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ACCESS TO JUSTICE FOR A RESPONSIVE AND INCLUSIVE LAND GOVERNANCE
NEED FOR INSTITUTIONAL ADJUSTMENTS
TO TARGET THE MOST ECONOMICALLY VULNERABLE GROUPS IN BRAZIL

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Habitat for Humanity Brazil (HFH) and The Center Dom Helder Camara CENDHEC are partner implementers of the *Empowering Women and Vulnerable Groups to Exercise their Rights for Inclusion and Secure Land Tenure and Property* Project. In Brazil around 40% of families living in urban areas do not legally possess a property or any legal document(s) to confirm possession of the land on which they live. This project aims to increase the access of women and vulnerable groups to secure land tenure through; an empowered citizenship and stronger community networks (capable of advocating, defending and exerting social control, with women as protagonists), specialized entities in the State and Municipal offices, new policies, and a Judiciary that uses the full potential of existing laws to the benefit of the target groups. It is expected that this will enhance efficiency, transparency, inclusiveness, responsiveness, and accountability in land governance.

A study in 2012 targeted the Judiciary’s practice in the State of Pernambuco, revealing the obstacles that are hampering the successful implementation of the *special (collective) usucapion rights for urban property (SCU)*¹, which is hindering the access to justice and the security of land tenure for the economically vulnerable. The SCU was created by the City Statute Law (CSL) No. 10.257² (2001) to: i) overcome administrative and legal delays; ii) foster collective legal actions; iii) reduce processing steps; and iv) to allow 5 years to be reached by the occupant of a plot (time required to claim SCU) by adding his possession to that of his predecessor, as long as the contact is continuous for both.

The evidences from the study show two types of obstacles: i) structural (bureaucracy and conflicts of competences among State institutions) and ii) a restrictive interpretation of the existing legal norms by the judicial authorities. The study did a random selection of 63 individual and collective *usucapion* cases³ (13.5%) of a universe of 472 *usucapion* cases in the judiciary related to the Mangueira and Mustardinha

¹ City Statute Law: Special usucapion rights for urban property; Section V, Art. 10: Urban areas with more than two hundred and fifty square meters, occupied by low income population for housing, for five years uninterrupted and without opposition. Where it is not possible to identify the land occupied by each possessor, collective usucapion can be used, as long as the possessors are not owners of other urban or rural property http://www.cidades.gov.br/images/stories/Arquivos/SNPU/Biblioteca/PrevencaoMediacaoConflitos/Legislacao_Laws.pdf p.8

² “...the City Statute sets out principally to provide consistent and unambiguous underpinning of a legal nature to actions undertaken by governments and organized society to control the processes of urban use, occupation, parceling and development of land” Edesio Fernandes in *The City Statute of Brazil: A Commentary*, Cities Alliance.

³ 16 individual usucapion, 26 *plurimas* usucapion (*plurimas* is a collective usucapion when the individual plots occupied are not in the same area), and 19 collective usucapion as SCU in the study (the occupants are in adjoining plots)

slums designated as Zones of Special Interest (ZEIS)⁴ in the city of Recife. The study's framework is based in the right to adequate housing, the ZEIS, the CSL, the new Civil Code (2002) and the Constitution (1988).

First Stage: the analysis. It takes 16 months for a SCU file to travel from the intake stage in the Judiciary to a judge assessing it for the first time (fig.1). This delay discourages the families and creates a lack of trust in the Judiciary. Furthermore, the time between the intake of the SCU claim and the Judge's initial call to the land owner to appear may take up 17 months (fig.2). The study shows that the judges did not call the land owner to appear in court in 63% of the SCU cases, because of "not sufficient information" for the judicial process to proceed (fig.3). The judge gives a deadline to comply with the submission of documents; if the deadline is surpassed he declares the case closed. While the land owner is called for appearance, another legal requirement is consulting the Public Administration (at Federal, State, and municipal levels) about ongoing processes over the land claimed. The study shows that the judges did not consult the Public Administration in 79% of the SCU studied (fig.4). In 21% of SCU cases where the Public Administration was consulted, only 25% of the consultations were answered by the Municipal authorities, 76% by the State authorities, and only 25% by the Federal authorities (Fig.5). The Attorney General intervention is also required, in 46% of the cases his response took up to 5 months; 9% took 5 months to 1 year; 36% 1 year, and 9% over 3 years.

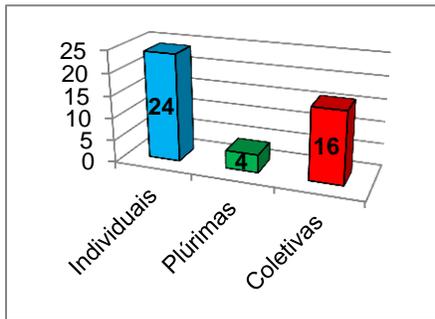


Fig.1: Months from the intake stage to a judge's assessment

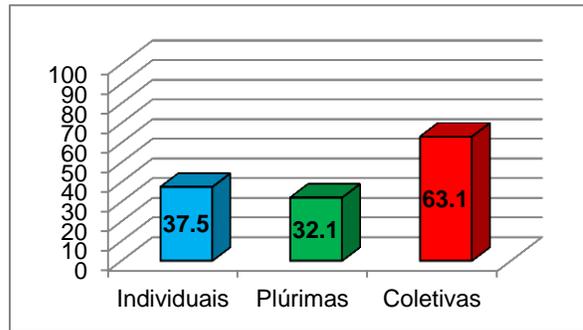


Fig 3: % of cases the judge does not call the land owner

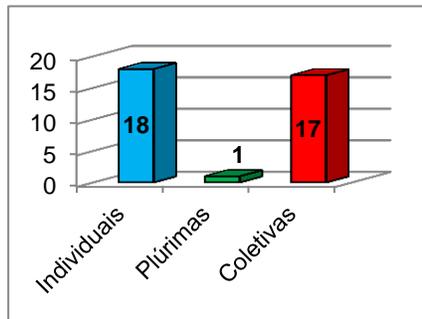


Fig.2: Months from the intake stage to a judge's call to the land owner

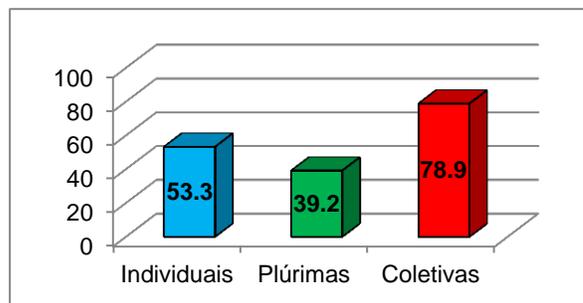


Fig 4: % of cases the judge does not consult the public administration

It takes a total of 42 months for a SCU to travel from the intake stage to the first hearing in the Judiciary (the first audience takes place when the land owner and the claimant's neighbors are cited, consulted public entities have responded, and the Judge considers that requirements are completed) (Fig.6). Time is

⁴ "The ZEIS designation serves as an anti-gentrification zoning tool by restricting the lot size and building heights so as to discourage real estate speculation. The ZEIS designation of an informal settlement officially recognizes the legitimacy of that community's claim to the land,..." http://www.princeton.edu/research/final_reports/f05wsws591g.pdf p.84

a serious obstacle to guarantee of the right to justice, and it highlights the difficulty in the Judiciary to visualize and understand land tenure regularization according to the social function of property⁵.

Second stage: analysis of the causes of delays for judges to deliver their final decision in the Judiciary. The study analyzed a sample of 45 cases (50.56% of 89 SCU in the ZEIS Mustardinha). This analysis was developed in four steps the: i) reconstruction of the progress of proceedings; ii) identification of causes or barriers in the proceedings; iii) identification of a typology of barriers (homologies); and iv) analysis of the homologies according to the initial conceptual framework.

Figure 7 shows the different typologies of barriers identified within the judicial process of the SCU:

- **H1**-conflict of competences, within the Judiciary on who is competent to undertake SCU proceedings; this has resulted in 28.88% of cases studied to be closed without legal analysis.
- **H2**-time taken by the administrators in the proceedings.

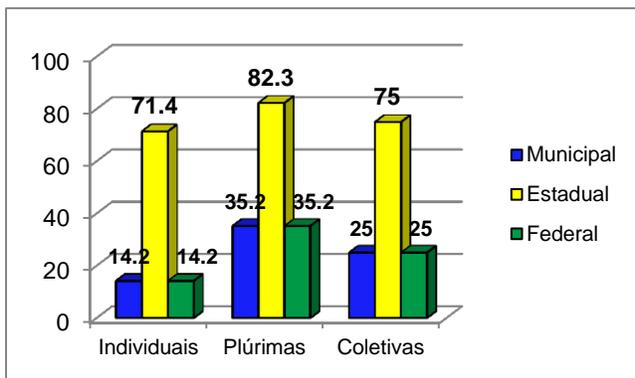


Fig.5: % of cases with none response from the public administration

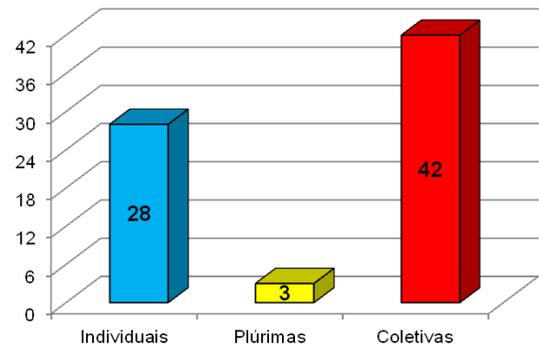


Fig.6: Months for the first hearing in the Judiciary

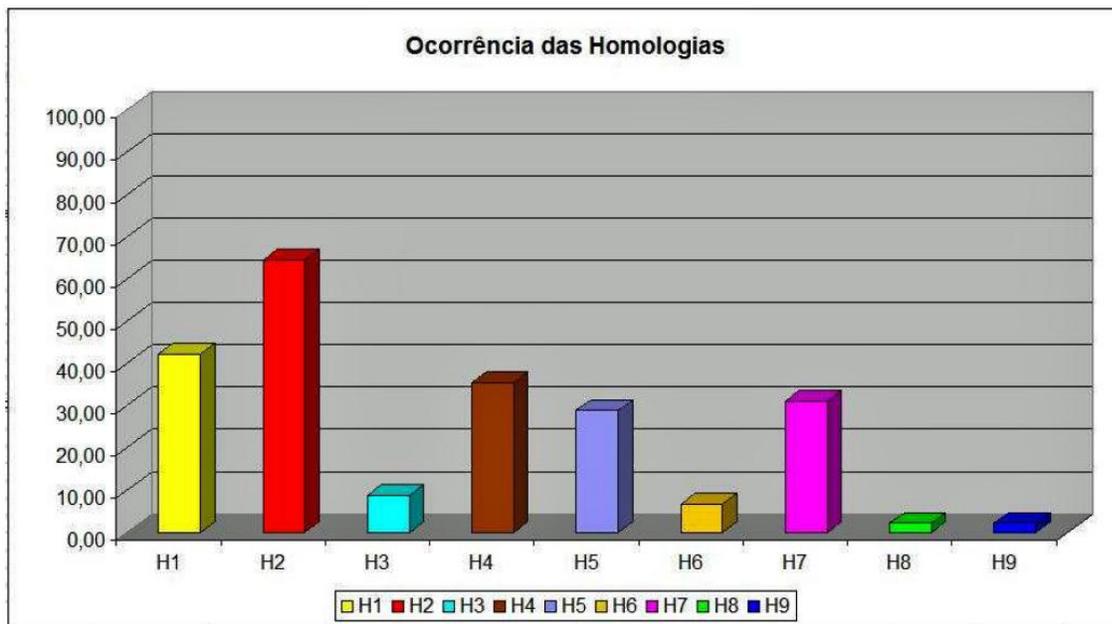


Fig.7: Typology of barriers

⁵ The social function of property, and the social function of the city two key features incorporated in the 1988 Brazilian Constitution, and later on in the CSL

- **H3**-restrictive interpretation of the Art. 12 III of the CSL. Although legally established representatives of a community, and explicitly authorized can represents the SCU's claimants in the Judiciary, the judges do not accept this type of representation.
- **H4**-unrecognition of the ZEIS, the designation of the settlement as a ZEIS is not mentioned in the judge's decisions.
- **H5**-restrictive interpretation of the Art 10 of the CSL (no-individualization of land parcels.
- **H6**-restrictive interpretation of the Art. 10 of the CSL (records of ownership). According to this Law, just a signed document from the claimant is necessary to prove negative record of property; however, the judge requires each claimant to present a certificate issued by each one of the Land Property Registry Offices throughout the country⁶.
- **H7** - restrictive interpretation of Art 12 of the CSL (economically vulnerable families should have all court benefits and free legal assistance but instead NGOs such as CENDHEC and others deliver free legal support)
- **H8** –Even though the CSL Art 14 establishes that the legal action of SCU is a summary action; the practice is slow and bureaucratic (as an ordinary action)
- **H9** –Requirement of authenticated copies of personal documents proofs of property and possession time.

Finally, none of the SCU cases studied had a favorable sentence declared by the judge. The judges had not responded to the principles of the social function of property, the right to access to justice, and the right to adequate housing along their decision making. This highlights that the Statute of the City Law has not gained legitimacy in the whole of society and especially in the judiciary which is blocking its implementation. The conclusion is that the economically most vulnerable are not able to access the justice needed to regularize the security of land tenure; and a huge demand exist which calls for institutional arrangements and fair responses. Following advocacy strategy will look for changes in this scenario.

⁶ There are thousands of registry offices throughout the country, and each registry certificate costs around US\$20, which is economically burdensome