judge must have been facing a crossroads. Space and time forked before him, and what was fair in one chronotope (BAKHTIN, 2014, p. 211) might not seem fair in the other. How should he respond to the lawsuit? With the criteria of 2000, when the lawsuit was filed and the property was invaded; or with the criteria of 2009, when, with the property transformed into a neighborhood, he was finally called to decide?

The dilemma is apparent in the *rationes decidendi* of the decision, but is all the more evident in the dispositive part itself, where the judge *recognizes the plaintiff's right to possession* – thus affirming the original illegality of the invasion, in 2000. However, in an apparently contradictory manner, the judge *denies the plaintiff's right of reinstatement*, on the grounds that there is no longer, in practice, any way of returning

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the property to the plaintiff – which, in reality, implied that the eviction of the residents from the area, in 2009, would be equally illegal.

A rare and strange phenomenon: for this decision of the trial court, the right existed and did not exist - and the two things seemed to happen simultaneously, by a surface effect that is very typical of legal rationality, which judges the past, in the present, in order to sanction it in the future, producing a succession between time-spaces by means of the same instant in which they merge[10]. After the decision was taken to the Court of Appeals of the State of Minas Gerais through an appeal filed by the plaintiff, even the judge-rapporteur of the Court was surprised with the decision – not so much because of the incongruity that it seemed to show as because there was no way of totally restoring it to a logic of non-contradiction. However, this did not prevent the judge-rapporteur from trying. And so he did, by applying the principle according to which *tempus regit actum*, multiplying the people in order to singularize them, or rather, subjectivize them, in distinct spatiotemporal strata.

The winning opinion of the rapporteur is based on a distinction that begins formally and then becomes more substantial. Thus, he begins by differentiating the occupants of the property between those who formally participated in the repossession suit – the so called "invaders" –, who had been defendants since 2000, and the other private occupants – the "third parties" – who were not *nominally* part of the legal-procedural relationship in 2009:

> "(...) I understand that the decision, failing to apply in practice the recognized right [*i.e.* the *ius possessionis*] (...), did not give the most correct solution to the litigation, especially in face of the defendants who continue in clandestine possession of the property, and therefore, the issue must be reexamined both in face of these defendants mentioned as well as third parties who are not parties to the action."

As for the nominal defendants in the case, the fact that they were accused of conducting the invasion had the power to incarcerate them in the chronotope of the land invaded in 2000. Time elapsed in the process and, above all, the spatial changes the property had undergone, remained abstracted, or at least irrelevant. The unlawful act,

[10] Although legal analyses that focus on these "time disputes" are rare, so to speak, they are more common than they seem. Something similar can be found on the application of the *tempus regit actum* principle to legal transactions, in: FERNANDES JR., 2019a.

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which qualified their possession as "clandestine"[11], had paralyzed both time and space for them, and the only way, in the present, by which they could reach the future, was, given the primacy of coherence in establishing action-and-consequence, to be held responsible for the past unlawfulness: until their eviction, they would never cease to be "invaders", no matter what happened – this being the dogmatic meaning of "clandestine possession" in Civil Law.

In relation to the "third parties", although they were also occupants of a property whose possession should, by right, belong to someone else, it was relevant that, instead of being perpetrators of an illicit act (*i.e.* "invaders"), they were, in fact, "victims" of the Municipality of Uberaba – which was, in fact, another "invader", and, above all, "deceptive". The judge-rapporteur of the Court said:

> "Evidence brought forward is very clear in demonstrating that the municipality of Uberaba-MG not only gave all the logistical and urbanistic support to the invaded area, since it promoted a true social settlement, with the construction of streets, avenues, paving and sewage systems, transforming the invaded area into a populous neighborhood, as the trial court decision acknowledged, but also ended up carrying out a real 'blow' against good faith, since it published a decree of expropriation to justify the works carried out and, later, when hundreds of families were already settled, it ended up revoking that decree, as it is inferred from the expert report".

Here, notwithstanding any assessment of the circumstances of each individual's entry into the occupation – which, logically, may have happened the day after the suit was filed, or even before that, provided it went unnoticed or anonymous to the plaintiff –, the chronotope that enclosed these subjects (the "third parties") was that of the 2009 urbanized neighborhood, and what promoted the coupling between the past and the future, in the present, was solely the condition of having been deceived, so to speak, by the Municipality. It was not even necessary, in order to qualify as a "victim" of the Municipality, that the occupants had settled after the 2004 decree, much less before the 2005 decree. It was enough that they had not been the first "invaders" of the land – or, better, that the plaintiff itself had not accused them of being so.

Hence the attempt, in the ruling, to solve the antinomy of the decision through a differential distribution of the judicial protection among the subject-occupants – masking, in the *decisum*, the multiplication of the incongruities that it sought to resolve:

[11] In this analysis, possession is understood as a factual situation, according to the interpretation of Pontes de Miranda (1971). On the ways through which Law functionalizes facts, and more specifically possession, see FERNANDES JR., 2018b.

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> "Having made these distinctions, the operative part of the decision needs to be modified in order to determine the immediate repossession of the Plaintiff/Appellant in areas where each of the defendants/Appellees are settled and only of physical space of the area occupied by each of them, and the appropriate repossession warrant should be issued. Regarding the area whose physical space is occupied by third parties who were not parties to the action, as well as in the common physical spaces that reveal social and public interest, squares, streets, avenues and sidewalks, the decision is confirmed to recognize the impossibility of the Plaintiff's de facto repossession of said areas".

Here is another unexpected rhetorical figure, that of "allotment guilt" – the guilt of the "trespassers" identifying the lots that should be returned, on the one hand, and the guilt of the "deceptive State", on the other, identifying the lots that could no longer be returned to the plaintiff. However, the most surprising thing is that the issue is not even merely spatial. With the original "invaders" paralyzed in 2000, the few spaces that they still occupied inside the disputed area no longer coexisted, neither temporally nor geographically, with the surrounding spaces occupied by the "victims". A different coloring marked both, making possession of the former "clandestine" and forever enclosing them in the condition of parcels of land, and making the latter, of more or less legitimate possession (if it can be said that way), authorized to exist in time, as they were already a neighborhood, and no longer a bare plot of land.

From the simultaneous existence and non-existence of the right in a subjective sense (*i.e.* the plaintiff's *ius possessionis*), we then arrive, in the Appellate Court, at the simultaneous existence and non-existence of the *object* of this right. The object of the plaintiff's right, and therefore the right, lived on with regard to the "lots" (*sic*) of the original "invaders", which continued to be parcels of the original "tract of land"; but the object of the right, and therefore the right, no longer existed with regard to the "lots" (*sic*) of the secondary "occupants", which became parts of the "city" – and the plaintiff's interest in this respect should be converted into losses and damages.

The real estate developer had no difficulty in seeing that, in practice, the right the decision had acknowledged in its favor, and that the Appellate Court had not denied, remained frustrated in the Appellate Court decision: from the area where hundreds of families had settled, the Court of Justice would only return to the plaintiff the relatively derisory and scattered plots occupied by few nominal defendants in the suit. It was more a punishment for them than a benefit for the company. It did not take long, then, for the company to file a special appeal with the Superior Court of Justice, based on article 105,

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III, "a" of the Constitution of the Republic, on the grounds that the decision in question contradicted or denied the validity of Federal law – indicating, at the time, non-compliance mainly with the rules of the 1973 Code of Civil Procedure (CPC/1973) which related to possession actions, in general, and the repossession action, in particular.

Since the occupants failed to file a counter-reply to the appeal, it was incumbent on the Superior Court of Justice to answer the following main allegations of the appellant: (1) for repossession, it *did not matter for how long* the invaders had occupied the dispossessed area, since formal fulfillment of the requirements of article 927, CPC/1973, would suffice; (2) mention of the existence of the social right to housing should not be sufficient to rule out the possessory protection, since the repossession proceeding is not, pursuant to article 1210, § 2 of the Civil Code, a proper means for discussing issues related to the social function of the property; and (3) since the case involved trespass practiced by an indefinite number of people, after the court summons, the legal-procedural relation is integrated, in the defendants' side, by *all* the occupants – not distinguishing the original "invaders" and the "third parties", who should equally be subject to the command of the decision.

After distribution of the appeal to the Fourth Panel of the Second Section of the Superior Court of Justice, which has jurisdiction over Private Law matters, Justice Luis Felipe Salomão was designated as its Justice-Rapporteur, who thus delimited the matter *sub judice*:

> "With respect to the merit, the question consists in determining whether, even if the fulfillment of the requirements for the granting of the repossession order is proven, in the face of the reported practical impossibility to comply with the order, the judicial provision may be converted into losses and damages."

In this way, as should be the case in accordance with Judicial Precedent n. 07 of the Superior Court of Justice, matters of fact that have already been consolidated by the trial and appellate courts were not going to be discussed again, since these lower courts are sovereign in their handling of evidential content of the records. Yet, in addition to this, the appellate and trial court decisions are accepted even in their legal qualification of those facts, that is to say, in the presence of proven trespassing, the plaintiff – former possessor of the land – has a right to possession – or, as one would say in a more technical fashion, the plaintiff is entitled to a *material action* for repossession, in view of the fact that his claim to possession was resisted by the occupants.

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The entire controversy, therefore, was restricted to knowing how to 2481ulfil the plaintiff's right. In this sense, the Justice-Rapporteur stated:

> "What is under debate is the dispute between a private individual who had his unused property invaded and a considerable group of people, families, who settled in that property, with the undeniable support of the municipal government, since, according to the technical reports collected, they do not live huddled together, precariously, but, on the contrary, it is an organized community, from the point of view of basic infrastructure".

We can notice the differential form that social conflict and the corresponding legal confrontation take on in this decision in relation to its predecessors. Time flows and space are transformed within it. Movement is restored in the triple opposition between the terms "property" (*i.e.* the tract of land without any constructions), "unused property invaded " and "organized community". The second term ("unused property invaded") is the mediator between the other two, since it summarizes, in the effectiveness of the verbal participle, the progressive emptying of the legal and economical sense of "property" as an asset that is apprehensible as an object of law – until we reach a point of uselessness, in which the thing ceases to be an asset, becoming inapprehensible as an object of that same right that previously related to "property".

This time flow, however, is also legal (*i.e.* codified in proper terms of Law). It is not, therefore, a mere factual finding (days, months, years). The past participle of the verb "to make unusable" ["unused"], succeeded by the term "organized community", indicates a judgment of legal admissibility of the final form of the objective process of transforming the area, showing that it is the fact of being spatially "organized" that makes it possible to recognize, in the past, the unusability of the "property": if this were not so, the "community" would lack "jurisgenesis" to replace the bare land, in legal terms.

The dogmatic focus, therefore, shifts from the *cause of* the invasion (from which "precarious possession" was verified and a distinction was made between the "invader" and the "third party") to its *consequence*. In words of the Justice-Rapporteur himself:

> "The social analysis of the issue of land distribution, urban or rural, is not appropriate here, nor is a sociological analysis of the invasion perpetrated, of the legality or otherwise of the form of occupation - which would make the possession exercised precarious. Reality is: in order to satisfy the desire for restoration of the previous situation, for the granting of the repossession, the arising of that populous neighborhood, where countless families have built their lives, cannot be disregarded..."

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Consequentialist as it may be – or, better, functionalist –, the argument, by freeing the flow of time from the dams that imprisoned it in the interstices of the watertight qualifications of the Code, unleashes the temporal short-circuits that previous decisions (barely) elided. The last two quoted passages seem to make "infrastructural organization" a necessary, but not sufficient, condition of the substitution of "property" for "community", to which a kind of "social organization" (indicated by the circumstance that numerous families have built their lives there) complements. However, if the "infrastructural organization" does not depend – as it seems – only on the work of the occupants themselves in building their houses and their business, but also on the work of the "invading-State" in urbanizing the product of these private efforts; and if the State only becomes an invader thanks to the "struggle" or the political agency of the occupants; then "social organization" precedes and causes, or, at the very least, takes place in conjunction with "infrastructural organization" – one might more correctly say that both are analytical expressions of the same real process of reterritorialization, with the future of one altering the past of the other.

The opinion itself does not fail to notice this, when it translates the "struggle" by "cultural and historical heritage" while merging the meanings of *urbe*-location and *polis*-political community:

> "In this case at hand, it is abundantly clear - and it has remained incontrovertible - that compliance with the repossession court order, with the satisfaction of the interest of the appellant, a real estate development company, will be at the cost of serious damage to the private sphere of many people, families who for years have built their lives in that location, making it a community, individuals united by the same historical cultural heritage".

Here we have, at once, the absolutely concrete meanings of the "social function" of *that property, that possession, that* "conquered city"[12]: life lived and territory were constructed simultaneously, and in mutual co-dependence, making it impossible to subtract one without extirpating the other; or to disintegrate the community into "invaders" and "third parties" without breaking the ties (*i.e.* the joint "struggle", or the collective work of (re)production) that formed its vital space. The arising of an "organized community" not only gives rise to a subject of law and obliterates the asset that had been the object of the plaintiff's right of possession, but it also indicates, due to the function

[12] The breakdown of "property" in a generic and abstract sense as a corollary of the recognition of the different functions exercised by rights and by things themselves has been perceived long enough that it does not sound new to anyone. Putting it in clear terms: TOMASETTI JR., 1996.

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that the area started to play in relation to that subject, the emergence of *another asset*, the object of the right of possession of the occupants collectively considered. And this is not even surprising, since what a "right", in the subjective sense, places in the legal space of the world, the "social function" places in time – according to the general clause of Intertemporal Law contained in the sole paragraph of article 2035 of the Civil Code, when it metonymically refers to the subsistence of the legal facts (*lato sensu*) that give rise to the legal positions (active and passive), and therefore, also to themselves: "No agreement shall prevail if it contradicts the precepts of public order, such as those established by this Code to ensure the social function of property and contracts".

If there was something left of the "property" object of the repossession suit at the time a decision had been reached in the Appeal before the Superior Court (or even the Appeal before the Minas Gerais Appellate Court), it was only, as Alcides Tomasetti Junior (1996) once said, commenting on the case of the Pullman shantytown (São Paulo/SP) – in almost everything identical to this one –, a "legal-registry pseudo-reality". This is the same conclusion reached by Justice-Rapporteur Luis Felipe Salomão of the Superior Court, when he stated that:

> "In this case, the property originally claimed no longer exists; the reality is different. The neighborhood that exists today, in place of the land previously subject to lending, has its own life, endowed with urban infrastructure, where services are provided".

Therefore, the plaintiff's specific claim of repossession did not comply with the rules of *Law*. But what about the real estate company, who saw its right to possession perish, after the object to which it was referring had been extinguished for so long? On account of suffering a loss that the company itself did not cause and that cannot be coherently attributed to the "nature of things" that are said to perish by their own characteristics, some would wrongly see in this case an unlawful, or even non-technical, conclusion in the decision reached by the Fourth Panel of the Superior Court, when it voted unanimously in accordance with the Justice-Rapporteur. That, at least, *if it* stopped there. This, however, is not the case. The hypothesis of the perishing of something that is the object of an obligation to give something certain – and this is what the things that are the object of repossession suits are – was already foreseen in the Civil Code (article 234) and, more specifically, in the 1973 Code of Civil Procedure (article 627). This rule, with minor changes, was transposed to the 2015 Code of Civil Procedure (which recognizes the peculiarities of collective bargaining over urban possession in its articles 554 and 565) in

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article 499, according to which "an obligation shall only be converted into losses and damages if the plaintiff so requests *or if it is impossible* to obtain specific protection or a practical equivalent result" (emphasis added).

Here we have, by analogy, one of those situations that case law and doctrine have named "indirect expropriation" – a legal institution that, as Teori Zavascki points out, originally dealt with cases of seizure of private property by the government itself, without the prior due expropriation process (ZAVASCKI, 2002, p. 854). More properly, as Nelson Rosenvald and Cristiano Chaves (2013, p. 85) clarify, this would create for the occupants the alternative of giving a certain *amount of money*, covering both the compensation for the loss of possession over the thing (which has its own assessable economic value) and the compensation for the loss of the thing itself[13]. Yet with one particularity, as stated in the opinion delivered by Justice Raul Araújo: the intervention of an "acquiescent State", "invading State" and "deceptive State" should logically make the State itself responsible, together with the occupants, for the compensation due to the company – and it is up to the plaintiff to file a material law suit to recompose these damages to its assets.

3. Back to immanence, or a new old research agenda in Civil Law

If the solution to the case described really was, as it seems to have been, the result of manifest and regular application of one of the most traditional rules of the Law of Obligations, then why is it useful to analyze it from the analytical concepts of ascending dogmatics and descending dogmatics?

It is not difficult to see that, between the *ipsis litteris* application of article 927 of the 1973 Code of Civil Procedure and the application, legally possible – although, let us say, counterintuitive – of article 627 of the same law, we are facing the classic problem of interpretation in Law, as stated in Chapter VIII of *Pure Theory of Law* (KELSEN, 2009, p. 393-394). However, taking positive Law as the raw material through which hermeneutics produces the dogmatic "frame" of legally possible solutions to a controversy, while Kelsen stuck to saying that the choice between one or another acceptable option was a function,

[13] The authors speak of "compulsory acquisition" of property, but this does not help them, since what justifies the loss of property for the holder of the *ius possidendi* is its perishing, and it is not possible to talk of acquiring something that does not exist because it has already been extinguished.

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exclusively, of the interpreter's political position, what the analytical categories of ascending dogmatics and descending dogmatics allow is to investigate, at the same time, the process of translation of this political position into Law, and the roles that the legal-political arguments of each one of the parties to the conflict play in the motivated persuasion of the judge, returning this supposed aesthetic-political unreason to ethical-political reason. In other words, once the universe of legal possibilities is produced by interpretation, the model claims that there is still everything to be done.

Ascendant and descendent models thus discard both the legal cynicism of those pseudo-positivists according to whom it doesn't matter which decision is chosen within the allegorical frame – as if the search for "correct decisions" were the monopoly of the equally allegorical natural law thinkers or post-positivists –, as well as the utterly nonsensical idea, not infrequently aired by illustrious "ivory tower" dwellers, that parties to the conflict do not take possession of the terms of positive Law itself to defend their claims, seeking themselves to shape what is acceptable and what is unacceptable in the interpretation of legal norms.

However, by doing so – and here is one of the two great virtues of this analytical scheme –, these categories do not deny what is properly juridical in legal experience, *i.e.* the specifically *normative* and *valorative* aspects that emerge from ethics and sociality as *facts* (REALE, 2003), and that the term "dogmatic" underlines. Thus, it becomes possible to investigate Law in practice, and, above all, the ways in which it is lived, without falling back into the "imported empiricism" of other disciplines: realism, which so many today confuse with merely economic, statistical or jurimetric analyses of jurisprudence, becomes once again a way – or rather, multiple ways – of understanding and making Law *as* Law. If, therefore, there is no reason to exclude other knowledges from the jurist's appreciation – and, on the contrary, the "extended look" that this knowledge provides might be considered virtuous – there is also no reason to abort dogmatics that may be born from legal research[14].

In fact, there are proven reasons to believe that this form of analysis is even more in line with legal *practice* than the mere mapping of "majority opinion" and "minority opinion" that national textbooks prefer to undertake on the issues and disputes that arise when interpreting legal norms. This form of literary production, which generally

[14] The manner in which knowledge objectified by other disciplines enters into Law has been the subject of discussion, *v.g.*, in: FERNANDES JR., 2021.

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refers only to quantitative aspects – and, what is more serious, to *alleged* quantitative aspects unrelated to any numerical evidence of the frequency the so-called "opinions" appear –, eliding the moralities that underlie it, seems to have as its exclusive addressee only the interpreter-judge, who sees the conflict "from above", in a "disinterested" and "impartial" manner, feeding with pseudo-objectivity the myth of a "neutrality" that is not even openly spoken about, out of sheer epistemological shame. Nevertheless, legal experience would be greatly impoverished if reduced to the experience of the interpreter-judge alone, however important it may be. Everywhere one looks, other more "profane" interpreters of the Law (lawyers, prosecutors, public defenders, public servants in general, citizens, social movements, etc.) are inserted "inside" the conflict, in an "interested" and "partial" way. For them, what matters most is not deciding between arguments already legally qualified, but the transformation, or rather, the translation/transduction of the social conflict they are witnessing into a legal confrontation, through the preparation of strictly legal arguments that may serve as instruments for the immediate interests to which they direct their professional activity. In this sense, a *legal analysis of the confrontation*, such as the one postulated here, since it brings to light what, as a rule, acts in the shadows, seems to be the most appropriate for the understanding and for the "majority" instruction of the so-called Law enforcers and users of the Law.

How does this legal analysis do this? Through a concrete, situated genealogy of the reasons *sub judice* in each litigation. The case reviewed above is exemplary of this. It shows, after all, gradually, how the defendants, aided by their legal representatives, and through the intervention of so many other agents (the plaintiff, the Military Police, the Municipality, the experts), were, step by step, procedural piece by procedural piece, document by document, from court to court, translating the efforts they made *in loco* as a symbolization and agency of their own way of life, into legal categories themselves, being able to request, from the Judiciary and the Public Administration, protection for that same way of life that was their immediate source: it was the "struggle" of the social movement being converted, in the end, into the "perishing of the thing". In a possible analogy with the literary genre so familiar to any legal practitioner, petitions, which are usually divided into three discrete, constituent parts – "facts", "Law" and "claims" – act as if the genealogy of the "ascending dogma" filled the gap between the first and the second part, in view of the third, by expressing the reticulations or transformations of an involving

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reality (*input*) into an involved reality (*output*), without reducing the passages from one to the other to the stable structural configuration of pre-individuated entities (pure facts, pure Law, pre-codified arguments).

In this way, two other politico-methodological aspects of this model become clear. The first aspect (and the second great virtue of the model itself) is that its main objective is to *describe* how lived life and its political demands become legal in order to dispute the Law in the public arena – regardless of whether they are relatively majority demands, in a qualitative sense (such as that of the garden neighborhoods of São Paulo) or minority demands (such as that of the urban occupations, discussed here) – and thus it may even be of interest to other disciplines, called zetethics, whose object is the "struggle for the Law", as Ihering would say, or Law as a political or social fact, for example.

This is regardless of whether or not these arguments are accepted in a given arena in a concrete case. Postulating the existence of "ascending dogmatics" does not mean to say that they will or should always prevail over "descending dogmatics" – and once formulated based on successive adaptations and dialogical iterations[15], one can expect that the former will have a long way to go before they become as convincing as the latter, considered legitimate *ab ovo*. Nor does it mean that "ascending dogmatics" will always contrast with "descending dogmatics", be it due to the interests they aim to protect, the practical results they intend to achieve, or even the legal categories they ventilate. In the case described in this paper, there was no lack of what could be called civil-constitutional rhetoric in any of the decisions rendered in this case. This rhetoric was not the object of analysis, since it was not the subject of this investigation and a great deal of literature has already been devoted to its description. However, its arguments were there, sometimes reinforcing the same demands induced by ascending dogmatics, sometimes contradicting them, by serving as an instrument for the interests of the real estate entrepreneur who had been the plaintiff in the lawsuit. Instead, the distinction between ascendency and descendency implies only that there are distinct forms of saying the Law (of juris-diction) – ascendency being attributable to minority flows, so to speak,

[15] According to Seyla Benhabib (2004, p. 19-20): "Democratic iterations are complex processes of public argument deliberation and learning through which universalist right claims are contextualized, invoked and revoked, throughout legal and political institutions as well as the public sphere of liberal democracies. (...) Through such processes the democratic people shows itself to be not only the subject but also the author of its laws.

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for the simple fact that ascendency is, to the present state of research, incompatible with the colonizing greed of Administrative Power and systems over the world of life.

The second aspect derives from this: the model presupposes, in the ascending type, the "jus-hermeneutic" and "jus-creative" influx of sociality. In other words, despite acknowledging the validity of the law and the Constitution, towards which it is directed "from below upwards", it starts from the principle that "jurisgenics" in the world does not and cannot derive only from these elements of legal experience. In order for the State to hold a legitimate monopoly of the use of force, it cannot be granted, in any way, a monopoly of the Law. The fact that the "struggle" produced the "perishing of the thing" represents, in an individual and concrete way, what, in a general and abstract way, is the recognition that intersubjective relations and social agency produce Law. Thus, the solution to the case described was indeed guided by the application of one of the most traditional rules of the Law of Obligations – but what explains the application of this rule to that *fattispecie*, in substitution to the rule that demanded the repossession in benefit of the plaintiff, is the "jurisgenic" of the sociality produced *in loco*, which can only be recognized, *as such*, through ascending dogmatics, *i.e.* through a legal argumentation that starts from life to the rule, and not from the rule to life. Even if illustrious interpreters were to go through all the transcendental principles of the Constitution, from its most express and reasonable principles to its most tacit and ingenious: no matter how great their genius, their individual brilliance, their goodwill, or the sincerity of their intentions, they would still not replace the transformative and collective agency that was made of the Law in this particular case. It is life that contains the Constitution, and not the Constitution that contains life.

In addition, here, at last, we return to what has been said at the beginning about the production of Civil Law, and about a "dogmatics of presence" that could contrast with the diagnoses of obsolescence or inaptitude of a "dogmatics of absence". The fact is that the legal affluence of sociality is no more and no less than the private autonomy upon which Civil Law was erected as a normative discipline that is itself autonomous. And to make this power the element of (re)adequacy and (re)mobilization of the Code, as a substantive, State and statist form that Civil Law contingently assumed in the project of legal modernity, is nothing other than to take up again, as a method, one of the oldest, most classic, most orthodox and most consolidated tasks in this field: that of the permanent codification and recodification, in verbal form, of intersubjective relations.

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Not in order to perform the "razing to the ground" of the Code – on the contrary, is it not to the Code that ascendancy has been resorting, as demonstrated above? –, but to search in practice, in streets, in markets, in neighborhoods, for the meanings of those indeterminate legal terms, those general clauses and those general principles of Law that were left, by the legislator, as systemic openings or escape valves for the recognition of customary, habitual or everyday regulation[16], so as to produce, in Law, the hybrids between the legal and the social, the economic, the political and the urban that, in the end, are the only ones that can confer legitimacy to Law.

(Re)founding this new old research agenda on the immanence of Civil Law is our initial hypothesis, which, if it had been first elaborated to address the problems of the "besieged city", now, confirmed again in the "conquered city", is armed with an amplified background of reality: besides conserving or (re)inventing socio-spatial legal relations, reterritorializing in the present the old space, the "ascending dogmatics" also accounts for describing the conquest of new territories, the production of new objects and subjects of law, and the invention of new spaces, making time flow in a way that the exclusive rationality of the Code previously had prevented.

Translation

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[16] For an analysis on the costs of this procedure, see: FERNANDES JR.; BOLOTI, 2021.

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