1-1-2009

Informal Land Subdivision and Real Estate Regularization: A Comparative Study between Colombia and Brazil

Alexandre dos Santos Cunha

Informal Land Subdivision and Real Estate Regularization: A Comparative Study between Colombia and Brazil

Alexandre dos Santos Cunha*

I. Introduction

In historical terms, the remarkable growth in population experienced by the city of Bogotá, Colombia—whose number of inhabitants has risen from 100,000 to about 8,000,000 people in the last ten decades—[1] has generated a pressure toward land subdivision and occupation of urban soil. This pressure has been met by means of informal subdivisions developed by private agents, locally known as "pirate subdividers."[2] Consequently, the growth of the metropolis has been based on a strategy of subdivision and occupation of the urban soil that is dictated by the economic forces of the market rather than by public policies of urban planning or by measures aiming at the social organization of residences that have turned out to be incompatible with the demands of urban expansion.

However, this process of building a city beyond the formally imposed limits of public policies for urban planning or the social organization of residences has been done mostly on *private* land; this is different from what has happened in other metropolises of the subcontinent, where the social pressure for residences has led mainly to the invasion of *public* land (as is the case in most Brazilian cities). In this sense, within a similar context of Latin American accelerated urban expansion we have observed two different and contradictory processes of illegal appropriation of the soil.

---

* Alexandre dos Santos Cunha is Property Law Professor at Fundação Getulio Vargas – São Paulo Law School, Brazil. The present article was sponsored by Fundação Getulio Vargas; field studies were conducted in Colombia in March 2008 during the international seminar "Study Space II – Property, the Environment and Cultural Diversity in Bogotá," organized by the Georgia State University Center for the Comparative Study of Metropolitan Growth and by the Facultad de Derecho de la Universidad de los Andes. I especially wish to thank professors Colin Crawford, Daniel Bonilla Maldonado, and Juan Felipe Pinilla for their support.

1. Matias Sendova Echanove, Bogota at the Edge: Planning the Barrios (2004), http://www.urbanology.org/Bogota/CiudadBolivar.pdf.

2. *See* William A. Doebele, *The Private Market and Low Income Urbanization: The "Pirate" Subdivisions of Bogotá*, 25 Am. J. Comp. L. 531, 533-534 (1977).

This allows us to consider the existence of different juridical structures encouraging one mode of historical evolution over another.

In order to make the argument easier to follow, this article is divided into two parts. First, I discuss the process of formation of a "pirate subdivision" in Bogotá, analyzing the juridical instruments used and the restrictions that such an operation would meet if it were conducted in a Brazilian context; secondly, I shall tackle the issue of entitlement to property in both juridical systems.

II. Building an Extralegal Urban Space

The process of formation of an informal subdivision in Bogotá is relatively simple and well-known in the local community. In principle, a private agent, either a person or an urbanizing company, purchases a wide tract of free land. Subsequently, that agent creates a basic plan for the enterprise, tracing public thoroughfares, private subdivisions, and eventually the space reserved for the construction of public facilities. Then, streets are developed and the real estate is divided with the use of wooden pickets. The process concludes with the building of a sales center, where the promotion and commercialization of the lots is offered through payment in installments.[3]

What characterizes the informality of such subdivision operations is the fact that the venture has not been registered with the competent urbanizing authorities. Thus, the private agent finds a way of avoiding the demands and requirements of the public authority, factors such as minimum lot dimension; thoroughfare and green area regulations; and those concerning pavement, sewer and power facilities. With the rapid occupation of the area and the subsequent formation of a community, one is led to expect that the urbanizing authorities' approval will be tackled through social and political pressure ex post facto, at the expense of public authorities and their contractors.[4]

Besides the significant reduction of costs achieved through the deliberate breach of established norms dictated by urbanizing authorities, making subdivisions financially more accessible to the buying public and increasing the profitability of the venture, the informality of the subdivision operation brings other sources of gain to the pirate subdivider. The precariousness of the juridical situation of purchasers makes it possible for the subdivider to sell

3. *Id.* at 536-537.
4. *Id.* at 546-548.

the same piece of land to more than one buyer, to evict dwellers in case of non-payment, and to engage in other abusive contractual practices.[5] This additional profit created by a situation of informality may explain why, although urbanizing authorities have increasingly simplified the public demands for the registration of subdivisions, these measures have proven to be insufficient to restrain the phenomenon of pirate urbanization.

In fact, the only guarantee that the purchaser of an informal piece of real estate has is the private document promising the sale, through which pirate urbanizers bind themselves to notarize a deed corresponding to the purchased property when all the installments have been paid. If at the time the installments have in fact been paid, and the subdivision has been formalized, it would be possible to register the deed with the public authority.[6] Although these do not confer property rights over the land, promises of sale are documents that entitle purchasers to occupy the space immediately, thus meeting the purchasers' needs.[7]

Evidently, in addition to economic reasons, there are historical and geographical motives that explain the predominance of informal subdivisions in private lands in the formation of the urban space in the city of Bogotá. Located in an arable area where different generations have settled since the 16th century, and, consequently, with only a small amount of public land around it, Bogotá could not have its urban surface extended mainly through the occupation of public land.[8] However, when compared to Colombian urbanization, there is another hypothesis for the reasons behind the infrequency of this phenomenon in Brazilian territory. After all, although most available land in the outskirts of the biggest Brazilian cities also belongs to the State, there is nothing to stop its purchase and subdivision by private agents, similarly to what is done in Colombia.

The factor that determines such differences might lie not in the administrative and urbanizing regulations concerning the activity of subdivision, but rather in the degree of jurisprudential protection granted by the two legal systems to the purchaser of the informal piece of subdivided real estate: the holder of a private document promising the sale of the piece of land. To the extent

5. Interview with Rosa Martínez, Head of the Junta de Acción Comunal de Tanque-Laguna, in Bogotá, Colom. (Mar. 12, 2008).

6. *See* Doebele, *supra* note 2, at 542-543.

7. *Id.* at 548-552.

8. *Id.* at 535-536.

that the legal system in Brazil grants a much higher degree of protection to the buyer of land from subdivisions, there is a lower degree of economic stimulus toward the informal subdivision of private land.

In the Colombian legal system, the regulation of preliminary contracts is quite superficial and there is no special treatment given to the promise of sale.[9] On the other hand, in 1937, Brazilian law started protecting the specific promise of selling urban land with the passing of a federal statute concerning the subdivision for sale of urban land to be paid in installments.[10] The rights granted to the purchasers of urban land by this pioneering statute have been progressively extended, both by the federal statute concerning public notarization[11] and by the federal statute concerning the subdivision of urban soil.[12] The new Civil Code has extended such rights even further.[13] Besides the statutory protection, both Brazilian Supreme Courts (the *Supremo Tribunal Federa* (STF) and the *Superior Tribunal de Justiça* (STJ)), have adopted precedents that are favorable to the side of the purchaser of real estate in such cases.[14]

In the beginning, the original concern of the Brazilian legislature was to grant legal guarantees so that the holder of a private document promising the sale of the piece of land could obtain a deed corresponding to the property acquired through an installment plan.[15] That is why the statutory law established that the purchaser could have the promise of sale notarized through public registration, thus obtaining a legal right concerning the property as long as its integral value was paid.[16] Thus, Federal decree n. 58

9. Código Civil [CÓD. Civ.] art. 1611 (Colom.); Interview with Juan Felipe Pinilla, Property Law Professor, Facultad de Derecho de la Universidad de los Andes, in Bogotá, Colom. (Mar. 13, 2008).

10. *See generally* Decreto-Lei No. 58, de 10 de dezembro de 1937, D.O.U. de 13.12.1937. (Brazil).

11. *See generally* Lei No. 6.015, de 31 de dezembro de 1973, D.O.U. de 31.12.1973. (Brazil).

12. *See generally* Lei No. 6.766, de 19 de dezembro de 1979, D.O.U. de 20.12.1979. (Brazil).

13. *See generally* Lei No. 10.406, de 10 de janeiro de 2002, D.O.U. de 11.1.2002. (Brazil).

14. In the Brazilian legal system, the STF alone performed the functions of a Supreme Court until the passing of the new Federal Constitution in 1988. Since then, it has kept the functions of a Constitutional Court, whereas the STJ has taken over the tasks corresponding to those of a Court of Cassation.

15. *See generally* Decreto-Lei No. 58, de 10 de dezembro de 1937, D.O.U. de 13.12.1937. (Brazil).

16. Decreto-Lei No. 58, art. 22, de 10 de dezembro de 1937, D.O.U. de 13.12.1937. (Brazil).

aimed at avoiding four types of malpractice by informal subdividers: (1) the promise of sale of the same piece of land to two or more people; (2) the unilateral canceling of the promise of sale; (3) the immediate eviction of a purchaser in case of non-payment; and (4) the refusal to grant property rights after payment of the land's integral value. In order to make those juridical guarantees more effective, the federal statute concerning the subdivision for sale of urban land to be paid in installments has created a procedural instrument called *Ação de Adjudicação Compulsória*, through which the purchaser of a piece of land could obtain a deed corresponding to the property provided that the promise had been previously notarized and the complete payment of all installments could be proved.[17] The statute also specified that the non-payment of installments did not authorize eviction, but rather only the opening of a judicial procedure aiming at debt recovery through execution.[18]

Originally, this series of juridical guarantees was available only to purchasers of *formally* subdivided land since it depended on public notarized registration of the promise of sale, which is only possible if the piece of real estate has been previously registered with the public authority.[19] However, even though the statutory law expressly demands so, Brazilian precedent does not consider the public notarized registration of the promise of sale as indispensable to the *Ação de Adjudicação Compulsória*, allowing judges to grant title to irregularly subdivided property.[20] Thus, the legal guarantee has also been extended toward those acquiring pieces of land located within informal subdivisions. This guarantees full civil protection over contractual relations created therein, weakens the contractual powers of the subdividers, and economically discourages the irregular subdivision of soil.

The greater protection bestowed upon the purchaser by the Brazilian legal system has created a perverse result. By hindering the supply of *informal* (but organized) subdivisions of private lands, it has encouraged the disorganized occupation of public land as the only viable alternative for the building of residences by

17. Decreto-Lei No. 58, art. 16, de 10 de dezembro de 1937, D.O.U. de 13.12.1937. (Brazil).

18. Decreto-Lei No. 58, art. 14, de 10 de dezembro de 1937, D.O.U. de 13.12.1937. (Brazil).

19. Decreto-Lei No. 58, art. 23, de 10 de dezembro de 1937, D.O.U. de 13.12.1937. (Brazil).

20. S.T.F., Súmula No. 413, 01.06.1964, D.J. de 06.07.1964, 2182 (Brazil); S.T.J., Súmula No. 239, 28.06.2000, 780 R.T. 189 (Brazil).

low-income layers of society.[21] However, within a context of less-available public land—such as around the city of Bogotá—this could generate a different effect, leading to a previous formalization of new subdivisions of private land.

The modes through which the legal system regulates the promises of sale may be relevant to the presence of formalization in subdivision activities. On the other hand, their effects are neutral over a different kind of reality common to Colombia and Brazil; that is, when informal subdivisions are illegal not only due to the fact they ignore urbanizing rules, but also because the pirate subdivider is selling property that belongs to someone else.

III. Legalizing the Built Urban Space

This is the case of the neighborhood of Jerusalén, in the district of Ciudad Bolívar, in the southern part of Bogotá. Here, a pirate subdivision regularized ex post facto a total area of about 350 acres, where around 100,000 people live today on approximately 20,000 pieces of real estate.[22]

Located in the urban fringe of the metropolis in a rural area, where the Bogotan highlands are more uneven due to the proximity to the Andes, the neighborhood of Jerusalén was the result of a pirate operation of urbanization headed by the Sociedad Urbanizadora del Sur, and operating in secret agreement with Noemí Ríos, who had the land in the name of the entitled owners, the Gavírias.[23]

Taking advantage of the state of abandon in which these lands had been left, pirate subdividers opened public thoroughfares, demarcating pieces of land and allocating spaces to the future construction of public facilities. Between 1981 and 1984, this construction occurred without the authorization of the entitled owners or the approval of the urban authority with jurisdiction over the area. Following the classic pattern of pirate urbanizers, they did all of the selling through promises of sale.[24] However, given the fact that the Sociedad Urbanizadora del Sur were never legal owners of the area, the purchasers still have not

21. *See* Milton Santos, *São Paulo: A Growth Process Full of Contradictions, in* The Mega-City in Latin America 224 (Alan Gilbert ed., United Nations University Press 1996).

22. Martínez, *supra* note 5.

23. *See* Daniel Bonilla Maldonado, *Pluralismo jurídico y propiedad extralegal: Clase, cultura y derecho en Bogotá*, 36 Revista de Derecho Privado de la Universidad de los Andes 207, 213 (2006).

24. *See id.* at 213-214.

been able to obtain the deeds corresponding to their property, even after they had paid the integral value of the installments and the municipality of Bogotá regularized the subdivision between 1989 and 1994.[25]

This situation generates today basically three types of property conflicts around the community of Jerusalén that could have been avoided if the Colombian legal system provided judicial tools for regularizing real estate that were more adequate to the reality of big urban communities.

First, there is the problem of the legal circulation of the plots of subdivided land. Over the past 30 years, many of the purchasers have died, divorced, or simply decided to sell the rights to their land and settle elsewhere.[26] However, the precariousness of their legal situation makes it difficult or even impossible to formalize those operations in the terms demanded by the Colombian legal system, forcing the community to create its own rules for local real estate transactions.

Secondly, there is the problem of obtaining the property deed over the piece of land. As purchasers in good faith in possession of the land, dwellers may obtain the property through judicial action (in Portuguese, *usucapião*, and in Spanish, *usucapión,* normally translated as "squatter's rights" acquired through the prolonged possession over something), in the terms of the Colombian statutory law.[27] According to the Junta de Acción Comunal de Tanque-Laguna, one of the three institutions representing the interests of the community of Jerusalén, around 200 purchasers have already obtained the deed to their properties through individual lawsuits asserting their *usucapión* rights with the judicial assistance of the Defensoria del Pueblo de Bogotá. Another estimated 2,000 individuals await the court's decision on their rights concerning land in Jerusalén. However, the procedure is slow and difficult, and the Gavírias have been actively trying to stop actions concerning real estate that initially belonged to them by any legal means available.[28] In this sense, the strictness of Colombian law concerning *usucapión,* especially the condition that the possession be in good faith, greatly hinders the purchasers' attempts at obtaining their rights in court.

Third, there is the conflict established between the Gavírias,

25. *See id.* at 222-224.
26. Martínez, *supra* note 5.
27. *See generally* Cód. Civ. art. 2518-2534.
28. Martínez, *supra* note 5.

the municipality of Bogotá, and the public utilities about property rights over public thoroughfares and areas destined for use as public facilities within the neighborhood of Jerusalén. Taking advantage of their formal position as landowners of this land, the Gavírias have constantly initiated lawsuits aiming at stopping the construction of facilities and urban improvements such as pavement, sewers, electricity, gas pipes, squares, parks, schools and health centers.

These three kinds of property conflicts faced by the community of Jerusalén could be solved simultaneously if the Colombian legal system allowed the collective *usucapión* of urban areas, a concept accepted by Brazilian law in 2001 with the passage of a new statute concerning urban development and city management.[29] In the Brazilian legal system, any urban community with a surface of 250 square meters or more that has been uninterruptedly occupied for five years or more by low-income dwellers, unopposed by its original owners or others, may be collectively acquired by those living in it through *usucapião*, thereby generating a condominium that may be broken down into smaller fractions.[30] Following the longstanding Brazilian tradition in the matter of *usucapião* rights in general, the statute does not include the dwellers' good faith as one of the conditions for its enforcement.[31]

Collective *usucapión* of the neighborhood of Jerusalén could solve the proprietary conflicts faced by the community in a number of ways. As in any other condominium, the dwellers on the land would be allowed to meet in a general assembly to create the rules of common life, making it possible to incorporate into the general legal system a group of specific rules generated within the community in order to regulate the relationships among dwellers. Purchasers would become the owners of ideal fractions of the total area of the neighborhood, obtaining property deeds over it. As owners of the neighborhood, they could transfer the land necessary for the building of thoroughfares and other urban improvements over to the name of the municipality.

Collective *usucapião* in urban areas may be a powerful juridical instrument to solve conflicts and to regularize real estate. However, in the case of Brazil, it has been timidly used due to the

29. *See generally* Lei No. 10.257, de 10 de Julho de 2001, D.O.U. de 11.7.2001. (Brazil).

30. *See* Lei No. 10.257, art. 10, de 10 de Julho de 2001, D.O.U. de 11.7.2001. (Brazil).

31. *See* 3 Clovis Bevilaqua, Codigo Civil dos Estados Unidos do Brazil commentado 89-90, Livraria Francisco Alves (1st ed., 1917).

nonexistence of specific judicial procedures for collective lawsuits concerning the possession of property or land. The Secretary of Statutory Issues has presented for discussion a proposal to reform possession- and property-related issues in the Civil Procedure Code, giving hope that this legal vacuum will soon be corrected. On the other hand, the use of collective *usucapião* as an argument of the defendant in lawsuits has already had some positive effect, giving greater legal security to many low-income communities in the municipality of São Paulo.

IV. CONCLUSION

Although the phenomenon of the extralegal formation of urban space is common to big cities both in Colombia and in Brazil, the relevance of informal subdivisions for low-income housing purposes is greater in the Colombian informal city than in its Brazilian counterpart. Apart from historical and geographical reasons, there are also legal explanations for this being so.

In this text, I have made use of the methodologies of comparative law to identify important differences between the Colombian legal system and the Brazilian one. These differences might account for the existence of greater economic incentives in Colombia for the phenomenon of pirate urbanization, which does not happen as often in Brazil. Rather than pointing out advantages and drawbacks, or the alleged superiority of one legal system over another, we should pay attention to the fact that those differences are more closely related to Civil Law and Civil Procedural Law than to Administrative or Urbanization Law.

In this sense, I hope to draw the attention of those urban policy makers addressing the formation of urban space to the importance of the rules concerning the assignment of property rights and the possibility of claiming those rights in court. Administrative and urbanization-related regulations may be important for the organization of territory, but, in capitalist legal systems, the demand for property exerts an almost irresistible attraction over private agents. And the definition of property and entitlement to real estate will always belong to the realm of Private Law.