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THE SOCIAL FUNCTION OF RURAL PROPERTY AND THE LEGAL RESERVE IN THE AMAZON

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ABSTRACT

This research looks into the legal relationship between legal reserve and the social function of property in the Amazon. The general objective of the research is to contribute with the application of legal reserve as an instrument to realize the social function of property in the Amazon. The research analyzes the legal content of the fundamental right to property and the social function of property, the evolution of legal reserve regulation from its inception down to the present time, and the application of legal reserve resizing in the State of Pará in order to understand the relationship between legal reserve and the social function of property. The methodology used included the deductive method, a qualitative approach, and documentary bibliographic survey technique. The research concluded that the social function of property is a legal basis for establishing legal reserve; on the other hand, legal reserve became one of the conditions to achieve the environmental aspect of the social function of the property. Compliance with legal reserve by the landowner ceases to be solely a guarantee-right of the landowner, and becomes a guarantee-right of the society for the conservation of the Amazon biome.

Keywords: Amazon; social function of the property; legal reserve.

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A FUNÇÃO SOCIAL DA PROPRIEDADE RURAL E A RESERVA LEGAL NA AMAZÔNIA

RESUMO

A pesquisa investiga qual a relação jurídica entre a Reserva Legal e o princípio da função social da propriedade na Amazônia. O objetivo geral é contribuir para a aplicação da Reserva Legal como instrumento de efetivação da função social da propriedade na Amazônia. A pesquisa analisa o conteúdo jurídico do direito fundamental à propriedade e da função social da propriedade, a evolução da regulamentação da Reserva Legal, desde seu surgimento até o momento atual, e a aplicação do redimensionamento da Reserva Legal no estado do Pará, visando compreender a relação entre a Reserva Legal e a função social da propriedade. A metodologia utilizada envolveu o método dedutivo, abordagem qualitativa e técnica de pesquisa bibliográfica e documental. A pesquisa concluiu que a função social da propriedade é o fundamento jurídico para o instituto da Reserva Legal; por outro lado, esta passou a ser uma das condições de cumprimento do aspecto ambiental da função social da propriedade. O cumprimento da Reserva Legal pelo proprietário do imóvel deixa de ser exclusivamente um direito-garantia do proprietário e se torna um direito-garantia da sociedade de conservação do bioma Amazônia.

***Palavras-chave**: Amazônia; função social da propriedade; Reserva Legal.*

FOREWORD

The adequate exercise of the fundamental right to private property is crucial for the protection of forest areas and for facing the socioenvironmental challenge in the Amazon. Public policies in the region have been developed on the basis of a vast, scattered and confusing legislative production, with a major impact on the exercise of private property and land use and occupation.

Private property and the social function of property are fundamental rights and the principle of economic regime, as provided for in the Constitution of the Federative Republic of Brazil – CRFB (BRAZIL, 1988) and must be exercised in a manner consistent with other individual, social and diffuse fundamental rights, like the right to an ecologically balanced environment.

The social function of property underlies environmental protection institutes like legal reserve, provided for in Federal Law 12,651/2012 (BRAZIL, 2012), called the Forestry Code. It is understood as an area located within a rural property or possession, which should be conserved with its native vegetation cover in order to ensure the sustainable economic use of the rural property natural resources, help in the conservation and rehabilitation of ecological processes, and promote the conservation of biodiversity and the protection of wildlife and native flora.

Legal reserve imposes a restriction on land use in the Amazon, forbidding the possibility of clearcutting in the forest area, which can cover 80% of the property area. The restriction can be treated in relative terms through the assumptions of resizing provided in the Forestry Code, which deserve careful study, given the diversity of possible interpretations.

This research looks into the legal relationship between legal reserve and the social function of property in the Amazon. The general objective of the research is to contribute for the proper application of legal reserve as an instrument to realize the social function of property in the Amazon.

The research specific objectives are as follows: (a) analyze the legal content of the fundamental right to property and the social function of property, which will entail the study of fundamental law theories and the legal relationship between private property and the social function of property; (b) identify the legislative evolution of legal reserve, from its inception to the present, within the scope of federal and state legislation of the Pará State, in an attempt to demonstrate how the intense changes in

legislation hinder the understanding and application of the institution; and (c) understand the nature of the relationship between legal reserve and the social function of ownership.

Currently, Legal Amazon is made up of all the States of Northern Brazil (Acre, Amazonas, Amapá, Pará, Rondônia, Roraima and Tocantins), the entire area of Mato Grosso State and part of the State of Maranhão; however, but our research specifically focus on the difficulties in regulating legal reserve in the State of Pará. The selection criterion adopted was the state's position as leader in annual deforestation rates in the Amazon in the year 2018 (INPE, 2019).

The methodology used included the deductive method, a qualitative approach, and documentary bibliographic survey technique. We have employed the deductive method in order to explain the content of our assumptions and, by means a descending order analysis from the general to the specific, reach a conclusion (PRODANOV; FREITAS, 2013).

1 LEGAL CONTENT OF PRIVATE PROPERTY AND THE SOCIAL FUNCTION OF RURAL PROPERTY

Private property is one of the most precious themes for the capitalist system of production, which has undergone intense global economic expansion, marked by making social rights and technological innovations more flexible. It is evident that private property has also undergone intense transformation due to the various forms capitalism, in constant transformation, manifests itself.

The research starts from the study of the current legal content of private property in Brazil, to then face the legal debate about the notion of the social function of property.

The term private property is used to designate different relationships and assets in the Brazilian legal system. CRFB (BRAZIL, 1988) uses several meanings to talk about the property: (a) property as a right to the protection of the legal relationship of ownership (Art. 5, heading, and paragraph XXII); (b) property and the social function of property as legal principles (Art. 170, II, III); (c) property as an asset (Art. 5, XIII, XXV, XXVI, Art. 182 and Art. 186).

Evidently, the several meanings of the expression make it difficult to understand its legal content. Eros Grau (1983, p. 64) concludes that "property, of course, does not constitute a single institution, but rather a set

of several distinct institutions, related to different types of assets".

Art. 5, heading, and paragraph XXII of CRFB (BRAZIL, 1988) provides for individual and collective rights and duties, and ensures to Brazilians and foreigners residing in the country the inviolability of the right to property. Property secured in this way shows a relationship between an individual and an object and also an opposition between the subject of this relationship and the universality of subjects who could also claim to participate in the relationship, but who are excluded therefrom on legal grounds (FIGUEIREDO, 2008).

Regarding the right to protection of the legal relationship of property, it is necessary to have a caveat, as well explained by Derani (2002, p. 58):

> Property translates into a relationship protected by law. Property is not a right. The right is its protection. Thus, property right is the right to protection of a subject's relationship to an object. Only that relationship that meets requirements laid down by law can be protected.

Cristiane Derani (2002) warns that the Brazilian law theory and the CRFB itself use the expression property ambiguously, sometimes employing it to designate a relationship between subject and object, sometimes to determine the object of the relationship.

1.1 Ownership and the social function of property as legal principles

Art. 170 of CRFB (BRAZIL, 1988) provides that the economic order, grounded on the valuation of human work and free enterprise, aims to assure a dignified existence for everyone in accordance with the dictates of social justice, and elects property and the social function of property as principles of the economic regime (BRAZIL, 1988, Art. 170, I, II).

Thus, it is necessary to analyze the relevance of the principles for the interpretation and application of legal rules. The constitutional interpretation adopted in this research is based on the legal system as the set of principles and rules, according to the model proposed by Robert Alexy (2002), where principles are norms that order something to be done, to the greatest extent possible, within existing legal and factual possibilities. They are, therefore, *mandates for optimization*, characterized by the fact that they can be fulfilled to varying degrees. How far it is complied with depends on the aforementioned factual and legal possibilities. Rules, by contrast, can only be either fulfilled or not. Rule conflict can only be resolved by introducing

in one of the rules an exception clause that eliminates the conflict, or by declaring at least one of the rules as invalid. When principles clash, one must yield to the other. However, that does not mean that the disregarded principle should be considered as invalid, nor is it necessary to introduce an exception clause, as in certain circumstances one of the principles precedes the other.

The principle-based legal system is grounded on values and allows the assessment of circumstantial aspects at the time the Law is applied, serving as an interpretation vector of the legal rules produced in an infra-constitutional context, when the interpreter may choose the possibility that best fits the achievement of social objectives from among all the possibilities. Eros Grau warns that there is no norm or legal institution that does not owe its origin to a purpose; hence the importance of objective norms (GRAU, 2005). Constitutional principles must seek to actualize the objectives of the Republic stated in Art. 3 of CRFB (BRAZIL, 1988).

Art. 170 of CRFB (BRAZIL, 1988) provides that private property is an economic regime principle and, therefore, must be enforced to the greatest extent possible. Specifically regarding rural property, Art. 186 of CRFB (BRAZIL, 1988) lays down that the social function is fulfilled when the rural property meets the economic, social and environmental requirements specified, namely: rational and adequate utilization, proper use of natural resources and preservation of the environment, compliance with the provisions governing labor and exploitation relations that favor the well-being of both owners and workers.

The criterion of rational utilization of the property has always been a requirement for land exploitation from the time of land grants made by the Portuguese Crown; later on, Brazilian law maintained the requirement of effective crop growing for recognition of tenure and access to the land, from the time of Law 601 from 1850, called Land Law down to this day (ROCHA *et al*., 2015).

The environmental criterion has become relevant with the intensification of the environmental crisis in Brazil and in the world, and it is certainly one of the great challenges of the notion of the social function of property, because it requires the land to be utilized rationally to guarantee its productivity. It also requires that it be used in a sustainable way, to ensure the preservation of biodiversity.

Art. 225 of CRFB (BRAZIL, 1988) fulfills the content of the environmental function of private property by stating that everyone has

the right to an ecologically balanced environment, which is essential to a healthy quality of life, and that to defend and preserve it is the duty both of the Government and society. Paragraph 1 of Art. 225 lays down specific duties for the Government that impact on the exercise of private property. They are, the duty to preserve and restore essential ecological processes and to provide ecological management of species and ecosystems, to demand a preliminary environmental impact study, protection of fauna and flora, and banning by law of practices that endanger their ecological function, cause the extinction of species, or subject animals to cruelty for the deployment of works or activity with the potential of causing significant environmental degradation.

It should be noted that a rural property that is not fulfilling its social function is susceptible to expropriation for agrarian reform purposes, upon prior and fair indemnity in the form of agrarian government securities, and include a clause requiring the preservation of their actual value, and that are redeemable within up to twenty years from the second year of their issuance, pursuant Art. 184 of CRFB (BRAZIL, 1988). However, there is no regulation on the criteria for defining non-compliance with environmental requirements that would justify the expropriation sanction.

Specifically regarding urban property, Art. 182, § 2 of CRFB (BRAZIL, 1988) provides that urban property fulfills its social function when it meets the fundamental requirements of city ordering stated in the city master plan.

1.2 The relationship between private property and the social function of property

Private property and the social function of property are fundamental rights and should be analyzed considering the theory of fundamental rights.

Perez Luno (2005) emphasizes the dual function of fundamental rights: on the subjective level, fundamental rights act as a guarantee of individual freedom, and on the objective level, they took on an institutional dimension, from which their content must become functional in order to achieve their ends and constitutionally proclaimed values.

> Fundamental rights have taken on vital importance for constitutionalism. As stated by Perez Luno (2005), there is a close relationship of genetic and functional interdependence between the rule of law and fundamental rights, since the rule of

> law requires and implies the guarantee of fundamental rights and these, in their turn, imply the existence of the rule of law for their realization.

The subject of human rights harks back to the controversy about their grounds, which will not be dealt with in this text. However, the lesson of Norberto Bobbio (1992) on the so-called "crisis of grounds" stands out, in that we are no longer allowed to illusion of absolute grounds advocated by the proponents of natural law theory.

Two theories about fundamental rights deserve to be highlighted in law theory: the Theory of Evolution based on the system of generations of Rights, and the Theory of the Indivisibility of Human Rights. The generation system is based on the observation of the History of Humanity in order to identify the affirmation of fundamental rights due to the occurrence of events or manifestations of oppression that are not tolerated by the civilization affected, according to its cultural values, at a given historical time. From this observation, the Theory of Fundamental Rights concentrates them in different generations, using as a criterion the characteristic common to the rights achieved in relation to the historical time they have been achieved at (BOBBIO, 1992).

The law theory that has been formed around human rights recognizes that the emergence and positivization of human rights has not overcome or broken up with previous achievements, but rather indicate an extension or complementarity of rights in the passage from one generation to another. That is why part of the doctrine proposes to replace the expression "aspects" for "generations" of fundamental rights. Paulo Bonavides (2005) states that the aspects word replaces – with logical and qualitative advantages – the word generation, when the latter only induces chronological succession and, therefore, a supposed caducity of previous generations' rights.

The theory of the indivisibility of human rights proposes another view of the relationship between fundamental rights. It denies the classic division between civil and political rights and economic, social and cultural rights on the grounds that fundamental rights are indivisible. Civil and political rights cannot be realized without economic, social and cultural rights, and vice versa. The greatest contribution of the Theory of Indivisibility is to deny the distinction between civil and political rights and social rights, and to question the immediate applicability of the former as opposed to the progressive applicability of the latter (LIMA JR, 2001).

Another important aspect to be addressed is the possibility of restricting fundamental rights. The Theory of Fundamental Rights is based on the fact

that such rights are not absolute. Determining the concept of restriction to fundamental rights is one of the most complex challenges of law theory. The most prestigious theories about the restrictions of fundamental rights are the internal and external theories.

Alexy (2002) explains that, for external theory, the concept of restriction to a right indicates at least the existence of the right and its restriction. Thus, first we have the unrestricted right itself, and secondly, what remains after the application of a restriction, namely, the restricted right. Thus, rights present themselves as restricted rights, but also conceivable as unrestricted ones.

In contrast, for internal theory there are not two things, the right and its restriction, but only the right with a certain content. The concept of restriction is replaced by the concept of limit. Alexy (2002) points out that doubts about the limits of the right do not mean doubts about how extensive its restriction can be, but rather about its content.

In internal theory there is a system of equilibrium and reciprocal conditioning between constitutional legal assets, requiring the interpretation of the constitutional text as a whole. The fundamental rights would be limited by the unity of the Constitution.

The legal protection content of private property must be analyzed together with the content of the social function of property, which has also undergone intense transformations since Augusto Comte proposed his ideas, the social doctrine of the Roman Catholic Church, and down to the Weimar Constitutionalism and Socialism (FIGUEIREDO, 2008).

Grau (1983) states that social "property-function" is a principle that is part of the positive-legal concept of property, determining profound structural changes, and it therefore becomes a duty and is not the thing that is the object of property that holds the function, but rather the property owner. That is, the one that fulfills the function embedded in the property owned is the owner of the thing.

Unlike Grau, Cristiane Derani (2002) affirms the social function not as a function of a right, whether of an inanimate good or a property owner, as stated by Grau, but rather the linking of the effects of the subject-object relationship with society. Property is the right to protection of a subject's relationship with an object. Thus, the social function creates a burden on the private owner toward society, which falls on the development of the power relationship between subject and object that establishes a property. That burden means that its performance must yield an advantageous result

for society, with legal consequences to the guarantee of the right. According to Derani (2002, p. 62):

> Consequently, just as an individual subjective right is imparted to allow the owner to claim guarantee of the property relationship, the State and society are given a public subjective right to demand that the owner take certain actions to allow the property relationship to maintain its validity on the legal level. The property right is then no longer exclusively a guarantee for the owner; it becomes a guarantee for society.

It is noteworthy that the social function of property does not mean merely laying down limitations on the exercise of property rights or limitations on the use of property; it is much broader than that. The social function of property is the content of private property that must meet public purposes and policies of fostering the good of everyone, which is the objective of the Brazilian Republic.

Relating to that, Figueiredo (2008) highlights the social function, not as a limit, but as a legal outline of private property, when he warns that the property rights framework cannot be confused with any restrictions on domain rights, since the environmental norms that interfere with the shaping of the right of property together constitute the substantiation of the principle of the social function of property. However, this principle is not a set of rules concerning the limitation of property rights; it is the very legal framework of the private property institution.

In this regard, it should be noted that the law theories advocated by Grau (1983), Derani (2002) and Figueiredo (2008) do not expressly adopt either the internal or external theory of fundamental rights when dealing with the content of the principle of social function. It is possible to see that they do not see the right to property as a right in itself, they do not conceive of a property right in the system without a restriction to the fulfillment of its social function, since they believe that there is only a certain content, as proposed by internal theory.

2 LEGAL RESERVE AND ITS APPLICATION TO RURAL PROPERTIES IN THE AMAZON

The principle of the social function of property should determine the interpretation and application of the legal norm in the face of rules expressing opposing interests, such as the Forestry Code (BRAZIL, 2012), which brought about significant changes to the environmental protection system, including the creation of new management tools.

Federal Law 12,651/2012 (BRAZIL, 2012) regulates on the protection of vegetation, Permanent Preservation Areas, and legal reserve Areas, forestry, the supply of forest raw materials, the control of the origin of forest products, and the control and prevention of forest fires; it also provides economic and financial instruments geared at sustainable development. There are several instruments regulated by the Forestry Code, such as the Rural Environmental Registry – CAR, Environmental Reserve Quotas, Permanent Preservation Area – APP, Legal Reserve, and the Environmental Regularization Program.

Generally speaking, the Forestry Code established two distinct regimes: one applicable to properties where illegal deforestation occurred in a legal reserve area or permanent preservation area – called a consolidated rural area – before July 22, 2008, and another regime applicable to properties that suffered deforestation after that date. The most relevant criticisms have been levied on the benefits available to real estates in a consolidated rural area.

Legal Reserve is one of the most controversial instruments, due to the peculiarity of its application to properties located in the Amazon. The institution underwent several transformations in the historical development of Brazil: Federal Decree 23,793/34 (BRAZIL, 1934, Art. 23) already provided for a restriction on land use, stating that no owner of lands covered with forests could "cut down" more than 75% (three quarters) of the existing vegetation. However, this restriction only referred to spontaneous vegetation, or vegetation resulting from work done by the government or by nature-protecting associations, and could be waived at the discretion of the forestry authority with jurisdiction, in the case of small isolated properties that were close to forests or located in an urban area.

Subsequently, Federal Law 4,771/65 (BRAZIL, 1965), in its original text, also did not expressly mention the term legal reserve. However, in its Art. 15, it determined a ban on the empirical exploitation of primary forests of the Amazon basin, which could only be used in compliance with technical execution and management plans to be laid down by the Government. Nevertheless, the article was not regulated, in the end. Art. 44 included a rule to be applied as long as there was no regulation provided for in Art. 15. It established that, during this period in the Northern Region and the northern parts of the Midwest, clearcutting would only be permissible provided that at least 50% of the area of each property kept its canopy.

The text of the 1965 Forestry Code (BRAZIL, 1965) has been amended

in several situations since Federal Law 7,803/89 (BRAZIL, 1989), which provided for the legal reserve of 50% for the Northern region of Brazil. From 1996 to 2001, several changes were made through Provisional Measures – MPs – that caused legislative confusion and great legal uncertainty in the application of the institution.

The amendment made by Provisional Measure 1,511 from July 25, 1996, (BRAZIL 1996) to the text of Art. 44 of the 1965 Forestry Code (BRAZIL, 1965) had a significant impact on properties in the Amazon, because it determined that, in the Northern region and northern parts of the Midwest, clearcutting would only be allowed as long as at least 50% of the canopy in each property was kept, but § 2 of the same Art. 44 determined that properties where the canopy was made up of forest phytophysiognomies, clearcutting would no longer be allowed on at least 80% of these forest typologies. Thus, it created two legal reserve percentages: 50% for properties in the Northern region and northern parts of the Midwest, and 80% for properties where the canopy consisted of forest phytophysiognomies, in the same regions.

In 1997, Provisional Measure 1,605-18 (BRAZIL, 1997, Art. 44, § 6) allowed the reduction of the legal reserve to the minimum limit of 50% of canopy in each property, in areas where the Ecological-Economic Zoning – EEZ was completed.

Provisional Measure 1956-44 (BRAZIL, 1999), was the one that caused the largest changes in the text of Federal Law 4,771/65 (BRAZIL, 1965): it altered the legal reserve limits, in addition to setting other conditions for the reduction and expansion of the legal reserve by means of EEZ and for including areas related to native vegetation existing in APPs when calculating the reserve percentage. It set the legal reserve percentages in the minimum limits of: I – 80% in rural properties located in a forested area within legal Amazon; II – 35% in rural properties located in a Cerrado (Brazilian mainland vegetation) area located within legal Amazon, with at least 20% in the property and 15% in the form of compensation in another area, provided it is located in the same microbasin.

Provisional Measure 2,166-65 from June 28, 2001 (BRAZIL, 2001) was the last to be enacted; it maintained the rates in Provisional Measure 1,956-44 (BRAZIL, 1999), until the enactment of current Federal Law 12,651, 2012 (BRAZIL, 2012).

Thus, the regulation of the Legal Reserve in rural properties within legal Amazon forest area is marked by changes through successive

provisional measures and reissues in a short time, which did not allow for the adaptation of local legislation and management, let alone the guarantee of adequate information to those the norm was aimed at, thus undermining the efficiency of the institution.

2.1 The Legal Reserve in Rural Properties within Legal Amazon

The concept of legal reserve is defined in Art. 3, III of Federal Law 12,651/2012 (BRAZIL, 2012) as an area located within a rural property or possession, bounded as specified in Article 12 of the same Law, with the function of ensuring the sustainable economic use of the natural resources of the rural property, help conserve and rehabilitate ecological processes, and promote the conservation of biodiversity, as well as shelter and protection for wildlife and native flora.

The Legal Reserve must be conserved with native vegetation cover by the owner, possessor or occupant, in any capacity, of the rural property, whether they are an individual or a public or private legal entity.

The first challenge is to determine what a rural property is. There is a controversy around the definition of rural property. The Brazilian National Tax Code, Federal Law 5,172/66 (BRAZIL, 1966, Art. 32, § 1), uses the property location criterion to define what a rural property is, when it lays down that the urban property tax has as a taxable event the property itself, the usufruct or possession of a real estate located within the urban area of the Municipality. The Land Statute, Federal Law 4,504/64 (BRAZIL, 1964, art. 4, I), on its turn, uses the criterion of destination in order to define what a rural property is. It defines as a rustic building of any continuous area, wherever it is located on, that is intended for extractive agricultural, livestock or agroindustry exploitation, whether by means of public valuation plans or through private initiative.

Even though there is no specific legal provision in Federal Law 12,651/2012 (BRAZIL, 2012) or in the respective regulatory decrees of said Law, Normative Instruction 2 from May 5, 2014, from the Ministry of the Environment (BRAZIL, 2014), which provides on the procedures for the Rural Environmental Registry System – SICAR, expressly adopts the concept of rural property laid down in the Earth Law.

The economic exploitation of the Legal Reserve is allowed through sustainable management, previously approved by the agency of the National Environment System – SISNAMA with jurisdiction in the matter,

in accordance with the adoption of selective exploitation practices under sustainable management modalities, without any commercial purpose, for consumption in the property and sustainable management for commercial forestry purposes, as per Art. 17, § 1, and Art. 20 of Federal Law 12,651/2012 (BRAZIL, 2012).

Incidentally, this is an important clarification, because there were many doubts about the economic use of the legal reserve in the Amazon. As explained by Lilian Haber (2015), part of the law theory argued for the use of the legal reserve with an economic bias and others advocated its non-use; however, for members of the rural bench, the legal reserve has always been considered an economic impediment, especially in the Amazon, considering the 80% of legal reserve for forest area, leaving only 20% for alternative land uses.

Art. 12 of the Forestry Code (BRAZIL, 2012) determines that every rural property must maintain an area with native canopy as a legal reserve, without prejudice to the application of the rules dealing with Permanent Preservation Areas, without prejudice to the minimum percentages in relation to the area of the property located within legal Amazon: (a) 80% in properties located in a forested areas; (b) 35% in properties located in Cerrado areas; and (c) 20% in properties located in open field areas or located in other regions of Brazil.

Although the percentage of legal reserve in the Amazon is considered high, the legal text itself has chosen several options for changing this size. The Art. 12, §§ 4 and 5, and Art. 13, I of the Forestry Code (BRAZIL, 2012) lay down options for reducing of legal reserve area and Art. 13, II includes an option for expanding it. Also noteworthy is the reduction in legal reserve arising from the application of Art. 68.

In properties located in Legal Amazon, the government may reduce the legal reserve down to 50% of the property for restoration purposes, when the Municipality has more than 50% of the area occupied by public domain nature conservation units and confirmed indigenous people lands, as provided in Art. 12, § 4 of Federal Law 12,651/2012 (BRAZIL, 2012).

After consulting the State Environmental Council, the State Government may reduce the Legal Reserve of Legal Amazon forest area down to 50%, when the State has approved EEZ and more than 65% of its territory occupied by duly regularized public domain nature conservation units, and by confirmed indigenous lands. These are requirements set forth in Art. 12, § 5 of Federal Law 12,651/2012 (BRAZIL, 2012).

We want to stress the innovation brought about by Art. 13, I of Federal Law 12,651/2012 (BRAZIL, 2012), which created a new option for resizing the legal reserve. When suggested by the state EEZ, the Federal Government may reduce the legal reserve down to 50% of a property located in a forested area within the Amazon, solely for regularization purposes, against recovery, regeneration or offsetting of the Legal Reserve of properties with consolidated rural areas, except for priority areas for biodiversity and water conservation and for ecological corridors. It may also expand Legal Reserve areas by up to 50% of the percentages provided for in Law, in order to meet the goals of biodiversity protection or reduction of greenhouse gas emissions.

Federal Law 12,651/2012 (BRAZIL, 2012) also determines in its Art. 13, § 1, and 15, § 2 that, in the event of a reduction in the legal reserve, the owner or holder of a rural property that kept a conserved and registered legal reserve in an area larger than the required percentages, may establish the Environmental Reserve Quota and environmental easement over the surplus area.

Art. 68 of the Forestry Code (BRAZIL, 2012) created an option that can be considered as a reduction of the legal reserve, as it allows the owners or holders of rural properties that have performed native vegetation suppression without prejudice of legal reserve percentages provided in the legislation in force at the time the suppression occurred to be exempt from promoting recovery, compensation or regeneration for the percentage areas required by law.

Thus, application of the legal reserve to rural properties in forested areas within legal Amazon can have variable aspects, depending on the specific legal regulation by the Federal Government, the States and the municipality, as it happens with the different regions of the State of Pará.

2.2 The Example of Legal Reserve Regulation in the State of Pará

Repealed Federal Law 4,771/65 (BRAZIL, 1965) provided for a single option for reducing the limits of the legal reserve. This was done in its Art. 16, § 5, which allowed the Executive Power, should the EEZ and the Agricultural Zoning suggest it, and after consulting the National Council of Environment – CONAMA, the Ministry of Environment – MMA, and the Ministry of Livestock and Supply – MAPA, to reduce, for restoration purposes, the legal reserve within Legal Amazon down to 50% of the

property. Thus, the reduction of the legal reserve for purposes of recovery should be made via the approval of the EEZ State Law and, subsequently, approval by CONAMA and by a Federal Decree.

State Law 7,243 from January 9, 2009 (PARÁ, 2009), provides on the ZEE of the Influence Area of BR-163 Highway (Cuiabá-Santarém) and BR-230 (Transamazônica) Highway in the State of Pará – West Zone. It determines the resizing of the legal reserve from 80% down to 50% for recovery purposes in rural properties located in consolidation zones. This is applicable only to rural properties with forest liability acquired before May 6, 2005 (PARÁ, 2009). This law was acknowledged by Federal Decree 7,130 from March 11, 2010 (BRAZIL, 2010).

It is noteworthy that the resizing of the legal reserve provided for in the West Zone EEZ came into force under the previous Forestry Code of 1965 (BRAZIL, 1965).

The Pará State Law 7,398 from April 16, 2010 (PARÁ, 2010), which provides for the East Zone and Northern Channel EEZ of the State of Pará, was also approved under the Forestry Code of 1965 and also determined the resizing of the legal reserve limits from 80% down to 50% of the property in the region for recovery purposes, but only because it was the only possibility provided for.

The revoked Forestry Code of 1965 (BRAZIL, 1965) allowed the Executive Power to reduce the legal reserve for recovery purposes, if suggested in the EEZ, which should be approved by State Law, as provided in Art. 16, § 5. It so happens that only in 2013 the Federal Government approved the EEZ of the East Zone and North Channel of the State of Pará, through Federal Decree of April 24, 2013 (BRAZIL, 2013), based on Art. 13, I, of Law 12,651 of 2012 (BRAZIL, 2012). This created another type of reduction, other than that provided for in State Law 7,398/2010. It authorized the reduction of the Legal Reserve area to down to 50% of the property area located in Consolidation Zones I, II and III, as defined by State Law 7,398/2010 of the State of Pará (PARÁ, 2010), with the sole purpose of regularization through recovery, regeneration or compensation. And priority areas for biodiversity and water resource conservation and ecological corridors should be excluded from the reduction.

Thus, even though the State Law only referred to the possibility of resizing for recomposition purposes, the Federal Decree authorized the reduction of the Legal Reserve area for the sole purpose of regularization through recomposition, regeneration or compensation.

Law 12,651/2012 (BRAZIL, 2012) provides for the concept of consolidated rural area as an area of rural property with anthropic occupation predating July 22, 2008, with buildings, improvements or agrosilvopastoral activities, in which latter case the adoption of the fallow regime would be allowed (Art. 3, IV of Federal Law 12,651/2012).

Under Pará state law, two Zoning laws set time frames for consolidated areas. State Law 7,398/2010 (PARÁ, 2010) adopts in its Art. 8, § 3 the timeframe of December 31, 2006. Law 7,243/2009 (PARÁ, 2009) adopts in its Art. 8, § 2 the legal time frame of May 6, 2005.

If the State of Pará remains with different time frames for consolidated areas defined in the Forestry Code and state Zoning laws, it will have to work with different scenarios for each zoned region and adapt the entire control and monitoring system. It is possible that the State of Pará will adopt the single time frame of July 22, 2008 in order to define the consolidated area, as determined in the general rule, Law 12,651/2012 (BRAZIL, 2012), with a view to facilitating the preparation of the operational control and monitoring system for ownership and holding in the State (FONSECA, 2017).

The scenario of multiple legal reserve area limits in the Amazon forest area contributes to the inadequate application of the institution and a disregard of the principle of the social function of property.

3 THE LEGAL RESERVE IN THE AMAZON AND COMPATIBILITY WITH THE SOCIAL FUNCTION OF PROPERTY

Currently, Legal Amazon encompasses all the states of Northern Brazil (Acre, Amazonas, Amapá, Pará, Rondônia, Roraima and Tocantins), the entire area of Mato Grosso and part of the State of Maranhão, located to the west of 44th meridian. The Legal Amazon area is equivalent to 59% of the national territory, with a total extension of approximately 5,020,000 km² (IBGE, 2019). It is the scene of major socio-environmental conflicts, which involve combating deforestation, illegal exploitation of forest resources, impacts resulting from large development projects, violence, land tenure issues, and disregard for labor norms.

The political map of Legal Amazon contrasts with the traditional rationale of the political division of space associated with the division of political jurisdictions and tax liens that define the division between states

and municipalities. This rationale came from the need for development of a region with special requirements; however, this region is not immune to the dispute of stocks of natural wealth on the world stage.

Up to 2012, 62% of the Legal Amazon area was covered by forests, 2% by the hydrographic network (rivers and lakes), 20% by native non-forest vegetation and 15% by deforested areas. However, when we consider only the Amazon biome, deforestation reached 19% of the region forest canopy. From 1996 to 2005, the area deforested on an annual basis reached an average of 19,600 square kilometers; between 2006 and 2012, the deforested area decreased to an average of 9.2 thousand square kilometers (SANTOS; PEREIRA; VERÍSSIMO, 2013, p. 16-17).

In September 2018, 444 square kilometers of deforestation were found in Legal Amazon, an 84% increase over September 2017, when deforestation totaled 241 square kilometers, and degraded forests in Legal Amazon totaled 138 square kilometers in September 2018, showing a 96% reduction compared to September 2017, when detected forest degradation totaled 3,479 square kilometers (FONSECA *et al*., 2018).

Bertha Becker (2005) points out that, if there is an appreciation of nature and the Amazon, there is also the relativization of the power of virtuality of flows and networks in the contemporary world thanks to globalization, which ends borders and States, which in its turn brought about a power dispute over natural wealth reserves, given the uneven geographical distribution of technology and resources for, while advanced technologies are developed in the centers of power, natural reserves are located in peripheral countries, or in areas that are not legally regulated. This is the basis of the dispute.

The exercise of private property and the social function of rural property in the Legal Amazon forest area must be understood in this scenario of tension between the need for wealth production through the exploitation of natural resources, and the need for biodiversity of natural resource conservation.

The history of occupation of the Amazon is marked by the concentration of land in the hands of privileged groups and by increasing inequality. Loureiro (2004) points out that an analysis of ancient or recent history of the Amazon and Brazil shows that the Brazilian State has been secularly transferring natural assets to privileged groups and social classes, to the detriment of others.

In addition to preserving biodiversity, another challenge in the Amazon

is related to land tenure. It is not only the property that must fulfill its social function, but also the ownership (MOREIRA; FONSECA, 2009). Land use in the Amazon must fulfill its social function and the legal reserve obligation is assigned to the property, regardless of who holds or owns it.

As has already been noted, the social function of the property does not mean merely laying down limitations on the exercise of property rights. It is necessary to identify the economic, environmental and social content of the rural property to establish its social function, and the legal reserve is one of the legal instruments that contribute to guarantee the environmental status of the rural property.

It is clear that the legal reserve implies restriction on the use of the private property, but at the same time it implies a condition of sustainability for the exploitation of the rural property itself, which can only be used through the approval of a Sustainable Forest Management Plan – PMFS, which includes execution, exploitation, forest recovery and management techniques matching the various ecosystems, as provided by Art. 31 of Federal Law 12,651/2012 (BRAZIL, 2012).

The sustainable forest management plan is essential to ensure compatibility between the economic and environmental aspects of the social function of rural property in the Amazon forest area. This is certainly the major challenge related to the analysis of the social function of the property. Part of the rural property is considered an Alternative Land Use Area (AUAS) and can be used for exploitation without specific restrictions, and part of the property can only be used through approval of the sustainable forest management plan by the environmental agency with jurisdiction on the matter.

As a result, the percentage of alternative land use and legal reserve area of each rural property in the Amazon will depend on the specific regulations of each region. In Pará, as an example we have already shown, there are rural properties in forested areas located in consolidated rural areas, whose legal reserve area is 80% to 50% for restoration purposes (areas in the West Zone EEZ), and rural properties located in forested areas in consolidated rural areas, whose legal reserve area is 80% to 50% for regularization purposes, allowing for recovery, regeneration and compensation. There are also rural properties that are not part of consolidated rural areas, with a legal reserve of 80%, including for recovery purposes.

Thus, the legal reserve is crucial for the analysis of the environmental aspect of the social function of rural property ownership in the forest

area of the Legal Amazon, and all the complexity of identifying the legal reserve percentage and ways to regularize the property through recovery, regeneration or compensation are also part of the challenges of identifying compliance with the social function of property.

Thus, if on the one hand the social function of property is the legal basis for the establishment of the legal reserve institution, on the other, the legal reserve becomes one of the conditions for compliance with the environmental aspect of the social function of property. This is not to say that the legal reserve is the very environmental aspect of the social function of property.

As already pointed out, the social function is the very legal outline of private property, and the property rights framework cannot be confused with any restrictions on domain rights, since the environmental norms that interfere with the shaping of the right of property together constitute the substantiation of the principle of the social function of property. However, this principle is not a set of rules concerning the limitation of property rights; it is the very legal framework of the private property institution (FIGUEIREDO, 2008).

The requirement for the rural property owner to comply with the legal reserve is a subjective right attributed to the State and society in order for the property relationship to remain valid. As already pointed out, the property right is no longer exclusively a guarantee-right for the owner and becomes a guarantee-right for society regarding the conservation of the Amazon biome.

CONCLUSION

Private property is a fundamental right (Art. 5, XXII of CRFB) whose legal content includes the social function of property (Art. 5, XXIII of CRFB) and the principles of the economic regime (Art. 170, I, II of CRFB), which must be exercised in a manner that matches the other fundamental individual, social and diffuse rights, such as the right to an ecologically balanced environment (Art. 225 of CRFB).

Property indicates a relationship between an individual and an object and also indicates an opposition between the subject of that relationship and the universality of subjects. It is a relation of a subject to an object protected by law, provided that it fulfills requirements and conditions set by Law itself.

The social function of the property creates a burden on the private owner toward society, which falls on the development of the power relationship between subject and object that establishes a property. That burden means that its performance must yield an advantageous result for society in order for the protection of the right to exist:

The fulfillment of the social function of the rural property has constitutionally-established criteria: rational utilization of the land, which constitutes the economic aspect, the proper use of available natural resources and preservation of the environment, which constitute the environmental aspect, and compliance with the provisions governing labor and exploitation relations that favor the well-being of owners and workers, which constitutes the social aspect (BRAZIL, 1988, Art. 186 of CRFB).

The social function of property underlies environmental protection institutes like legal reserve, provided for in Federal Law 12,651/2012 (BRAZIL, 2012). It is an area located within a rural property or possession, which should be conserved with its native vegetation cover in order to ensure the sustainable economic use of the rural property natural resources, help in the conservation and rehabilitation of ecological processes, and promote the conservation of biodiversity and the protection of wildlife and native flora.

We have demonstrated that the regulation of the Legal Reserve is fundamental for application of the social function to rural properties within legal Amazon, but the evolution of the legal regulation of the institution is marked by changes through successive provisional measures and reissues in a short time, which did not allow for the adaptation of local legislation and management, l*et al*one the guarantee of adequate information to those the norm was aimed at, thus undermining the efficiency of the institution.

Currently, the Forestry Code determines the Legal Reserve area in relation to the area of a property located within Legal Amazon as 80% in properties located in forested areas; (b) 35% in properties located in Cerrado areas; and (c) 20% in properties located in open field areas. Although the percentage of legal reserve in the Amazon is considered high, the legal text itself has chosen several options for changing this size. Arts. 12, §§ 4 and 5, and 13, I of the Forestry Code (BRAZIL, 2012) lay down options for reducing of legal reserve area and Art. 13, II of the same legal instrument includes an option for expanding it.

In properties located in Legal Amazon, the Municipality may reduce the Legal Reserve down to 50% of the property for restoration purposes,

when more than 50% of the area is occupied by public domain nature conservation units and confirmed indigenous people lands (BRASIL, 2012, Art. 12, § 4); after consulting the State Environmental Council, the States may reduce the Legal Reserve down to 50%, when the State has approved EEZ and more than 65% of its territory is occupied by duly regularized public domain nature conservation units, and by confirmed indigenous lands; and when suggested by the state EEZ, the Federal Government may reduce the legal reserve down to 50% of a property, solely for regularization purposes, against recovery, regeneration or offsetting of the Legal Reserve of properties with consolidated rural areas, except for priority areas for biodiversity and water conservation and for ecological corridors (BRAZIL, 2012, Art. 13, I).

The legislative confusion was demonstrated when analyzing the legal regulation of Legal Reserve in the State of Pará, where there are rural properties in forested areas located in consolidated rural areas, whose legal reserve area were resized from 80% to 50% for restoration purposes (areas in the West Zone EEZ), and rural properties located in forested areas in consolidated rural areas, whose legal reserve area was resized from 80% to 50% for regularization purposes, allowing for recovery, regeneration and compensation. There are also rural properties that are not part of consolidated rural areas, with a legal reserve of 80%, including for recovery purposes.

The specific nature of the resizing of the legal reserve in the Amazon is reflected in the exercise of private property and the social function of rural property in the Amazon forest area, which must be understood in this scenario of tension between the need for wealth production through the exploitation of natural resources, and the need for biodiversity of natural resource conservation.

The social function of the property does not mean merely laying down limitations on the exercise of property rights. It is necessary to identify the economic, environmental and social content of the rural property to establish its social function, and the legal reserve is one of the legal instruments that contribute to guarantee the environmental status of the rural property, as laid down in Art. 225 of CRFB (Brazil, 1988).

The legal reserve implies a restriction on the use of the private property, but at the same time it implies a condition of sustainability for the exploitation of the rural property itself, which can only be used through the approval of a Sustainable Forest Management Plan – PMFS, which includes execution,

exploitation, forest recovery and management techniques matching the various ecosystems (Art. 31 of Federal Law 12,651/2012) and is essential to ensure compatibility between the economic and environmental aspects of the social function of rural property in the Amazon forest area.

This is certainly the major challenge related to the analysis of the social function of the property. Part of the rural property is considered an Alternative Land Use Area (AUAS) and can be used for exploitation without specific restrictions, and part of the property can only be used through approval of the sustainable forest management plan by the environmental agency with jurisdiction on the matter.

The legal reserve is crucial for the analysis of the environmental aspect of the social function of rural property ownership in the forest area of the Legal Amazon, and all the complexity of identifying the legal reserve percentage and ways to regularize the property through recovery, regeneration or compensation are also part of the challenges of identifying compliance with the social function of property.

If, on the one hand, the social function of property is a legal basis for establishing the legal reserve institution, on the other, legal reserve becomes one of the conditions to achieve the environmental aspect of the social function of the property.

Compliance with legal reserve by the owner of a rural property is a subjective right attributed to the State and to society, and it ceases to be solely a guarantee-right of the landowner, and becomes a guarantee-right of the society for the conservation of the Amazon biome.

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