Chapter 22

Fundamental law to housing and the risk of hurting it with the defects of extrajudicial execution of the default debtor

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ABSTRACT
This article analyzes the extrajudicial execution procedures of the defaulting debtor constant in the legislation and how their possible vices can harm the fundamental law to housing, identifying the constant failures in the extrajudicial execution procedures of the debtor in the legislation, verifying where one may be violating the said right, exposing the importance that housing has on the person and society, analyzing the social and individual impact that the problem causes and discussing and analyzing possibilities and ways to modify this reality in order to preserve the rights of the parties and human dignity.

Keywords: fundamental law, home, extrajudicial execution, vice of unconstitutionality, constitutionality control, default.

1 INTRODUCTION

Home ownership or housing is among the most important factors of social peace, since it guarantees those who conquer the certainty of a home and the guarantee of a basic dignity, besides integrating into the goods of the community. With the acquisition of a property to live in, the citizen gains the sense of protection and ensures even greater attachment to work.

Home ownership also means the formation of social, family, emotional and professional stability. This is one of the reasons why the Universal Declaration of Human Rights in article XXV considers housing as one of the most relevant rights, providing that any individual has the right to a standard of living with the ability to guarantee himself and his family health and well-being, as well as food, clothing, housing, medical care and essential social services, the right to security, in case of unemployment, illness, disability, widowing, old age or other cases of loss oflivelihoods in circumstances outside its control.

Like the States Parties to Article 11 of the International Covenant on the Economic, Social and Cultural Rights of the United Nations, which was even promulgated in Brazil through Decree No. 591 of 1992, providing that they recognize the right of every person at an appropriate standard of living for himself and his family, including adequate food, clothing and housing, as well as an improvement intheir living conditions.

The right to housing is also a high-end clause, contained in Article 6 of the Federal Constitution, which states that education, health, food, labor, housing, transportation, leisure, security, social security, maternity and childhood protection and care for the homeless are social rights.

Moreover, in Brazil, currently, due to the financial situation of the majority of the population, the most used means by which a property is acquired is through the Real Estate Financing System, more specifically by the Fiduciary Disposal of the immovable property, ensured by law No. 9,514 of November 20, 1997.

According to the Central Bank of Brazil, in 2020 alone, 682,730 was the number of properties acquired through fiduciary disposal, and every year on average a number is acquired close to this through this same financing. However, according to the same bank, a considerable portion of the above-mentioned financing is in default, and in such cases, as a result of this default, the creditor has the right to execute the debtor out of court following the guidelines of law no. 9,514/97 and provision No. 08/2014, where it will occur if the payment of the debt is not made during this period, the procedures of subpoena of the debtor, consolidation of the property and auction of the property, in this order, in accordance with articles 26 and 27 of that law and in the entire extensionof the air tigo 822 of the provision 08/2014.

On the other hand, during the execution of the above-mentioned procedures we can observe various defects that harm the debtor and, to a large part, result in the loss of the property of the debtor, with the creditor being the owner in its entirety. With this, the vices in question may be hurting the fundamental right tothe radia in which we are addressing.

Thus, it is quite pertinent to analyze and discuss this theme in its various aspects, in which we can identify the vices contained in the procedures determined in the law and its possible consequences that hurt the fundamental right to housing. The present work is part of the study of social rights. The choice of the theme is justified by the importance of the subject from the political, social and legal point of view and by the greatness of the impact in which it can bring to the life of the population, as well as by the interest of deepening the knowledge acquired in the exercise of internship activity at the Registry office of the 1st Office of Registration of Real Estate of Fortaleza, where it is also to whom it is responsible for the registration of the extrajudicial acts of execution of the debtor as well as all other Registry Of Real Estate in Brazil.

With regard to the objectives, the focus is on analyzing the procedures of extrajudicial execution of the defaulting debtor contained in the legislation and how their possible defects can hurt the fundamental right to housing, identifying the constant flaws in the debtor's out-of-court enforcement procedures in the

legislation, verifying where it may be in violation of the fundamental right to housing, exposing the importance that housing exerts on the person and in society, analyzing the social and individual impact that the problem causes and discussing and analyzing possibilities and ways to modify this reality in order to preserve the rights of the parties and human dignity.

With regard to methodological aspects, it was developed through bibliographic research, using published works that deal with the theme in question, and documentary, since it also makes use of materials, data and information that have not yet been treated analytically and scientificly. As for the use of the results, the research is pure, because it has as its primary purpose in seeking the improvement of knowledge on the subject. Regarding the purposes, the research is classified as exploratory, because it seeks a greater knowledge regarding the matter addressed. As for the approach, the research is qualitative, emphasizing the understanding and interpretation of the theme, attributing itto the collected data.

The first topic discusses the concepts of the right to housing, also discussing its origin, the importance of housing and its social impact and the aspect related to the disrespect for the right to housing and its various implications.

The second topic presents the possible defects contained in the competent legislation and the damage they may cause to the debtor's right. It also presents the responsibility for identifying illegality and seeking the proper execution of the debtor, also exposing the difficulties and circumstances of the debtor injured to seek justice in the face of the illegality of the execution.

In the third topic, the approach is more focused on solving the problem in question, discussing the importance of constitutionality control, identifying the ways to solve the vices explained and also analyzing the possibility and need to change the competent legislation as a way to protect the right to housing.

2 FUNDAMENTAL RIGHT TO BITE: ELEMENTS, CENTRAL CONCEPTS AND IMPORTANCE

Fundamental Rights in a more objective concept consists of protective rights, which ensure the minimum necessary for an individual, in a dignified manner, to exist within a society administered by the State Power. They are provided for in the Federal Constitution of 1988 in its title II, which also has, in articles 5 to 17, all the fundamental rights and guarantees that Brazilians hold.

According to Ingo Wolfgang Sarlet (2001) fundamental rights comprise in positive rights present in a legal order which traditionally carry a confluence with human rights. Therefore, the constitution is indispensable for fundamental rights to be effectively entitled as fundamental, "[...] fundamental rights are born and end with the Constitutions, resulting, in such a way, from the confluence between the natural rights of man, as recognized and elaborated by jusnaturalist doctrine [...]". (SARLET, 2001, p. 31). It is not classified as a fundamental right if the right is not positive in a legal order.

There are some criteria that allow the analysis of fundamental rights, which are the positivist legal and the general jusnaturalist, as already addressed by Paulo Bonavides (1997, p. 514):

> Fundamental rights can be analyzed from two conceptions. A more general one establishes that fundamental rights are those that create and maintain the basic presuppositions of a life founded on freedom and human dignity. The other, but specific and normative, states that those rights that the current order considers as such are fundamental.

Some historical moments are of the utmost importance for fundamental rights to be configured and recognised, such as the Declaration of The Rights of France of 1789, the Declaration of Rights of the United States of 1776, the recognition of rights in the Magna Carta of 1215, *in the Bill of Rights of* 1688, since they served as the basis and inspiration for other rights linked to the person and several other constitutions, which principles of extreme relevance related to fundamental rights have progressed and led to the admission of new fundamental rights, such as freedom, fraternity and equality among all men contained in the French declaration of 1789 and basic human rights demarcated in the Universal Declaration of Human Rights of 1948.

It is impossible to deal with unconfrontational and imperative foundations for fundamental rights, given the existence of a diversity of these and means to justify them (MENDES; WHITE, 2012, p. 208). However, Sarlet (2006) is based on the various sources and fundamental rights, attesting that, together and harmoniously, it can be seen, in an essential way, a principle that throughout human legal history has been observed and developed serving as logical support to the idea of the rights in question, the principle of human dignity. According to Ingo Sarlet (2006, p. 40) it is an arduous task to accurately conceptualize the principle of human dignity, however it can be said, predominantly, that it is defined as "a quality considered inherent to every human being."

Although fundamental rights are founded by various elements, with great influence at the time, the dignity of the human person presents itself as a branching trunk and support of several fundamental rights.

The fundamental principles are given the title of informative and basic norms of all constitutional order, mainly norms and fundamental rights, through the Brazilian Constitution of 1988. It is also clear in this same constitution the immense value of the dignity of the human person being mentioned in Article 1(III). "Art. 1. The Federative Republic of Brazil, formed by the indissoluble union of states and municipalities and the Federal District, is constituted as a Democratic State of Law and has as its foundations: III - the dignity of the human person" (BRASIL, 1988).

The Democratic State of Law not only has fundamental rights as elements of its Constitution, but also are inherently recognized as indispensable members of the Democratic State of Law itself, without them it would be impossible to be defined as democratic law. In view of this, it is perceived "a consonance with the principle of human dignity and the dynamic jusnaturalist history of fundamental rights." (SARLET, 2001, p. 64).

Thus, fundamental rights consist in the positiveization of principles and values arising from historical jusnaturalism and human rights in a given constitution, building, based on principles, a normative structure, legitimizing a certain Democratic Constitutional State of Law, granting subjective rights to man and coating it of at least a double character of protection, negative and positive towards the state.

Fundamental rights hold a variety of tasks at the real social and legal order. The task of Material Provision is fundamental to understand the right to housing. In its strict sense, fundamental social rights consist of the rights of the individual devoid of his own means of deterring the right, with regard to the State. (ALEXY, 2011, p. 499).

In the positive aspect, the preservation of social rights allows a material delivery of the State before the needy individual and are configured in order to alleviate social inequalities, aiming at the greater number of people benefiting from the effective freedom through the opportunity of the liberation of their needs. (MENDES, 2012, p. 235)

The above-mentioned rights to material services have the purpose of promoting a concrete relationship with society. Thus, the social rights contained in Article 6 of the Constitution, which are education, health, food, work, housing, transportation, leisure, security, protection of motherhood and childhood, social security and assistance to the destitaway, are the social sectors that the Brazilian legislature realized how to operate social transformation, transforming reality.

The establishment of the State is essential for the existence of social rights due to its characteristics and its object, being crucial the legislative work for the creation of laws as well as the work of the executive and judicial power for its proper full implementation.

Therefore, the rights to material provision aims to alleviate the inequalities and social obstacles, consequently, through constitutional amendment No. 26 of February 14, 2000, the right to housing was recognized in the legal constitutional, which, through its positive, resulted in its title as a fundamental social right in the strict sense, thus needing to receive from the State its due material provision.

Considered as a basic principle and as a means of grounding fundamental rights, size its power of scope in matters related to law, the principle of human dignity is rooted in the concepts and philosophical studies of the legal field that base laws, being known as a core generator of law. (SARLET, 2006, p. 40).

> Dignity, as an intrinsic quality of the human person, is indispensable and inalienable and is an element that qualifies the human being as such. [...] Moreover, for this reason too, it is necessary to recognize and protect it by the legal order, which must ensure that everyone receives equal (since all are equal in dignity) consideration and respect on the part of the State and the community, which, moreover, points to the political dimension of dignity, [...] (SARLET, 2006, p. 54).

The duty of respect for the individual is originated by human dignity, that is, it necessarily covers respect and preservation of the physical integrity of the subject. Thus, either directly or indirectly, the individual is centralized whatever the philosophical legal study. Therefore, the dignity intrinsic to the human being must be respected by any legal order.

It is important to remember that the Brazilian Federal Constitution mentions the foundations that base the Democratic State of Law in its Article 1, having cited as one of them the dignity of the human person in item III of that same article, thus highlighting the extreme importance of the principle in question. (BRAZIL, 1988).

As an essential principle and value, the dignity of the human person according to Judith Martins Costa (2005, p. 75) is a "source value that animates and justifies the very existence of a legal system". The above-mentioned principle is already clearly used as a hermeneutic criterion in judicial decisions, being the basis for the settlement of disputes.

One of the moments when the connection between the principle of human dignity and the fundamental right to housing is highlighted in the Federal Constitution of 1988, for example, is in the provision of Article 170, item III: "Art. 170. The economic order, founded on the valorization of human work and free initiative, aims to ensure that all lives worthy, according to the dictates of social justice, observed the following principles: III - social function of property. (BRAZIL, 1988).

Given the way society is currently based, being focused on production and consumption, people with low wage income find themselves in a situation of inferiority, given this configuration decent housing is one of the most present goals in brazilian social culture. In order to assist these people, the State develops public policies and legal provisions that facilitate the acquisition of immovable property, implementing as a consequence the principle of human dignity in all social groups.

Fundamental rights, therefore, point in their concept a great jusnaturalist influence, contributing to the beseen, not only by their primary function of mechanism for the defense of individual freedom, but also as an appeal of the objective legal order, comprising a system of values that function as a material basis of the legal system as a whole.

Unlike the property, which may be a movable or immovable property, the villa consists, as a rule, of a still property. Thus, since the origin of the housing property, it is related to the configuration of an individual fixed in a place that promotes the maintenance of life, providing him protection and, since indirectly, serving as a means in the process of developing a diversity items, inventions, food, that is, at some point the house is associated with people's work. It means an *erga omnes right*. In the words of Nolasco (2008, p. 87):

> Housing is the intimate place of survival of the human being, it is the privileged place that man usually chooses to feed, rest and perpetuate the species. It constitutes shelter and protection for themselves and yours; from this is born the right to its inviolability and the constitutionality of its protection. There is a dependency link between these two rights. The right to housing tends to the right to live and is only satisfied with the acquisition of this in its fullness. For this, all the elements of the house must compete. Whoever got land, but not the house, satisfied only partly his right to housing. The same is true of those who own the house, but not long enough, required by other life relationships (work, conviviality, culture, education of children). Thus, the right to live extends the same principles that order the right to housing.

Housing is directly linked to the meaning of dignity, it is not enough to have a place to live, it is necessary that this dwelling has minimal conditions that preserve the dignity of the human person. The social and natural needs of housing holders need to be guaranteed by it, and it is essential that it preserves and projects a dignified human life.

One of the main entities of civilization is residential property, not only because of creating the minimum set of social values that are conducted and organized by people and things, but also for determining and realizing the provision with which traditionally governing and constituting the relations between society, states and people. In the position of fundamental right of man, housing has changed together with the historical process of the development of society, which the progression of rights from generation to generation, favored the advent of new values and assets to be protected by law. (PAY, 2009, p. 122).

Living is extremely important for an appropriate connection between the human being and society, not only with their peers, but also with the structure of permanence and maintenance of the current market, since this structure, in all its historical human and social complexity, enables and requires the subject to remain in one place, being paramount for both the security of the ordered Modern State, as for that of the individual who integrates it. Given this, housing is shown as the reciprocal existence of state and individuals and legal entities, providing various ways of working, exerting great influence on the economy and basic structure of society.

Brazil, with the support of the Democratic State of Law, received a new ideology. "The implementation of the Democratic Rule of Law, in the mid-twentieth century, gave property new social, political, economic and legal contours." (PAY, 2009, p. 46).

More specifically on the right to housing, we should highlight that it is classified as inppusa, since the prescription consists of a legal institute that affects only the exercise of property rights, not reaching the claim of personal rights of extrapatrimonial, even if individual.

The right to housing also has the characteristic of being indispensable, since it, being a fundamental right, needs to be understood as an opportunity, of the individual, to live appropriately to the human condition, that is, guaranteeing all the rights contained in Article 6 of the Federal Constitution of 1988.

Another peculiarity of the right in which we are addressing is in the illegality of its violation. On such peculiarity we can state that:

> There is a violation of the right to housing whenever an infraconstitutional system or any act from a public authority that imports this right is in violation, in reduction, disprotection or acts that make it impossible to exercise, because the right to housing enjoys protection (through the three powers) to respect, protect, expand and facilitate this fundamental right. Thus, any and all infraconstitutional legislation that suppresses, hinders or makes impossible the exercise of the right to housing by an individual – its violation – even if by a validly constituted and promulgated rule – is considered to violate the right to housing. (SOUZA, 2008, p. 117).

It is also important to emphasize that the right to housing is universal, since it extends to all people, without relying on any other condition, such as creed, race, sex, political-philosophical conviction or its financial power. (SOUZA, 2008, p. 118).

The Public Power must act to ensure the effectiveness of such a right contained in the Brazilian Federal Constitution, through coercive methods, because for this it is not enough only the simple

legitimation of the law. Therefore, despite the right to housing having instant application, the State has an obligation to promote and protect its full exercise, as well as the infraconstitutional rules, for this same purpose, need to work together with the constitutional norm.

3 ANDTHE DEFAULTING DEBTOR'S REJECTION AND HIS VICES IN LEGISLATION

As highlighted in the introduction, most of the Brazilian population currently uses fiduciary disposal with banks to acquire a property, because it facilitates the acquisition through debt installment, which is provided for in Law No. 9,514/1997 as a form of real estate financing. However, under guarantee, the bank receives the resoluble property of the property subject to disposal, and it has the right to execute the trustee in the possibility of it stopping payment of the installments due, becoming delinquent.

The purchase and sale with fiduciary disposal is made by contract and registered in the competent property registry office, as stated in Article 822-B of Provision No. 08/2014 of the CGJ of the TJ/CE.

Faced with the default of the trustee with three installments in arrears, the fiduciary creditor can initiate the procedures for the execution of the debtor to begin by his subpoena, which, as well as the disposal and all other procedures of execution of the debtor in which we quote, need to be registered in the registry of real estate, since this provides the validity, legality and legal certainty of the procedures in question.

The subpoena of the debtor is provided for and needs to be made in accordance with Article 26 of Law No. 9,514 of 1997 and Article 822-E to 822-Q of Provision 08/2014 of the CGJ of the TJ/EC. The creditor must submit a list of documents and information as stated in the above-mentioned articles for the registry officer of the competent notary to analyze them and, in cases of pending, provide within 10 days a return note, in accordance with Article 188 of Law No. 6,015 of 1973.

In cases where there are pending documentation, such as errors or lack of documents, the creditor's representative needs to withdraw the documentation to correct it and then return it for re-analysis and, if there are no more pending, proceed with the subpoena and its registration. However, all this process of pending corrections and re-analysis in the vast majority of times take a significant time that can subsequently harm the debtor, since during this time, new installments delay and new interest arise stems and increases without the debtor being aware, as it is not being subpoenaed for reasons of the creditor's error. Therefore, there can be an addiction in this situation in the process of executing the debtor that the legislation promotes.

In Article 26 of Law No. 9,514/97, in paragraph 4, it is foreseen how it is necessary to proceed with a subpoena in cases in which the debtor is in an unknown, uncertain or inaccessible place.

> Art. 26, §4. When the trustee, or his transferee, or his legal representative or attorney is in an unknown, uncertain or inaccessible place, the fact will be certified by the serventuário in charge of the diligence and informed to the property registry officer, who, in view of the certificate, will promote the subpoena by notice published for at least three (3) days in one of the newspapers of greater local circulation or another of an easily accessible district, if there is no daily press on the site, counting the deadline for purging the mora from the date of the last publication of the notice. (BRAZIL, 1997)

It can be observed that to subpoena the debtor who is in an unknown, uncertain or inaccessible place it is necessary to promote the subpoena by notice by publishing it in at least three days in one of the newspapers of greater local circulation. Here we can point out our second execution addiction. In the times in which we live, with the evolution of technology, the emergence of new media and information, the overwhelming majority of the population no longer usually use the printed newspaper as a source of information, so this form of subpoena provided for in the above-mentioned article proves precarious and vicious.

Therefore, the debtor is extremely impaired, since not taking notice of this subpoena and becoming inert during the 15 days of payment deadline that he has, which becomes the most likely possibility before said defect, the creditor can proceed with the execution of the debtor by starting the process of consolidation of property with the registry of real estate, where he takes ownership of the debtor to be the full owner of the property.

Once the property has been consolidated on behalf of the trustee, the trustee may proceed with the last procedure for executing the debtor consisting of the auction. Although the debtor no longer owns the property, he still holds the right of preference to acquire the property, according to Article 27, paragraph 2b of Law No. 9,514/97.

> Art. 27, § 2b. After the registration of the consolidation of fiduciary property in the assets of the fiduciary creditor and up to the date of the second auction, the debtor is guaranteed the right of preference to acquire the property at a price corresponding to the value of the debt, added to the charges and expenses covered by Paragraph 2 of this article, the amounts corresponding to the inter-living transfer tax and the award, if applicable, paid for the purpose of consolidating the fiduciary property in the assets of the fiduciary creditor, and the expenses inherent in the collection and auction procedure, also entrusting the fiduciary debtor with the payment of the tax and expenses charged for the new acquisition of the property, this paragraph, including costs and fees. (BRAZIL, 1997)

In view of this right of preference cited, before the auction, the fiduciary creditor has the obligation to communicate the debtor regarding the dates, times and locations of the auctions by correspondence addressed to the addresses present in the fiduciary disposal contract and to electronic addresses if any, in accordance with Article 27, paragraph 2a of Law No. 9,514/97.

Another way to resum this obligation that is currently being practiced and accepted by the notatories is the presentation of a statement from the creditor stating that the fiduciary was informed about the day and time of public auctions. This alternative is being practiced with support in judgments and decisions of judicial proceedings such as the following:

> REAL ESTATE REGISTRATION. FIDUCIARY DISPOSAL IN WARRANTY. PUBLICATION OF THE NOTICE IN NEWSPAPER OF THE SITUATION OF THE PROPERTY THAT WOULD NOT BE OF GREAT CIRCULATION. AUCTIONS, BY VIRTUAL MODALITIES AND ALSO, FACE-TO-FACE HELD IN A PLACE OTHER THAN THAT IN WHICH THE PROPERTY IS LOCATED. Given the declaration of the fiduciary creditor that there was prior communication of the auctions to the fiduciary debtors, it is not appropriate to prevent the registration of the deed of purchase and sale, because the eventual declaration of the absence of the communication, or of vice in its realization, should be obtained by the debtors in own action, to be filed against all interested parties. Doubt dismissed. Appeal not provided. (SAO PAULO. TJ, 2019)

However, this possibility of rescuring the obligation of the debtor's communication by means of a statement proves to be completely vicious, since it cannot guarantee whether this communication was actually made or not, moreover it can be used easily with bad faith, leaving the debtor in this situation once again impaired with his right of preference injured.

As can be seen in the judgment above, the arguments used by the magistrates is based on the "duty" of the injured debtor, if by chance he later realizes that he has been harmed, to apply by means of legal action of his own initiative, the nullity of the auction for hurting his right of preference for not having been communicated by the creditor on the date and time of the auctions.

In order to proceed with the registration of the auction registration on their registration, in addition to the requirement of the above communication, they have some other requirements that need to be met and that are provided for in Decree No. 21.981/32, Law No. 9,514/97 and Provision No. 08/2014 of the CGJ of the TJ-CE. The registry officer of the competent notary, as well as the other procedures, will assess through the documentation submitted by the creditor whether these requirements are being met.

More specifically when it comes to the requirements that involve the correct holding of the auction, such as article Art. 38 of Decree No. 21,981/32 which provides:

> Art. 38. No auction can be held without at least three publications in the same newspaper, the last one must be very detailed, under penalty of a fine of 2:000$. Sole Paragraph. All auction announcements should be very clear in the descriptions of their effects, especially in the case of immovable property or objects that are characterized by the names of authors and manufacturers, types and numbers, under penalty of nullity and liability of the auctioneer. (BRAZIL, 1932)

Having a requirement of this nature disrespected the registrar officer currently has the guidance of refusing to list pending the return note and to bar the record, on the grounds that the notary cannot require the creditor to redo the auctions that have already taken place, having the debtor once again that, if he later notices the error and feels impaired, promote a lawsuit requiring the nullity of the auction for hurting the legal process required by law. This is another vice of the defaulting debtor's out-of-court enforcement process.

It is perceived that the argument used to justify some of the vices mentioned is based on the debtor's own initiative to seek his rights in court once he realizes that he has been harmed. However, it is ignored that a large part of the Brazilian population is poor and has precarious conditions for access to information

and education, being somewhat limited to know that they have been harmed and that they have such rights that need to be respected.

One cannot always wait for the debtor's own initiative in the face of these conditions. The notary responsible for analyzing the regularity of the documentation of the debtor's enforcement procedure may not proceed with the registration of the debtor in the registration of the property if the disobedience of the requirement provided for by law is verified, at risk of injuring one of the most important rights that is the fundamental right to housing provided for in Article 6 of the Federal Constitution, but unfortunately it is not what has been happening today.

Although access to justice is guaranteed by the Federal Constitution through Article 5, XXXV, a portion of the Brazilian population still has great difficulty in resolving their disputes. The judiciary, along with the elitist class that as a whole composes it, harms the lower class.

There are comparative international studies that reveal that societies that have high rates of social and economic inequality are very likely that large layers of their population will be characterized by ignorance of rights. This characteristic compromises the universalization of access to justice, promoting the removal of those who do not even have information about rights.

Even if little deepened, a reflection of the situation of Brazil, can be observed through some indexes. In 2012, the country reached 0.498 points in the Gini Coefficient, showing high concentration of income and significant inequality. Data from the National Household Sample Survey (Pnad) show a high rate of distance between the poorest and the richest, showing that in 2012 those at the top of the pyramid, i.e., 1%, had an increase in their income of 10.8%, while that of the poorest grew 6.6%.

Income inequality, together with serious deficiencies in the results of public policies aimed at guaranteeing social rights, promotes a social structure based on cumulative inequalities. That is, a system of exclusions powered by limitations in the social protection network and the precariousness of public services. Thus, income-related inequalities reproduce and stimulate dissimilarities in educational levels, in obtaining quality of health and housing, briefly, in social well-being standards.

Education plays an essential role, both as an agent that acts in the area of reducing social inequalities, as well as as an impulse for the knowledge of rights and how to require them. Data from the 2010 IBGE Census show that 9.6% of the population aged 15 years or older is illiterate. This condition suffers deep regional distinctions and between rural and urban areas. In the same year, more than half of the country's illiterate (53.3%) were concentrated in the Northeast; in the rural population the rate reached 23.2%, while in the urban population it was 7.3%. The 2012 Census shows that there are 13.2 million full illiterate and 27.8 million more functionally illiterate. A report published by the Organization for Economic Cooperation and Development (OECD) published a report in 2013, which assessed that students' skills to solve logic and reasoning issues puts Brazil, in a ranking of 44 countries, in 38th position, evidencing problems and deficiencies of high severity in the educational system. Even taking into account that the current

socioeconomic situation is higher than in the past, it is an inopportune state to the real extension of rights and the possibilities of pleading with them when not respected.

Given the above, it is proven the difficulty of access to justice by a significant portion of debtors, which is focused on the precariousness of education and education, making the majority argument used by the registrars previously mentioned, incorrect and unjustified.

4 DTHE POSSIBILITY OF CORRECTION OF INCONSTITUTIONAL VICES

The control of constitutionality, in a general aspect, consists of a tool of constant correction in a given legal system, being a system that has the function of verifying the consonance or obedience of an act in relation to the Constitution. The Constitution is the supreme law, so it is not allowed that any act (decree, law, etc.) that is hierarchically below the same one in front of its principles, because consequently it would be causing the disharmony of the rules themselves, causing legal uncertainty to the agents of the legal system.

The control of constitutionality is extremely important for the preservation of the legal order, since the acts, both administrative and legislative, need to maintain agreement and coherence with the Major Norm. Thus, the same Constitution needs to establish how the control of the laws created through the other agents will take place in the constant process of execution or construction of their rights, programs, principles, etc., which becomes an appeal by which it promotes the implementation of policies objectified and delineated by the constituent legislator, sustaining the regularity of public entities and individual acts.

The rule once challenged is removed from the legal world when there is the process of abstract control of constitutionality, since the said control has this power. In addition, only some authorities and entities have the legitimacy to promote such action. Likewise, it is permissible to declare the unconstitutionality and nullity of an administrative act, of which the implications of the decision are diversified, but must obey the principles that guide such modulation.

Some preliminary care is required of the interpreter in the process of analysis of constitutionality of a concrete act or a norm, because these play a great influence on the decision to be taken, needing to observe the limits of the very text of the Constitution, seeking in this the foundations that support a choice or hermeneutic line in favor of another. In this regard, Bandeira de Mello (1996, p. 545-546):

> [...] it is a nuclear commandment of a system, true foundation of it, fundamental disposition that radiates over different norms, composing them the spirit and serving as a criterion for their exact understanding and intelligence, precisely by defining the logic and rationality of the normative system, in what gives it the tonic and gives it harmonic meaning.

Constitutionality control has some classifications, most of which are related to the moment of exercise of control, with the judicial body that exercises control and how to exercise it. With regard to the moment of the exercise, of the existing classifications, repressive control is what should be applied in the vicious norms that regulate the extrajudicial execution of the defaulting debtor, since this control is that

practiced when the standard is already in force, and has the effect of incapacity for its effectiveness. In the law that governs Brazil, commonly, this control is practiced by the Judiciary, through all its organs, through diversified processes.

There are certain methods of repressive action by the Legislative Branch, such as the opportunity to suppress exorbitant normative acts created by the Executive, and by the Executive Branch, such as direct denial in putting into practice unconstitutional law. Whatever the hypothesis, there is divergence regarding the interpretation of a constitutional rule, the final decision is that of the Judiciary.

Referring now to the judicial body that exercises the control of constitutionality, of the existing classifications, the concentrated control is what fits the situation in which we address, since it is practiced by a specific body or by a restricted amount of organs established exclusively for this purpose or having in this activity its central function. It is known as the Austrian system, since it was pioneered in the Constitution of Austria of 1920 and improved in 1929 by means of amendment. This is also the system adopted by Europe's constitutional courts. (BARROSO, 2019, p. 70).

It was through Constitutional Amendment No. 16 of December 6, 1965, that concentrated control of constitutionality was instituted in Brazil, ahead of the Supreme Federal Court, through the representation of the Attorney General of the Republic, also known as "generic action". This is because previously there was in Brazil the interventional action, which, in some cases, presented itself as a hypothesis of the decree of federal intervention in the States, and was also the concentrated competence of the Supreme Court.

It is also worth mentioning that concentrated control, because it is done by the Supreme Court, needs to be obeyed by all other lower organs extending to the entire national territory. Barroso (2019, p. 70-71) shows that.

> [...] in spite of exceptions and mitigations, the courts of a higher court bind all lower judicial bodies within the same jurisdiction. It follows that the decision given by the Supreme Court is mandatory for all judges and courts. And, therefore, the declaration of unconstitutionality in a specific case brings as a consequence the non-application of that law to any other situation, because all courts will be subordinated to the established legal thesis. Thus, the decision, notwithstanding a specific dispute, has general effects in the face of all (erga omnes).

Now referring to the form or mode of judicial control of existing classifications, "direct action control" is what should be used in the rules in question, because, according to Barroso (2019, p. 72-73):

> [...] control is due to the model established in Europe with the constitutional courts. This is control exercised outside a specific case, independent of a dispute between parties, with the object of the discussion about the validity of the law itself. It does not take care of a mechanism for the protection of subjective rights, but of preserving the harmony of the legal system, from which any rule incompatible with the Constitution should be eliminated.

Direct action is presented through an objective process, in which there are no parts or deal in a technical sense. Because it has an institutional nature, and not the defense of interests, only some entities and agencies have the legitimacy to propose control by the main way, that is, to raise direct action of unconstitutionality. In its sphere, ordinarily, the existing law and its supposed divergence with the

Constitution will be a point of discussion. However, the argument of omission can also be used for the recognition of unconstitutionality by the constitutional court, if once the illegitimate inertia in the edition of the law claimed by the Supreme Law is found.

The various models of constitutionality control (French, Austrian, American), such as the multiple modalities of control (political or judicial, diffuse or concentrated, prior or repressive, principal or incidental), were created to deal with the phenomenon of normative acts that enter the legal sphere with a validity defect. (BARROSO, 2019, p. 53)

When we deal with vices of unconstitutionality, we also come across their modalities, these are the one that interests the subject and characterize the vices present in the norms under discussion, it is the vice of material unconstitutionality, since it is characterized "when it is material, presenting vice in the content of the law or act of public power", being thus "contaminated by material vice". In the words of Barroso (2006, p.29): "[...] material unconstitutionality expresses a non-compatibility of content, substantive between the law or normative act and the Constitution."

Material vices, in a different way from formal ones, are linked to the very meritof the act, referring to conflicts of rules and principles determined in the Constitution. In this regard:

> Material unconstitutionality involves, however, not only the direct contrast of the legislative act with the constitutional parameter, but also the measurement of the misuse of power or the excess of legislative power. It is possible that the vice of substantial unconstitutionality arising from excessive legislative power is one of the most tormenting themes of constitutionality control today. It is necessary to assess the compatibility of the law with the constitutionally provided for purposes or to verify compliance with the principle of proportionality, that is, to censure on the adequacy and necessity of the act legislativo. (WHITE; ELHO CO; MENDES, 2010, p. 1172).

From the same perspective Barroso (2006, p.30) discusses material unconstitutionality, alluding to the Federal Constitution and its related norms:

> Material unconstitutionality expresses a substantive incompatibility of content between the law or the normative act and the Constitution. It may be translated into the confrontation with a constitutional rule – e.g., the fixing of the remuneration of a category of public servants above the constitutional limit (art. 37, XI) – or with a constitutional principle, as in the case of a law that illegitimately restricts the participation of candidates in public tenders, due to sex or age (arts . 5th, caput, and 3rd, IV), in disharmony with the commandment of isonomy. The material control of constitutionality can have as parameter all categories of constitutional norms: organization, rights defining and programmatic.

Thus, material unconstitutionality is presented when the rule hurts the explicit parameters of the Constitution or hurts the aspects of the principle of proportionality (necessity and adequacy).

Given all the above in the last two topics, it can be seen that the defects present in the legislation that regulates the extrajudicial execution of the defaulting debtor present all the necessary requirements for it to be the object of an action of unconstitutionality, being subject to the practice of repressive constitutionality control, concentrated and by the main way, possessing defects of material

unconstitutionality. This control is necessary since several people are constantly having their fundamental right to housing disrespected and, consequently, being extremely impaired.

5 CONCLUSION

As seen, the right to housing is fundamental in the life of every individual, being directly linked to the dignity of the human person. This right is guaranteed by the Federal Constitution, in article 6, therefore considered a pertrea. However, amid the observation of the practice of extrajudicial execution of the defaulting debtor, it was suspected of the presence of some defects of unconstitutionality, which could hurt the fundamental right to housing.

The purpose of this monograph was to expose the importance of the fundamental right to housing, to analyze the legislation regulating the extrajudicial execution of the defaulting debtor and to point out possible defects that would hurt that right. Subsequently, the aim was to analyze a possible solution to the problem in question that would enable respect for the right to housing and, once found, study it to understand its principles and concepts and how it works.

With the analysis of the competent legislation, which basically consists of the following rules: Law No. 9,514/1997, Law No. 6,015/1973, Provision no. 08/2014 and Provision 06/2017, it was possible to notice some defects of unconstitutionality, as well as ways in which they could hurt the debtor and his right to housing.

During the research it was possible to classify the unconstitutionality exercised by the biases addressed, which are framed in material unconstitutionality, which consists of a content incompatibility, substantive between the law or normative act and the Constitution. In addition, it was found that the way that allows the correction of these defects in legislation would be through the application of constitutionality control.

Constitutionality control also has its classifications in several aspects, as we can see in chapter three, so it was quite important to understand these classifications so that it was possible to distinguish which of these forms of control would be applicable to the case in which we addressed them. It was found then that the way to solve the aforementioned defects of unconstitutionality would be through direct action of unconstitutionality practicing repressive and concentrated control. Through direct action because it is exercised having as object the discussion about the validity of the law itself and not in a specific case, repressive because the rules object of the action are already in force and need to have their effectiveness inabilitated, and concentrated because it can only be practiced by a limited set of legitimate organs.

Thus, it is concluded that the purpose desired by this Monograph was achieved, since in summary it was able to expose the great value of the fundamental right to housing, analyzed and successfully pointed out the defects that hurt that right present in the legislation regulating the extrajudicial execution of the defaulting debtor and presented and studied a viable way to solve the problem in question.

This work, through the evaluation of the norm and its constitutionality, aims to produce effects that contribute to the construction of a legal system that effectively respects not only housing, but also all other individual rights guaranteed by law, providing it with greater security and credibility. The security desist from the certainty that the law actually respects the right of the parties, and the credibility departing from the reliability that the law actually fulfills its purpose.

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