

DISCHARGING: ACQUISITION OF PROPERTY IMPOSED BY THE EXTRAJUDICIAL USUCAPTION PROCEDURE

DESJUDICIALIZAÇÃO:
AQUISIÇÃO DA PROPRIEDADE IMÓVEL PELO
PROCEDIMENTO DE USUCAPIÃO EXTRAJUDICIAL

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ABSTRACT

With the entry into force of the Code of Civil Procedure (Federal Law n. 13.105/2015), originated the possibility of adverse possession, that is, of the interested party seeking the declaration of the possession of real estate property directly in the extrajudicial services, without the necessity of if you turn to the Judiciary. It is, in fact, the search for the new civil procedure to adapt the means of conflict resolution, in order to promote social pacification with access to effective, just, efficient and adequate justice. In this idea, the adverse possession aims at exactly this misjudicialization of the conflicts, facilitating the acquisition of the immovable property. However, after a few years of its validity, it is necessary to analyze, through a bibliographic and specific legislation review, the institute under a vision of practical applicability and to point out possible issues that may hinder its effective action in society.

KEYWORDS: Social pacification. Adequacy in means of conflict resolution. Disqualification. Adverse possession.

RESUMO

Com a entrada em vigor do Código de Processo Civil (Lei Federal nº 13.105/2015), originou-se a possibilidade da usucapião extrajudicial, ou seja, do interessado buscar a declaração da usucapião da propriedade imobiliária diretamente nas serventias extrajudiciais, sem a necessidade de se recorrer ao Judiciário. Trata-se, em verdade, da busca pelo novo processo civil da adequação dos meios de solução de conflito, a fim de se promover a pacificação social com acesso à justiça efetiva, justa, eficiente e adequada. Nessa ideia, a usucapião extrajudicial visa exatamente essa desjudicialização dos conflitos, facilitando a aquisição da propriedade imóvel. Contudo, passado alguns anos da sua vigência, cabe analisar, por uma revisão bibliográfica e de legislação específica, o instituto sob uma visão de aplicabilidade prática e apontar possíveis questões que possam prejudicar sua atuação efetiva na sociedade.

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PALAVRAS-CHAVE: Pacificação social. Adequação nos meios de solução de conflito. Desjudicialização. Usucapião extrajudicial.

1 INTRODUCTION

The current legal scenario has brought the great importance of the study and creation of new forms of conflict resolution in order to promote a proper solution in reasonable time and in a fair and effective manner.

In this sense, the entry into force of the Civil Procedure Code of 2015 brought, among other factors, the discharging of the procedure for declaration of adverse possession of real estate property.

Meanwhile, some years after its validity, the question of the practical applicability of the institute is highlighted, that is, whether it is effectively serving its purpose and, if not, what factors can influence this (in) applicability.

Thus, this article aims to analyze the procedure of extrajudicial adverse possession, the cause of its emergence and its practical (or not) application within the proposal given to it.

Based on this problematization and outlined this objective, observing methodical, deductive, systemic and axiological, considerations on property and adverse possession will be scored, within its constitutional foundation, as well as the idea of social pacification of conflicts in a vision of adequacy of the means of solution, presenting, in this, the dejudicialization of conflicts.

Afterwards, it will deal with extrajudicial usucaption, its procedure and its applicability, as well will be made, through a bibliographic review and specific legislation, some notes of possible causes for the ineffectiveness of the institute.

2 THE PROPERTY AND ITS SOCIAL FUNCTION

The Brazilian legislator did not offer the concept of property, limiting itself only to listing, in article 1.228 of the Civil Code, the powers inherent in the condition of owner such as the ability to use, enjoy and dispose of the thing, and his right to reclaim it from the power of whoever unfairly owns or holds it (BRASIL, 2002).

This is a real right par excellence, the axis around which the right of things gravitates. It is, thus, the "most complete of subjective rights, the matrix of real rights and the nucleus of the rights of things" (GONÇALVES, 2018, p. 223).

Thus, the concept of property, although not open, must be indispensably dynamic. It must be recognized "that the constitutional guarantee of the property is subjected to an intense process of relativization, being interpreted, fundamentally, according to parameters established by the ordinary legislation" (GONÇALVES, 2018, p. 223).

Within this field, the principle of the social function of property is, undoubtedly, one of the biggest factors limiting property rights. This is because in the historical evolution of its concept, property that was full, exclusive and unlimited is now subject to public and social interest, within a phenomenon called by the doctrine and jurisprudence as publicizing private law³.

That said, the Federal Constitution guarantees everyone the property right in its article 5, item XXII. However, shortly thereafter, in item XXIII, it relativizes this by determining that the property will serve its social function (BRASIL, 1988).

This notion is also inserted in the Civil Code, provided in article 1.228, § 1º, that "the property right must be exercised in line with its economic and social purposes" (BRASIL, 2002).

However, analyzing social function is not a simple task. "It is an expression that the doctrine itself recognizes to be of vague content. However, even if generically, it can be interpreted as the subordination of a certain institute to its social or collective interests, within a given society" (MARCHETTI FILHO, 2018b, p. 99).

In general, function, keeps the "notion of a power to give a determined destiny to an object or a legal relationship, to link them to certain objectives; which, added by the adjective 'social', means to say that this objective goes beyond the interest of the holder of the right – that, so, comes to have a power-duty - to reveal itself as of collective interest" (GODOY, 2004, p. 111).

Therefore, in simple lines, "to speak about the social function of a right, means to say its performance or reflection of its effects within the society in which it is inserted, leaving aside its exclusively individualistic aspect, and observing a collective notion of its incidence" (MARCHETTI FILHO, 2018a, p. 78).

Therefore, bringing this idea to the field of property, the social function relativizes property, transforming the concept of *jus abutendi* of Roman Law, in the sense that today the owner can no longer, within the right to dispose, do what he wants. "The disposition of the thing must take place in the light of the Federal Constitution, within the social function of property" (MARCHETTI FILHO, 2018a, p.76).

Thus, the right to property remains a fundamental right, representing the maximum characteristic of "individuality and human patrimony, but which, in its exercise, must observe a function within the society in which it is inserted, in flagrant contradiction to the extreme individualism of the 19th century, with an absolute concept of property" (MARCHETTI FILHO, 2018a, p. 78).

Anyway and synthetically, the social function of the property can be understood as the set of minimum requirements established by the legislator to consider that the exercise of the domain meets the collective interest, under penalty of adopting the sanctioning measures provided for in the ordinance.

3 "In fact, there is a modern trend for the intersection of legal regimes specific to Public and Private Law. The publicization of Private Law is growing all the time [...] and, on the other hand, the privatization of Public Law'. Consequently, within the idea of social solidarism, already mentioned, necessary to the Constitutional State of Law, 'the principle of the dignity of the human person culminates in unveiling the new vocation of Private Law, that is, that of redirecting the scope of its norms to protection of the person, without prejudice to the regulatory mechanisms for the protection of property'" (MARCHETTI FILHO, 2018b, p. 94-95).

3 BRIEF NOTIONS ON ADVERSE POSSESSION

Described between articles 1.238 to 1.274 of the Civil Code (BRASIL, 2002), the modes of acquisition of movable and immovable property can be originated or derived. In the first, the acquisition takes place in a way that is not linked to the previous property. That is to say, there is no act of transmitting property from one subject to another. In the second, there is a bond, resulting from an act of transfer of ownership. This act results from a relationship between two subjects, such as a legal business, for example.

In these terms, the majority doctrine has understood the usucaption as a way of original acquisition of the property⁴, strictly linked to time. "In fact, time can cause the extinction of a right, or its acquisition. It is the prescription, as a genre, having as type the extinctive prescription, treated in article 189 of the Civil Code, and the acquisitive prescription, treated here as adverse possession" (MAUSRCHETTI FILHO, 2018a, p. 88).

Modernly, it has been understood that, in the constitutional scope, adverse possession is based on the social function of property. This is because it seeks to give the property to the one who is effectively bringing it a social and economic utility to the property (MARCHETTI FILHO, 2018a, p. 88).

Indeed, the social function of property "contemplates, at the same time, a set of faculties and a set of positive and negative obligations, no longer purely and simply expressing a situation of power, by itself and abstractly considered" (CHALHUB, 2000, p. 12).

In this line of thought, through adverse possession, within the social function, "the one who effectively gives usefulness to the thing is rewarded, to the detriment of the owner who, in the face of his disdain, allows enough considerable time to pass without giving it any social or economic" (MARCHETTI FILHO, 2018a, p. 88).

Understanding this, we have that the adverse possession must meet assumptions of a personal, real and formal nature. Those of a personal nature are requirements about active and passive legitimacy.

In this regard, from the perspective of Article 1,241 of the Civil Code, "the active legitimacy is of the possessor with possession *ad usucapionem*, that is, with the intention of 'to usucapt'. And the passive legitimacy belongs to the person who appears as the owner in the registration of the property" (MARCHETTI FILHO, 2018a, p. 89).

Furthermore, it should be noted that limitations imposed by the force of article 1.244 of the Code⁵, that prevent certain people from 'usucapt' for not counting the respective term, such as "between ascendants and descendants, during the family power" and "between tutelage or curatelados and their tutors or curators, during the tutelage or curatela" (BRASIL, 2002), in the form of article 197, items II and III.

In turn, the real requirements refer to assets and rights susceptible to adverse possession, since not all things can be subject to adverse possession. This is because some goods

4 Caio Mario da Silva Pereira (2008, p. 138) believes that adverse possession is a mode of acquisition derived from property.

5 Art. 1.244. Extends to the possessor the disposition as to the debtor about the causes that prevent, suspend or interrupt the prescription, which also apply to adverse possession. (BRASIL, 2002)

are insusceptible to adverse possession due to their nature (such as air and light), or because they are out of commerce, or because they are public goods⁶.

Formal assumptions, on the other hand, are related to the general indispensable and customary requirements of adverse possession, such as possession, time lapse and *animus domini*, as well as those specific to each modality, such as fair title and good faith, or the size of the area of the property, or even the form of its use.

It is also to be considered that possession *ad usucapionem*, that is, "the one that extends over time, to the point that it is capable of generating the acquisition of the property by the acquisitive prescription" (MARCHETTI FILHO, 2018a, p. 54), it must comply with the *animus domini*, be meek and peaceful, continuously and publicly, over the period defined by law. The absence of this prevents the adverse possession.

As a parenthesis, it is worth remembering that the meek and peaceful possession is that practiced without the opposition of the owner against whom he intends 'to usucapt'. Therefore, if the owner of the thing was in any way opposed to the possession of the possessor, it will no longer have the status of undisputed and will not fulfill the basic requirements 'to usucapt' (MARCHETTI FILHO, 2018a, p. 51). And it continuously comprises that possession performed without interruptions.

Likewise, the possession cannot harm the possessor who is defending his domain. Therefore, to characterize this, it is necessary that the owner does not violate the rights of the owner of the thing and the owner remains inert, passive in relation to this factual situation, without trying to recover the thing for himself.

Still referring to the theme, the possibility of succession in possession for purposes of counting the term of adverse possession is recognized, pursuant to article 1.243 of the Civil Code. In this line of count, "the possessor can, in order to count the time required by the preceding articles, add to your possession that of your predecessors (article 1.207), provided that all this possessions are continuous, peaceful and, in the cases of article 1.242, with a fair title and in good faith" (BRASIL, 2002).

It should be noted that the possession must be fair, without the vices of violence, clandestine or precariousness, insofar as if the situation is in fact the result of these forms, it will not induce possession until the effects cease. And, if it is acquired on a precarious deed, it will not change in fair ownership in any way.

In view of this, it is understood as a meek or peaceful possession, for the purposes of adverse possession, that reached without opposition to the owner of the property. That is to say, the owner is aware that his possession has been violated. However, it remains inert, doing nothing to allow its recovery, either judicially or extrajudicially.

That is, it does not alienate the invader, it does not propose the corresponding possessory remedy. Simply "conforms to the loss. Now, owner who acts like this, omitting himself reveals disinterest for the good and, with that, opens space for another to occupy and use it. Who, in the face of an aggression on possession, remains inert, reveals his disregard for it" (MARQUESI, 2018, p. 30).

6 Despite some divergence on the possibility of adverse possession in relation to public domain goods, the still dominant understanding in doctrine and jurisprudence is in the sense that "public goods are not subject to the possibility of acquisitive prescription or, in a word, the public goods are not subject to adverse possession" (MAZZA, 2015, p. 711).

On the other hand, in the case of acquisitive prescription, time lapse is one of the requirements for the consummation of adverse possession. Indeed, in its fundamentals, it is observed that “time has an purchasing power, although it is also a cause of loss of property or real right of the former holder” (MARQUESI, 2018, p. 26). This lapse may vary depending on the modality of the institute.

Anyway. It is certain that, in a superficial glance, there is a feeling that the adverse possession offends the right of property, from the moment the possessor starts to occupy the thing, losing the right to *dominus*.

However, as we have seen, within the aspect of the social function of property, there is a reason behind this legal situation that underlies this fact. On this theme, there are two explanatory currents: the subjective and the objective.

The first, called subjective, is represented by the passivity of the owner. For her, the mind of renouncing the right to property is presumed, that is, it is considered that he stopped being interested in the thing/property, giving it up.

On the other hand, the objective chain is based on the social function of the property, constitutionally recognized as the duty of the owner when exercising his property. It is the current accepted, modernly, in the constitutional view, as previously noted.

Thus, from the moment the possessor gives the property a useful, “giving it a socio-economic function, a feature that, as is known, is the foundation of the institute in question” (MARQUESI, 2018, p. 31), the adverse possession does not offend the property. On the contrary, it strengthens it in the constitutional vision.

4 THE NEED FOR PACIFICATION OF SOCIAL CONFLICTS AND THE CIVIL PROCESS CODE

The State has the power-duty to, through jurisdictional protection, provide the pacification of social conflicts and, at least, exercise the function of justice. Indeed, access to justice is not just the fundamental right to protocol a lawsuit. Goes far beyond. It represents, within the Constitutional State of Law, access to effective, fair, efficient and adequate justice, in promoting conflict pacification, not only in the legal aspect, but also in the social and psychic aspects. (MARCHETTI FILHO, 2018c).

However, what can be verified during this process is that the Judiciary has not contributed effectively, with justice and efficiency with regard to the resolution of disputes, and this idea of pacification of the conflict is impaired.

Even because “pacifying, before being a simple task, implies a unique complexity. ‘As it involves reaching a human state of mind, it covers aspects that are not only legal, but above all psychological and sociological’” (MARCHETTI FILHO, 2018c, p. 203).

In this sense, it’s necessary to emphasize “at the same time that the legislator ensures unrestricted access to justice, it also advocates the virtues of consensual conflict resolution,

assigning to the State the burden of promoting this pacifying practice whenever possible" (THEODORO JÚNIOR, 2015, v. 1, p. 76).

It is not a question of discrediting the state of Justice, but of combating the excess of litigiousness that dominates contemporary society, which believes in jurisdiction as the only way of pacifying conflicts, raising to such a gigantic number of adjourned processes, that it exceeds the flow capacity of entities and structures of the available judicial service. In several countries, culture has shifted most conflicts to extrajudicial mechanisms, such as mediation and conciliation, which, in addition to relieving pressure on public justice, are in a position to produce substantially more satisfactory results than those imposed by provisions authoritarian from the courts. (THEODORO JÚNIOR, 2015, v. 1, p. 76)

Furthermore, it must be considered that, today, there is a certain "prioritization of certain aspects of the process, for which the traditional system did not provide a solution. The most evident cases are related to access to justice and the slowness of the proceedings, as well as the distribution of the burdens resulting from the delay in resolving conflicts" (GONÇALVES, 2017, p. 44).

But it's not just. "There is also the issue of socialization of justice, related to the fact that many conflicts of interest are not brought to justice, either because of the cost that this demands, or because the interest has not harmed the right, because the damage is spread among the whole society" (GONÇALVES, 2017, p. 44).

Importantly, this line of reasoning, the Civil Procedure Code 2015 has the north "an appreciation of consensus and a concern to create within the Judiciary a space not only for judgment, but for conflict resolution', with a view to pacification" (MARCHETTI FILHO, 2018c, p. 213).

Indeed, it seeks, within this conflict resolution vision, to provide "a resizing and democratization of the Judiciary's own role and of the intended jurisdictional provision model" (MARCHETTI FILHO, 2018c, p. 213).

Therefore, it is possible to highlight "basically four factors to put the 2015 Codification as an instrument of social pacification: a) objective good faith; b) cooperation; c) modernization of the contradictory; and d) the adequacy of the means of conflict resolution" (MARCHETTI FILHO, 2018c, p. 213).

In this sense, with the current Civil Procedure Code in force, the trend of adequate means for conflict solutions. Its pacification must be encouraged by the operators of the law, so that each day it is more applied case by case, within the idea of adequate conflict resolution.

5 THE PROPER CONFLICT RESOLUTION MECHANISMS

As stated, the fourth factor that promotes social pacification is the adequacy of the means of resolving conflicts offered by procedural legislation. At this point, the Civil Procedure Code gained prominence.

That's because, for him, the means available for resolving a conflict, either by self-composition (conciliation or mediation) or by heterocomposition (arbitration or specific process), "should be considered by the following premise: the middle must be suitable for solution of the conflict presented for the promotion of social pacification" (MARCHETTI FILHO, 2018c, p. 224).

Logically, in this approach, mediation, conciliation and arbitration are highlighted, precisely because, within their specificities, they remove from the State the power to decide the conflict.

Ante a ineficiência na prestação estatal da tutela jurisdicional, especialmente pelo perfil contencioso e pela pequena efetividade em termos da pacificação real das partes, os meios diferenciados vêm deixando de ser considerados "alternativos" para passar a integrar a categoria de formas "essenciais" de composição de conflitos (jurídicos e psicológicos), funcionando como efetivos equivalentes jurisdicionais ante a substituição da decisão do juiz pela decisão conjunta das partes. (TARTUCE, 2018, p 149)

In view of this reality, there is a greater interest by the State itself in the search for less formal measures, which make the guarantee of repairing the injured legal matter viable, promoting the solution of the conflict in an appropriate way and, thus, social pacification⁷.

For each type of conflict, the appropriate route for its approach must be adopted, considering several factors, such as, for example, the intention of the parties, the profile of the dispute and the possibilities inherent to each mechanism that can be applied case by case.

It is in this context that the phenomenon of de-judicialization of the conflict arises and will be treated then.

6 WAVES FOR IMPROVING JUSTICE: THE DEJUDICIALIZATION TECHNIQUE

The procedural technique provided for in the Civil Procedure Code of 1973 was essentially the judicialization of conflicts. This is because its essence was based on the individualism and patrimonialism that prevailed in the 19th Century in Europe and that came to Brazil by Enrico Tulio Liebman.

For this reason, the procedural protection of the 1973 Code was extremely strict, seeking satisfaction by final court decision of merits. And, due to this scientific rigorism, is that there was no original provision for provisional tutelage or openness to other forms of conflict resolution.

Of course that, in modern times, this view of process and judicialization of conflicts no longer met society's wishes, notably because the Judiciary itself is no longer able to respond

⁷ "The judicial policy proposal which encourages the development of diverse pathways is to create, alongside the administration of traditional justice, new ways of resolving disputes, preferably through light institutions, relative or totally unprofessionalized (sometimes, even preventing the participation of lawyers); the use must be cheap - if not free - and located in order to facilitate (and maximize) access to services, operating in a simplified and poorly regulated manner to obtain solutions mediated between the parties" (TARTUCE, 2018, p 176).

satisfactorily and in a reasonable time in all the procedural demands it receives daily. The need for change was pressing.

Following that line, the reason for the 2015 Civil Procedure Code is understood, in addition to abolishing certain institutes fixed in the 1973 Code and modernizing others, it allowed the option of extrajudicialization in adverse possession of the real estate.

In this sense, the expression “dejudicialization” refers to the legislative phenomenon that brings the parties the possibility of resolving their conflicts of judicial nature, provided they have legal capacity and can be used by authorized users. It is the search for conflict solutions without the intervention of the courts.

In the field more specific to the theme proposed here, dejudicialization points to the optional transfer of some activities that, until then, were specific attributions of the Judiciary, to the scope of extrajudicial services, assuming that these institutions can resolve the conflict through administrative procedures.

In fact, the 2015 Code of Civil Procedure does not change “the scenario in the event that the adverse possession process takes place in court, despite having omitted some necessary steps. But it opens up the possibility of handling it extrajudicial, certainly to avoid the complexity and delay of the judicial system” (MARQUESI, 2018, p. 51).

This legislative process of transferring the solution of some conflicts and certain issues to extrajudicial registry offices - that before only the Judiciary would have the competence to do so - has the purpose of prioritizing agility in its resolution, especially when there is no dispute.

Within a view of adequate means of conflict resolution, proposed by the current Civil Procedure Code, the aim is precisely to reduce the growing pressure on the courts, which are full of lawsuits.

In fact, in the current format of society, with abundant information and knowledge of its rights, combined with access to justice as a fundamental guarantee, it has become essential to seek forms that promote applied solutions to conflicts in the exhibition of social pacification, leaving aside the idea of the process as an exclusive means and deconcentrating the performance of the Judiciary machine, notably of less complex issues.

Consequently, dejudicialization seeks to avoid judicial intervention in situations where it is not necessary.

The trend that is being outlined, and that in a not too distant horizon, it is to leave to the Judiciary only cases of resisted pretension, in which the judge will act as a mediator and substitute for the will of the parties. The dejudicialization will be increasingly frequent in those cases where the parties are in agreement, the interests are available and the law authorizes the extrajudicial solution. (MARQUESI, 2018, p. 62)

Therefore, it is essential to use instruments that ensure the citizen the provision of effective judicial protection, so that it can meet the fundamental right of access to Justice. In this case, the satisfactory term for the delivery of guardianship plays an essential role, being a prerequisite for the satisfaction of disputes arising from changes in the modern world.

Faced with the obstacles faced by the Judiciary in responding with agility to the judicial demands that society produces every day, as well as the need to find effective solutions, the dejudicialization, little by little, began to become a reality in the country.

In fact, whether through laws or resolutions of the National Council of Justice, the quest to dejudicialization of conflicts is a reality. And one of the ways that favor and encourage the composition of social situations is exactly through extrajudicial services, seeking, in this way, the possibility of relieving the Judiciary.

An example of this is in extrajudicial separation and divorce, extrajudicial inventory, rectification of property registration directly at the registry office, possibility of rectifying the name in the civil registry adapting to gender identity directly at the registry office, and extrajudicial adverse possession, subject of this study.

Such examples symbolize the precious cooperation of the legislator to mitigate the burden of lawsuits and provide faster solutions for the intended proceedings, in addition to attesting progress in national legal system.

7 THE EXTRAJUDICIAL USUCAPTION OF PROPERTIES IN GENERAL LINES

Usually, adverse possession is, as a rule, declared through a judicial process that currently follows the common procedure of the Civil Procedure Code of 2015, taking into account that the new legislation ended the special procedure of the adverse possession procedure.

In fact, this procedural structure is easily noticed in articles dealing with adverse possession, for example, article 1.238 which refers to extraordinary adverse possession. For him, whoever owns, as if it were his, for fifteen years without interruption or opposition, a specific property, regardless of title and good faith, acquires the property, "being able to request the judge to declare it by sentence, which will serve title for the registry at the Real Estate Registry Office" (BRASIL, 2002).

It is observed, therefore, that the rule procedure is judicial. However, as of 2009, the possibility of adverse possession was obtained extrajudicially or in an administrative manner.

In fact, Federal Law nº 11.977/2009, known as Law of the My house My life Program, already brought, in his art. 60⁸, the possibility of the recognition of the original acquisition of the property by property possessors in places susceptible to land regularization programs, without any judicial intervention (BRASIL, 2009).

More current, the Code of Civil Procedure of 2015, within its innovative spirit of better resolving conflicts, which will be seen later, brought about a major change and update in the possibility of extrajudicial or administrative recognition of the adverse possession.

8 The original wording of the article stated that "without prejudice to the rights arising from the possession previously exercised, the holder of the title of legitimation of possession, after 5 (five) years of its registration, may request the real estate registry officer to convert this title into property registration, considering to its acquisition by adverse possession, under the terms of article 183 of the Federal Constitution" (BRASIL, 2009).

Indeed, the article 1.071 of the Code of Civil Procedure introduced article 216-A into the Public Registry Law (FL nº 6.015/1973), admitting extrajudicial adverse possession, which will be processed directly at the Property Registry Office of the district where the property is located.

Art. 216-A. Without prejudice to the judicial process, the request for extrajudicial recognition of usucaption is admitted, which will be processed directly at the registry office of the real estate in the region where the property object of adverse possession is located, at the request of the interested party, represented by a lawyer, instructed with:

I - notary minutes drawn up by the notary, attesting the investiture time of the applicant and his predecessors, according to the case and his circumstances;

II - plan and descriptive memorial signed by a legally qualified professional, with proof of notation of technical responsibility in the respective professional supervisory board, and by the holders of real rights and other rights registered or endorsed in the registration of the property object of adverse possession and in the registration of the adjacent properties;

III - negative certificates from distributors in the district of the situation of the property and the applicant's domicile;

IV - just title or any other documents that demonstrate the origin, continuity, nature and time of possession, such as the payment of taxes and fees charged on the property. (BRASIL, 1973)

It can be seen that the legislator's idea was, in fact, to create a new way of recognizing adverse possession, extrajudicially or administratively. And it did so in a "completely different and without doubt more effective way than that provided for in Law 11.977 of 07/07/2009" (HABERMANN JUNIOR; HABERMANN, 2018, p. 100).

Now, meeting the requirements of the material law and article 216-A of the Public Records Law, the interested party, gathering the documents that prove their possession, as well as their circumstances and the time lapse and, still, the "absence of action claiming the property, presents the documentation to the notary of the locality, of which, after examining it, draw up a notary minute, document by which publicly attests the existence of the possession and its characteristics" (HABERMANN JUNIOR; HABERMANN, 2018, p. 100).

This extrajudicial procedure "can occur in any kind of adverse possession, provided that has as its object a real estate and that there is no dispute" (BOCZAR; ASSUNÇÃO, 2018, p. 78). However, as can be seen from the wording of the article 216-A, "although it is a voluntary jurisdiction, the law requires that the interested party must be represented by a lawyer. This requirement is justified to make the procedure more effective" (BOCZAR; ASSUNÇÃO, 2018, p. 79).

Note that extrajudicial adverse possession will be recognized upon requirement faced with the Real Estate Registry, with the presentation of all the documents required by the items of the mentioned article and also, instituted by a notary minute drawn up by the notary.

These minutes are nothing more than a narrative objectively from a fact that was verified or witnessed by the notary, without issuing a judgment of value. It can "be made in any notary's office in the country, and subsequently forwarded to the competent Real Estate

Registry Office - together with the documents required in items I to IV of that article - for processing." (ASSIS NETO; JESUS; MELO, 2017, p. 1.420).

Another important point for the administrative procedure in the registry office is the need to instruct it with the "plan and descriptive memorial signed by a legally qualified professional, with proof of technical responsibility notation in the respective professional supervisory board, and by the holders of real rights and other rights registered or endorsed on the registration of the property subject to adverse possession and registration of adjoining properties". This, of course, to ensure security of the procedure and certainty in what is being object of adverse possession.

However, in the form of art. 216-A, § 2, if the plan and descriptive memorial are missing the signature of any of the holders of real rights or other rights registered or endorsed in the registration of the property subject to adverse possession and the adjacent properties, "this will be notified by the competent registrar, personally or by post with acknowledgment of receipt, to express consent in an express manner within 15 (fifteen) days, interpreted the silence as agreement" (BRASIL, 1973).

It is clear, from the text of the law, that the silence of such people when not signing the plan and descriptive memorial, remaining inert, means agreement in relation to its terms. So, here who is silent agrees⁹.

It is important to highlight that the original wording of the article was in the opposite direction, that is, silence mattered in disagreement, which caused a series of obstacles. This text was amended by Federal Law nº 13.465 of 2017.

The presence of this requirement "reveals the consensual nature of adverse possession" (MARQUESI, 2018, p. 79), because it requires the consent of the owner of the property subject to adverse possession, as well as that of the owners of adjoining properties, which, in their case, may be tacit.

That Federal Law of 2017 also included some exceptional situations. First, in the form of § 11, in the case of real estate in an autonomous building of condominium unit, like an apartment, for example, the "consent from holders of rights in rem and other rights registered or endorsed in the registration of adjacent properties is waived and the liquidator's notification will suffice to manifest itself in the form of § 2º of this article" (BRASIL, 1973).

In addition, as required by § 12, "if the adjoining property contains a building condominium, the liquidator's notification will suffice for the effect of § 2º of this article, waiving notification of all tenants" (BRASIL, 1973).

Another important point added is in § 13, by which, if the person to be notified was not found or if they are in an uncertain place, without knowing their current address, "this fact will be certified by the registrar, who must promote the person's notification by notice through publication, twice, in a local newspaper of great circulation, for a period of fifteen days each, interpreting the silence of the notifying as agreement" (BRASIL, 1973). This notice may be made by electronic means, if so regulated by the public service's correction agency, "in which

⁹ On this theme, "the aphorism that 'silence gives consent'. But in fact, whoever is silent says nothing. We take care of the application of article 111 of the Civil Code, which, regarding the manifestation of will, states that 'silence matters consent, when circumstances or uses authorize it, and it is not necessary to express the declaration of will'" (MARQUESI, 2018, p. 105).

case it will dispense with publication in newspapers of great circulation" (BRASIL, 1973), in the form of § 14.

Besides, the Law also brings as a requirement in item III the "negative certificates of distributors in the district of the situation of the property and the applicant's domicile" (BRASIL, 1973). Consequently, "if the law orders the distributors' certificates to be issued, it is clear that we want to ascertain the existence of legal proceedings that may influence the acquisition of the property by adverse possession. It is understood that the certificates refer to both the person of the owner and the applicant" (MARQUESI, 2018, p. 89).

Another requirement, present in item IV, is proof of the "fair title or any other documents that demonstrate the origin, continuity, nature and time of possession, such as the payment of taxes and fees levied on the property" (BRASIL, 1973).

This requirement must "be understood as necessary only in the ordinary adverse possession, a fact that, given the lack of legal provision, other types of adverse possession do not require" (MARQUESI, 2018, p. 90).

In this regard, Federal Law nº 13.465, of 2017 added § 15 in art. 216-A, facilitating the production of the proof required in item IV. Now, if such documents are absent or insufficient, "possession and other necessary data may be proven in an administrative justification procedure in an extrajudicial service." (BRASIL, 1973).

This is another innovation of Law, now extrajudicializing the procedure of justification that "will comply, where applicable, the provisions of § 5 of art. 381 and the rite provided for in arts. 382 and 383 of Law nº 13.105, of March 16, 2015" (BRASIL, 1973).

Understanding your requirements, it is important to highlight that this form of extrajudicial procedure is optional, as the legislator himself highlighted at the beginning of article 216-A. Therefore, the interested party "may choose to bring a lawsuit even if there is no litigation, and is part of the phenomenon of dejudicialization of the law, which includes, for example, among others, the extrajudicial inventory and divorce" (GONÇALVES, 2018, p. 223). Even because, given the fundamental guarantee of access to justice and the unfeasibility of the Judiciary's assessment, present in article 5, item XXXV, of the Federal Constitution, "the law will not exclude injury or threat to the right from the Judiciary's assessment" (BRASIL, 1988).

As the interested party opted for it and formulated the request, through the representation of a lawyer and instructed with the mentioned documents, in the form of article 216-A, § 1º, "the request will be assessed by the registrar, extending the period of filing until the reception or rejection of the request" (BRASIL, 1973).

In sequence, complying with § 3º of that article, "the real estate registration officer will inform the Union, the State, the Federal District and the Municipality, personally, through the title and document registration officer, or by mail with acknowledgment of receipt, so that they can manifest themselves in 15 (fifteen) days, about the request" (BRASIL, 1973).

After this, "the real estate registration officer will promote the publication of a public notice in a widely circulated newspaper, where applicable, to the knowledge of third parties who may be interested, who may manifest themselves in 15 (fifteen) days" (BRASIL, 1973).

After this period has elapsed and the documentation is in order and there is no objection, "the real estate registry officer will register the acquisition of the property with the descrip-

tions presented, and registration may be opened, if applicable" (BRASIL, 1973), as provided in § 6º of that article.

Meanwhile, § 8 establishes that "if the documentation is not in order, the real estate registry officer will reject the application" (BRASIL, 1973), being possible, in any case, for the "interested party to raise the doubt procedure, under the terms of this Law" (BRASIL, 1973).

Always good to remember that, in the form of § 9º, "the rejection of the extrajudicial request does not prevent the filing of a adverse possession lawsuit" (BRASIL, 1973). As stated, "a contrary understanding of this would imply a violation of the guarantee of formal access to justice, provided for in art. XXXV, of the Federal Constitution" (MARCHETTI FILHO, 2018a, p. 99).

8 THE PRACTICAL APPLICABILITY OF EXTRAJUDICIAL USUCAPTION

Having exhausted the discussion on the appropriate means of resolving conflicts, understanding a little about the phenomenon of dejudicialization and the legal discipline of extrajudicial adverse possession with its procedure, the practical applicability of this institute must be analyzed.

In this regard, the doctrine has emphasized that in the face of some situations presented within the administrative procedure and also in the culture of society, the applicability of extrajudicial adverse possession has been mitigated.

That is to say, cases that could be easily resolved in the procedure of extrajudicial adverse possession, are not solved by several aspects and end up becoming a litigation process in the Judiciary.

The obstacles to the widespread adoption of the consensual model for addressing conflicts are many, and the following obstacles can be added as central: 1. the academic training of law operators, which does not include such a system; 2. the lack of information on the availability of consensual forms; 3. the fear of the loss of power of authority of traditional institutions for the distribution of justice. (TARTUCE, 2018, p. 110)

In this line of account, some factors that make the practical application of extrajudicial adverse possession ineffective will be pointed out below.

8.1 THE LITIGIOUS CULTURE

The change of mentality and the effort of the legal community, regarding the promotion of means of resolving disputes for the settlement of conflicts, are essential in modern society, notably in the Constitutional State of Law, in the view of effective, fair, efficient and adequate access.

In this regard, relevant legislative innovations have materialized in recent years, notably in 2015, with the new Civil Procedure Code (Federal Law nº 13.105/2015), the punctual reform of the Arbitration Law (Federal Law nº 13.129/2015) and the Mediation Law (Federal Law nº 13.140/2015).

It's interesting to note that, replicating the Federal Constitution, the Civil Procedure Code of 2015 provides, in art. 3º, that "threat or injury to law shall not be excluded from judicial review" (BRASIL, 2015). But, within this aspect, it is taken into the civil process, the idea of the appropriate means of conflict resolution by stating that the process is not the only way forward.

For this reason, it emphasizes, in §§ 1º to 3º, that "arbitration is permitted, in accordance with the law" (BRASIL, 2015) and "the State will promote, whenever possible, the consensual solution of conflicts" (BRASIL, 2015). But this promotion is not just the duty of the State. "Conciliation, mediation and other methods of consensual resolution of conflicts should be encouraged by judges, lawyers, public defenders and members of the Public Ministry, including in the course of the judicial process" (BRASIL, 2015).

Therefore, the new procedural diploma determines the Courts to create judicials centers for consensual resolution of conflicts, with conciliators and mediators trained to attend the demands of conflicts present in the judiciary.

But that is not all. It also brought important aspects related to the extrajudicial solution of the conflict through administrative procedures directly at the registry office, as in the extrajudicial inventory (CPC, art. 610, §§ 1º and 2º), in divorce, separation and extinction of the stable union by consensual way through the extrajudicial way (CPC, art. 733) and the extrajudicial adverse possession, inserted through the creation of article 216-A in the Public Registry Law (CPC, art. 1.071).

However, the practical applicability of these institutes, notably extrajudicial adverse possession, is minimal. And one of the factors is exactly in the culture of litigation ingrained in Brazilian society, a factor that is reflected in legal education and professional practice.

In fact, despite the fact that the law requires the participation of a lawyer in the extrajudicial adverse possession procedure, the fact is that the operators of the law, not only in graduations, but also in their professional lives, are not encouraging to adoption the measures of adequate solutions and conflict resolution in an extrajudicial way, due to self-disinterest, or due to the disbelief of the part that attends.

In the formation of the Bachelor of Laws, the emphasis of the study ends up being primarily focused on the exercise of the contentious state jurisdiction, generating a certain neglect in dealing with consensual means. Reinforced the fundamentals of the process as an instrument of public law, the understanding was consolidated that, based on the performance of the State and its element capable of submitting one of the parties to the pretension of the other, fair is what the State determines and enforces. (TARTUCE, 2018, p 112)

This is, therefore, a reflection of the culture of litigation and the expectation of results only from judicial sentences that is impregnated in Brazilian society. "In this line of account, the lack of training for law enforcement personnel focused on the appropriate means of resolving conflicts, 'above all on a consensus basis, constitutes a major obstacle to be overcome in the development of a culture of peace'" (MARCHETTI FILHO, 2018c, p. 247)

Thus, in spite of all the legislative advances that encourage the applicability of the appropriate measures for conflict solutions and the search for the process of de-judicialization, the operators of the law are out of step with this practice.

In this relational trajectory, the simple legislative change will not imply any transformation in the current situation if it is not accompanied by the breaking of the social paradigm that is experienced in Brazil. The change in the way of thinking of society in general, from the ordinary citizen to the operators of the law and those responsible for public administration in general and justice, mainly, is essential. (MARCHETTI FILHO, 2018c, p. 242).

Therefore, there is no need to talk only about changing the law in order to have the incentive to adopt adequate means of conflict, especially the solution of conflicts through the extrajudicial procedure. Cultural change is also essential, the social transformation to lead to the adoption of these means.

8.2 THE DUE EMOLUMENTS

In addition to the problems involving the culture of litigation and the lack of preparation or lack of interest in promoting the appropriate solution to the conflict of the legal professional, there are also obstacles in the procedural line itself. And one of them refers to the value of the fees charged in the notary service, that is, the cost of an extrajudicial procedure.

The Federal Law nº 10.169 of 2000, establishes the general rules for setting emoluments related to acts performed by notary and registry services. Thus, under the terms of article 1º, "the States and the Federal District will fix the amount of the fees related to the acts practiced by the respective notary and registry services, observing the rules of this Law" (BRASIL, 2000), and, by paragraph unique, this value "must correspond to the effective cost and the adequate and sufficient remuneration for the services provided" (BRASIL, 2000).

In addition, art. 2º of the Law establishes the parameters that must be used for setting the emoluments, highlighting:

Art. 2º In order to set the value of the emoluments, the Law of States and the Federal District will take into account the public nature and the social character of the notary and registration services, in addition to the following rules:

I – the values of the emoluments will appear in tables and will be expressed in the country's currency;

II – the acts common to the various types of notary and registration services will be remunerated by specific fees, fixed for each type of act;

III – the specific acts of each service will be classified into:

a) acts related to legal situations, without financial content, whose fees will attend the socioeconomic peculiarities of each region;

b) acts related to legal situations, with financial content,

whose fees will be fixed by observing bands that establish minimum and maximum values, in which the value contained in the document presented to the notary and registry services will be included. (BRASIL, 2000)

Furthermore, the Law expressly prohibits, in art. 3º, item II, the setting of “emoluments in percentages levied on the value of the legal business object of notary and registration services” (BRASIL, 2000).

Thus, basically and in the practical field, each State Court of Justice is responsible for the price list for notary and registration services in their respective State. The values of each activity are calculated and, if there is a need for any adjustment, a Bill with the new price list is sent to the state legislature for approval, observing the principle of anteriority.

In practice, however, these values are much higher than the cost of a lawsuit. Be it because in the extrajudicial procedure there are no benefits of free justice; either because, even with regard to “justice paid”, there are many times when the costs of the process are much lower than the fees charged by the notary service.

Just as an example, in the State of Mato Grosso do Sul, Law nº 3.003 of 2005, does not provide any cost estimate for the extrajudicial adverse possession procedure. However, in order to register a declaratory judgment of adverse possession, the emolument is R\$ 92,00 (ninety-two reais) (table III.C, annexed to Law¹⁰).

Furthermore, the simple analysis of Table I of the Annex to this State Law shows the charging of emoluments staggered according to the amount declared in the deal for the drawing up of public deeds, which can reach R\$ 7.847,00, which, of course, is very expensive and discourages the practice of the extrajudicial procedure, considering that the costs of the adverse possession process do not reach half that amount. That's when doesn't have the benefits of free justice.

8.3 THE RECORDER REFUSAL

The last point that stands out in this study and that generates discouragement for the use of the extrajudicial procedure of adverse possession is exactly in the procedure itself. This is because, under the terms of § 8º, article 216-A, of the Public Records Law, “at the end of the due diligence, if the documentation is not in order, the real estate registry officer will reject the request” (BRASIL, 1973).

Translating this and within the idea of the procedure of art. 216-A, the lack of express agreement of any of the persons indicated in item II - whether due to conflicting interest, or due to lack of interest in the matter, or due to malice or revenge - inevitably generates the rejection of the administrative request.

Moreover, as stated in § 9º, “the rejection of the extrajudicial request does not prevent the filing of the adverse possession lawsuit” (BRASIL, 1973). Not that this is wrong. On the contrary. It is correct, even because the law cannot exclude any subject from the Judiciary, in the form of art. 5º, item XXXV, of the Federal Constitution (BRASIL, 1988).

However, the practical and logical effect of this is that if, after all the work and cost, there is a risk of rejection for the simple fact of having an unfounded challenge, so it's better to enter directly with the adverse possession action.

10 A Lei Estadual n. 3.003/2005 e as tabelas anexas à ela estão disponíveis em: <https://www.tjms.jus.br/legislacao/visualizar.php?lei=21119>.

In addition, § 10^o states that if there is a challenge to extrajudicial recognition, the officer must refer the case to the District Court where the property is located. And, converted into an adverse possession action, the party must amend the initial to adapt it to the common procedure of the Civil Procedure Code.

In other words, at the end of all the work, due to a simple objection, sometimes completely unfounded, which was supposed to be a simple extrajudicial procedure, ends up becoming a civil litigation, a process of adverse possession.

This makes the applicant return to square one, being obliged to face, in addition to the time lost in the extrajudicial procedure, the delay in the process. This, of course, ends up making extrajudicial adverse possession unfeasible.

9 FINAL CONSIDERATIONS

As seen, property is a fundamental right of the person, constitutionally guaranteed. But, unlike in the past, today its exercise is not absolute. This is because, while the Federal Constitution guarantees it as a fundamental right, it also brings the burden that the exercise of this property must serve the social function.

In view of this, we have that the adverse possession institute has evolved greatly, gaining a new foundation, now constitutional, focused on the social function. That is to say, adverse possession seeks to hand over ownership of the thing to the one who is effectively exercising the social function of the property, at least in the basic exercise of its powers.

From the other north, it is known that, as a rule, the declaration of the usucaption must be made by judicial sentence, which will be taken to the registry, after the processing of the process that will follow, according to the current system of the Civil Procedure Code of 2015, the procedure common.

In the meantime, it is known that the Judiciary Power, in modern society, is unable to meet the large load of demands that daily enter through virtual system, which creates a slowness for the jurisdictional provision.

This, of course, creates a detriment to effective, fair and efficient access to justice, aspects that must permeate the process under the constitutional view of the State of Law, notably for those causes that are simple to solve and there is no manifest dispute.

It was with this in mind that the 2015 Civil Procedure Code sought, within a modern vision of pacifying social conflicts, dismiss the idea of process as the only means of resolving conflict.

In fact, the Code started from the premise that the process is just another means, among many available for the solution of social conflicts. Thus, it brought the idea of the adequacy of the means of conflict resolution to promote social pacification.

Therefore, in addition to bringing conciliation, mediation and arbitration into the civil process, it also confirmed the phenomenon of dejudicialization of conflicts, giving notary services the possibility of resolving conflicts, notably those involving separation, divorce, dis-

solution of union stable, inventory and now the extrajudicial adverse possession, through the creation of article 216-A in the Public Registry Law.

This article contains all the administrative procedure that must be followed in the notary service, from the requirements of the application, the necessary documents and signatures and their outcome, with the registration of the adverse possession or its rejection, in addition to the possibility of conversion to legal process, if there is an objection.

In the meantime, some issues may impair the effectiveness of this procedure. Here, three main points were pointed out. First, the culture of litigation and the lack of trust of legal professionals and the lack of trust of society itself in other means of conflict resolution than the process. And this affects the applicability of the dejudicialization of conflicts.

Second, there is a high cost of notary services in Brazil, which sometimes exceeds the cost of the process, notably when there is the possibility of free justice, while in extrajudicial administrative proceedings, fees are always charged. Therefore, even if it's fast, the value to obtain the solution becomes more attractive through the process, even though jurisdictional protection takes time to obtain.

Finally, thirdly, there is a problem with the procedure itself. This is because, despite all the improvements made in the administrative procedure with Federal Law nº 13.465 of 2017, there is still the difficulty pointed out in the sense that the existence of impugnation, although manifestly unfounded, makes the registry officer forward the procedure to the Judiciary.

In other words, in any case, if there is rejection or objection, the process to resolve the conflict will be necessary. And the reasoning for the part is simple: only time and money was lost.

In this order of ideals, although interesting and with the objective of promoting the solution of the conflict in a simpler and faster way, the fact is that, in relation to adverse possession, the procedure ends up not having the applicability that it could have due to the factors presented.

It is therefore essential, for a better application, to promote the dissemination, in society and in professionals, of the importance of the adequacy of the conflict resolution means aiming at social pacification, removing the idea that the process is the only mean of solution.

In addition, it is necessary to promote an exemption from the procedure in order, from an economic point of view, to become more interesting, in addition to making no legislative field an adaptation of the procedure to make even more possible its materialization.

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