

Access to Justice for a responsive and inclusive land governance to target the most economically vulnerable groups in Brazil

Habitat for Humanity in Brazil conducted a study in 2012 which examined the challenges faced by vulnerable people living in informal settlements in the Brazilian city of Recife in their efforts to secure land tenure for themselves. The study looked at 63 cases where families were attempting to gain property rights for the land they lived on through the process of adverse possession (or 'Usucapion' as it is known in Brazil). This process allows a squatter to take the owner of the land that they live on to court in order to gain legal ownership for themselves. To gain ownership a squatter must have occupied the land, exclusively for a certain amount of time and this occupation must be seen to be 'adverse' in that it is against the wishes of the legal owner. This piece, which takes its title from the study, summarises the findings and sets out the conclusions which can be drawn from them.

Background: Protection for the Poor in the Brazilian Constitution

Brazil has several constitutional principles which focus on the rights of people to land and housing, among these is the '*Right to the City*'. The National Forum on Urban Reform describes the *Right to the City* as the "collective right of everyone to the enjoyment of the city within the equitable principles of social justice and territorial, environmental sustainability and democracy". Within this wide ranging ideology is a specific reference to the 'social function of property'. This legal doctrine specifies that where land is owned but not used in a way which is beneficial to the community as a whole, then that land may be repurposed in order to meet that goal through projects such as social housing for the poor. The process of 'usucapion' honours this principle by enabling poor people who are living in illegal and informal settlements to take the owners of that land to court, and potentially gain legal ownership.

There have been several attempts made through different laws and provisions to make the procedure of acquiring land through 'usucapion' more accessible to those with scarce economic resources. One example of this is by trying to make the process much quicker and thereby less expensive and gives the applicant a much earlier ruling on their case. Another example is allowing individual applicants to group their applications together into either Collective applications (where individual cases are heard as part of the same application but given individual rulings) or as Special Collective applications (where a group of applicants bring a case for all of them to jointly contest a single large piece of land) in order further speed up the process. These measures supposedly indicate an attitude of understanding on the part of the government towards the vulnerable and disenfranchised people living in informal settlements around cities. However, Habitat for Humanity's 2012 study identifies several significant obstacles to poor people's ability to properly access the justice system and have their claims for adverse possession dealt with properly.

The main barriers that the study identified are:

- The procedure that applicants have to go through is overly time-consuming.
- When judges are handling land disputes, they frequently apply the law in ways which make the whole process a lot more complex. This has an especially adverse effect on the poor.

Barrier to justice: Delays

The length of legal proceedings on these issues is still far too long to be deemed acceptable. It is quite possible for such proceedings to take up to a decade. With such lengthy procedures comes increased cost of legal representation and is also a major disincentive for people to actually start the proceedings in the first place. The study found several factors which make this whole procedure much longer. Firstly there can be a significant gap between the point where a person or group actually files their claim and when a judge first reviews the case. It can take on average 12 months for an individual claim to even be seen by a judge and up to 32 months for collective actions. In many cases there are conflicts between different local courts and authorities over where the case should actually be decided and this can lead to even greater delays just at the beginning of a case. The study found that in cases where there was this kind of administrative confusion individual cases could take up to two years before advancing to the next stage of the procedure and 28.88% of all cases studies were closed outright without any proper legal analysis.

The next delay occurs when the court is supposed to notify the defendant (the owner of the land in question) that a person or group has applied to challenge him for ownership of the land. In the cases that this study looked at, the delay between the judge's first deliberation and the initial citation of the defendant was 18 months in the individual cases, one month in collective cases, and 17 months for special collective cases. In addition to these long delays, many cases risk failing at this stage because the court simply does not inform the defendant that his ownership of the land is being challenged. This occurred in 37.7% of individual applications, 32.1% of collective applications, and 63.1% of special collective applications.

Similar challenges surface at the next stage of proceedings where the court is required to inform the various levels of government of the case so that the relevant authorities can announce any interest they have in the land. Again there can be months of delay at this stage caused by either the failure of the relevant authorities to respond to the court or the failure of judges to inform the relevant authorities. The study found that State authorities failed to respond to over 70% of cases across the board which caused substantial delay while judges waited for responses which never came. Judges failed to inform the relevant authorities in 53.3% of individual cases, 39.2% of collective cases and 78.9% of special collective cases.

Barrier to justice: Judges

The role of judges' in a legal system is to interpret and apply the law to the cases which are brought before them. Where laws are definite and precise, judges simply apply them to the facts before them. Where laws are unclear or vague, judges are allowed to use their own discretion to look into what the law means, even if it is not written out in the law itself.

The second barrier that the study identified is where judges adopt an overly restrictive interpretation of the law and do not give enough weight to the implied notions of fairness which would otherwise facilitate the legal procedure for poor applicants.

The first and most frequent example of this approach is the outright failure of the court to recognise in any way that the land that they are dealing with is part of an area which has been classified as a Special Zone of Social Interest (ZEIS). ZEIS are areas where there is inadequate and insufficient basic urban infrastructure and services (water, roads, sanitation systems, etc.) and are occupied by people living in poverty without security of tenure. These areas are supposed to benefit from the earlier mentioned legal instruments which are designed to enable the people living in these areas to more easily secure their legal and economic position such as access to free legal support. In 35.6% of the cases included in this study, there was almost no mention whatsoever of the ZEIS status of the land in question by judges and prosecutors. There was also an insistence

from judges and prosecutors that applicants must prove that they are 'poor according to the law' and are required to provide evidence that they were in fact living in poverty.

These problems manifested themselves in several ways; firstly all of the applicants in the cases analysed in this study were accompanied to court by a private lawyer from the Dom Hélder Câmara Center of Studies and Social Action (CENDHEC). The court treated the applicants' bringing a lawyer with them as evidence that they were not in fact as poor as they claimed to be and refused to allow applicants the benefit of free legal support. The court also required applicants to produce evidence that they were in fact poor, even though there was evidence showing that the applicants all live in ZEIS areas and were, by virtue of that, poor. There were also several instances where a judge would ask applicants who were part of a collective application to identify their own individual plot of land and when the applicant did so, the judge then threw out the application on the grounds that it should have been made by the individual alone and not as part of a collective. All of these examples show that many judges have either completely misunderstood the legal instruments designed to protect the most vulnerable members of Brazilian urban society or are simply choosing to ignore them in favour of preserving the legal status quo and the rights of individual land owners over the rights of all to the social function of land.

Conclusions and Recommendations

This report concludes that in spite of recent reforms in public policy, which are supposed to engender a more compassionate welfare attitude towards the economically vulnerable population, the most vulnerable in society are still unable to effectively access the justice needed to secure their ownership of land. A fairer and more inclusive approach is still lacking in many of the institutions and practises associated with this goal and this needs to be changed in order for the realisation of rights which so far exist only on paper. The study suggests a greater effort to instil in the judiciary greater sensitivity towards the concept of collective ownership and an appreciation of how lengthy legal processes can be damaging, especially to people living in poverty. This could be achieved through additional training for judges, advocacy and awareness campaigns for policy changes, and a greater focus on land tenure from inside the legal system.