Community Land Trusts And Informal Settlements: Assessing The Feasibility Of CLT Instruments Developed By The Caño Martin Peña Communities In Puerto Rico For Favelas In Rio De Janeiro, Brazil

Legal opinion regarding the potential of current Brazilian legislation to support a Community Land Trust instrument, prepared as part of larger effort for the Lincoln Institute of Land Policy.

By Attorney Tarcyla Fidalgo (IPPUR/UFRJ), April 2018

1. Introduction

It is possible to affirm that "Community Land Trusts" are, before any other technical definition, instruments to guarantee security of tenure for vulnerable populations.

The translation of the term into the Portuguese language is controversial, and involves more than just choosing the words with the most similar definitions to the original English terms. The term originated in the United States of America, which adopts the judicial system of "common law", based largely on judicial precedent that has priority over legal writings. Thus, the concept of "Land Trust" is neither reproducible nor translatable into Portuguese.

Many translate it to "collective property fund" (*fundo de posse coletiva*), while others have translated it as "land trust" (*fideicomisso fundiário*). Both these translations seem incomplete. *Fideicomisso* is a very specific term within Brazilian law, related specifically to succession law,[1] and its use tends to generate confusion among different institutes. On the other hand, the term *fundo de posse coletiva* contains two imprecisions in relation to the model at hand: firstly, it can lead to the incorrect conclusion that it refers to a legal-financial figure, a fund, linked to financial applications; and secondly, by containing only the idea of property, the translated nomenclature can conceptually fail to contain the complexity inherent in the mixed character of the instrument. This results in a gradual weakening of the term's meaning as property increasingly appreciates.

Thus, the preferred working translation is Terms of Community Territory (*Termo Comunitário Territorial*), which evokes the crucial aspects of consensus and community of the CLT instrument. *Termo* as a legal concept describes an agreement, a demonstration of consensus between parts. Its combination, in turn, with the adjectives *comunitário* and *territorial*

[1] A policy by which the testator nominates a legatee or heir, but also requires the legacy or inheritance indicated by the testator to be transmitted to another chosen person once specific conditions are met. Set out in the Article 1951 and afterwards, in the Brazilian Civil Code.

provide the dimension to the subject – community – and also convey the end goal that the consensual model attempts to attain – territory.

The first experiences with CLTs took place in the United States in the 1960s, spurred by the Civil Rights Movement and located exclusively in rural areas. Initially, the idea of CLTs faced resistance from local residents, and as a result, few were effectively implemented in this first moment. The first urban CLT was organized in 1980, in the city of Cincinnati (Davis 2010).

The first CLTs failed, especially, because of difficulties related to procuring the resources necessary to acquire land. With the passage of time, the model of CLTs improved and the demonstration of successful results began to overcome the initial skepticism. As a result, CLTs have grown in prominence: in 1995 there were around 100 CLTs in the USA, while in 2005 there were more than 200, with an estimated 12 new CLTs each year. In the present context, CLTs are in operation in 45 states within the United States and other countries such as Canada, England, Scotland, Australia, and Kenya (Davis 2010). Much of this expansion is due to the fact that CLTs left their rural borders and were increasingly applied in cities, where, in fact, situations of vulnerability are multiple and serious.

The dissemination of CLTs produced an increasingly malleable model, so that CLTs can adapt to diverse localities. In the words of Davis (2010):

> The CLT has been reinvented repeatedly over the years, adapting to new audiences, conditions, and applications. Such flexibility has been a perennial source of renewal and vigor, helping the CLT to spread far and wide. A deeper appreciation for the model's evolution may encourage today's practitioners to continue the experimentation that gave rise to the model in the first place (p. X).[2]

The judicial and institutional arrangements of CLTs have come to vary in order to conform to the reality of each location in which they have been instituted. Regardless, it is still possible to define some common characteristics to the actions which fall under the term "CLT", which are: (i) maintenance of the accessibility of land to vulnerable populations for an indeterminate period; (ii) land under collective ownership; (iii) buildings and residences under individual ownership; (iv) participatory management; and (v) voluntary entry.

After a brief discussion of CLTs' history and characteristics, it is possible to augment the definition of CLT with an emancipatory aspect, one which has had substantial success in the

[2] The Community Land Trust has been reinvented repeatedly over the years, adapting to new audiences, conditions and applications. This flexibility has been a perennial force of renewal and vigor, helping the CLT to spread throughout the world. A deeper appreciation of the evolution of the model can encourage today's practitioners to continue the experimentation process that gave rise to the first model (free translation).

protection of security of tenure for certain communities through an arrangement initiated and managed by the residents. Though there is no overt ideological confrontation with the judicial and institutional arrangements of private property, CLTs nevertheless contain an ideological element, in that they empower residents and guarantee their ability to remain in territories from which they would otherwise normally have already been removed by state or market forces.

1.2 The Brazilian Legal System

Brazil uses a legal system of "civil law", which means that rights have a basis in legal texts, with precedent and customs being only secondary in the country's laws. In this context, laws assume a preponderant role in social organization and public policy.

This characteristic, associated with the type of bureaucracy historically established in the Brazilian state, led to a situation of conservatism that tends to disregard and even resist the possibility for actions not explicitly outlined by law.

That resistance is universal throughout Brazilian society, from constituents to representatives of the executive and judicial powers. This hinders the success of creative efforts to produce new judicial solutions for social problems out of existing institutes, as in the case of CLTs.

An essential question in an adequate overview of Brazil's judicial system is that of the key responsibilities of the different federal entities. Brazil is a federation divided into three autonomous entities: the Union, the States, and the Municipalities.

The Union represents the central government, and does not express a defined territory. Although this structure is concentrated in the country's capital, it has centers of representation in all states throughout the federation. The states are macro-territorial units, of which there are 27, tasked with centralizing and coordinating their competencies in line with Brazil's federative character. In turn, municipalities are micro-territorial units, totaling 5,700.

The Federal Constitution distributed capabilities and responsibilities between the three entities, attributing specific responsibilities to the Union and the municipalities, and leaving states with the remainder in order to encompass all of the responsibilities not explicitly discussed and allocated in the Constitution.

Within the constraints of the present discussion on the legal possibilities for the construction of a Brazilian CLT, we will basically restrict ourselves to the field of federal responsibilities – that is, those of the Union – and of municipal responsibilities. This is because

municipalities were allocated the capacity to regulate urban policy and all subjects pertaining to local interest, while the regulation of associated models and judicial instruments that are used to this end are within the remit of the Union, by way of federal legislation.

Thus, the present discussion will address these two legislative spheres and their legal regulations. It should be noted that while this multiplicity of domains can complicate the creative process of adapting CLTs to the Brazilian legal system, it could also open political and institutional possibilities for the practical application of CLTs.

Another important issue in this general context of the Brazilian legal system is that of taxation. Given the governmental arrangement and the sharing of duties between different government entities, Brazil has federal, state, and municipal taxes. Potential exemptions can only be determined by whichever entity has jurisdiction over the tax collection in question. The exemption of taxes between federal entities is prohibited.

The logistics of implementing a CLT in the country may involve transactions that result in tax-generating activities for these three governmental spheres, especially related to property sales. These hypotheses will be discussed in more detail in the following section, along with further discussion of the possibilities for implementing a CLT. In any case, it is important to highlight that the tax issue will depend on the situation and context of the selected area, and thus, this area should receive special consideration and attention during the construction of the CLT.

1.3 Methodology

The methodology of this report is based on legislative and bibliographical analysis of relevant themes for the construction of a model of Community Land Trust that could be applicable in Brazil, focusing on the context of favelas and their populations in vulnerable positions.

The legislative analysis was based on federal laws, representing the general models of instruments and institutes further detailed in the laws of states and municipalities.

Bibliographical support is crucial to clarify the content and possibilities associated with each of the instruments and institutes covered throughout this document, revealing the understanding of the courts and legal professionals regarding the themes here discussed.

Regarding the proposal to build a Community Land Trust model using existing instruments and systems of Brazilian law, the report adopts a “circuit” methodology as developed by Neto (2014). This methodology is based in two basic conditions: the conditional

application of one instrument in relation to another and the pursuit of an optimal solution that integrates these instruments to achieve the desired objectives. Both conditions are directly related to the proper implementation of a CLT in Brazil, as this analysis demonstrates.

2. Creating the Legal Person

The first step to implementing a CLT is to find an institutional arrangement that guarantees that property will be held collectively, for which the best available solution is the creation of a legal person.

The law recognizes abstract entities as subjects of the law, to which it attributes legal personality, so-called “legal persons”. Legal persons, although not defined in the Civil Code, are inanimate but personalized subjects of the law, possessing the generic capacity to take legal actions. Maria Helena Diniz defines a legal person as “a unit of natural persons or of property, which aims to achieve certain goals, recognized by the legal order as the subject of laws and obligations.” (DINIZ 2001, p.206). Or rather, a legal person consists of a group of people or goods with its own legal personality and created by law.

A legal person requires: (1) an organization of people or goods; (2) the possession of legal goals or ends; (3) the possession of a legal capacity recognized by norms.

Legal persons can fall within domestic or international public law, or private law (Civil Code, Article 30). Associations, societies, foundations, religious organizations, political parties, and individual businesses with limited responsibilities are legal persons under private law.

Next we address the modalities of the legal person that could be used to organize a CLT model in Brazil given currently existing legal instruments.

2.1 Civil Society Organizations (Organizações da Sociedade Civil, CSOs)

Article 5, section XVII of the 1988 Constitution states that “there is total freedom of association for lawful purposes, except that of paramilitary character.” Freedom of association is among the individual rights provided for in international agreements on human rights, including the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social, and Cultural Rights, all of which Brazil is a signatory.

Civil Society Organizations (CSOs) are the product of citizens' greater democratic participation in the process of formation, execution, and monitoring of public policy. Article 2 of Federal Law 13.019/2014[3] defines CSOs as private non-profit entities, cooperative societies, and religious organizations.

CSOs are characterized, beyond their private nature, by the absence of profit-driven motives, by their legal and voluntary creation and administration, and by the many legal formats they can take. The Brazilian Civil Code determines, in Articles 53 and 69, that CSOs can assume the form of associations, foundations, and religious organizations.

2.1(a) Associations and Foundations

Most CSOs fall into two categories: association or foundation. Associations are formed by the union of people who organize themselves for a specific end goal, which can be (1) directed towards the collective (e.g., associations for the defense of human rights or the environment), (2) for mutual benefit, or (3) restricted to a select and homogeneous group of associates (e.g. a club).

Foundations, on the other hand, are defined by the intended purpose of its assets. To create a foundation, the founder must make a special allocation of free assets by public deed or will, specifying the purpose for which they are intended, and defining, if they so wish, how to administer the assets (Article 62 of the Civil Code). Both individuals and companies can found private foundations with assets. Unlike foundations, associations do not require capital to begin their activities, as they are based on people.

Associations and foundations are both regulated by bylaws that must be based on rules provided in the Civil Code.

	ASSOCIATION	**FOUNDATION**
Origin	Set of people who organize themselves for a certain purpose.	Patrimony (combination of assets) destined for a specific purpose.

[3] Establishes the legal regime of partnerships between the public administration and civil society organizations, under mutual cooperation, for the achievement of public and reciprocal interests, through the execution of activities or projects previously established in inserted work plans in terms of collaboration, in terms of development or cooperation agreements; sets out guidelines for development, collaboration, and cooperation policies with civil society organizations.

Purpose	Not-for-profit, of public or mutual interest (of associates). Depending on the statutes, there is a possibility that members may change its institutional purpose by means of a meeting.	Non-profit, of public interest. Perennial purpose as determined by the founder(s). Can only be amended with the authorization of the Public Prosecutor (*Ministério Público*).
Asset	No obligation of existence of social capital or initial equity.	Requires the existence of a minimum equity and of a sustainability plan approved by the Public Prosecutor's Office.

Source: MARCO REGULATÓRIO DAS ORGANIZAÇÕES DA SOCIEDADE CIVIL: A CONSTRUÇÃO DA AGENDA NO GOVERNO FEDERAL – 2011 a 2014.

The expression “for non-economic ends” (*de fins não econômicos*), which the Civil Code ascribes to Associations is interpreted as synonymous with “non-profit ends” in a way that does not impede the CSOs from realizing activities that generate income consistent with their statutorily allowed purposes.

2.1(b) Cooperatives

Cooperativism in Brazil arose out of European immigration in the 19th century, and the first Brazilian cooperative laws date to the beginning of the 20th century. Decree 1.637 of 1907 introduced cooperatives into the national legal framework as a type of commercial society.

Cooperativism transformed in Brazil, and with the 1988 Constitution freedom of association and the non-intervention of the State in the functioning of cooperatives became guarantees.

A cooperative is defined as an organization formed by members of a determined economic or social group that aim to carry out a determined activity for the common benefit. The premises of cooperativism are (1) the identity of purposes and interests, (2) joint, voluntary, and objective action for the coordination of contribution and services, and (3) the achievement of a useful and common result.

Law 5.764 of 1971 regulated cooperatives, defining the **National Cooperative Policy**, instituting the legal framework of cooperative societies and makes other provisions. This law defined cooperatives as societies of people with their own form, legal nature, and characteristics.

Cooperatives can be primary (constituted by a minimum of 20 individuals), central cooperatives, federations of cooperatives, or confederations of cooperatives (Law 5.764/1971, Article 6).

Law 9.867/1999 also enabled the creation of social cooperatives, whose objective is to integrate disadvantaged people into the labor market. This law holds a specific view of the activities of social cooperatives: (I) the organization and management of socio-sanitary and educational services and (II) the development of agricultural, industrial, and commercial activities and services; and a definition of “disadvantaged people” which limits the formation of social cooperatives.

In regards to the legal requirements for the formation of a cooperative, the formalities for their creation do not differ in procedure from that of other types of legal entities. A general assembly of founders will deliberate about its formation and institute the cooperative by means of minutes taken (private instrument) or by public deed, in this case drawn up in the Notary of Notes or Documents (*Cartório de Notas ou Documentos*).

Cooperatives are limited in their suitability for a CLT model as their designated activity must be of economic nature with equal distribution of possible income or assets among the members and they require a minimum number of members to be registered with the cooperative.

2.2 Other forms of social organization or management of common assets and projects

Among the diverse associative models, there are also other forms of social organization and management of common goods and projects that do not necessarily involve creating a legal person.

2.2(a) Consortium

Consortia of natural and legal persons are regulated by Law 11.795/2008, which provides for a “System of Consortia”. The System of Consortia is an instrument of social

progress that intends to provide access to the consumption of goods and services.[4] In this sense, the Brazilian Association of Consortium Administrators defines a consortium as:

> …a mode of purchase based on the union of people – natural or legal – in groups, with the purpose of saving funds for the acquisition of goods, real estate, or services. The formation of these groups is carried out by an Administrator of Consortia, authorized and financed by the Central Bank of Brazil (ABAC, 2018).

The consortium group is an unincorporated company represented by its administrator, actively or passively, in court or out of court, in the defense of its collective rights and interests and in the performance of the contract of participation in a consortium group. The consortium contract, as a standard form contract,[5] is based on multiple co-operation and works to the extent that all participants fulfill their share of the obligation, gathering different people around common goals, and may be an option for managing a CLT.

A real estate consortium permits the purchase of developed plots, of residential or commercial properties in urban and rural areas, as well as the discharge of any outstanding balance of any housing financing and the use of the Severance Indemnity Fund (*Fundo de Garantia por Tempo de Serviço*, FGTS). It can also be created via municipal public policy, by transferring the property to the municipality to complete construction works (Article 46, Paragraph 1, Law 10.257/2001).

2.2(b) Condominium

A condominium is a legal arrangement in which two or more owners exercise ownership rights over a determined property.

The Brazilian legislation provides for three types of condominium: (1) voluntary (Articles 1.313 to 1.326 of Law 10.406/2002, Civil Code); (2) necessary (Articles 1.327-1.330 of the Civil

[4] Art. 2 Consortium is the meeting of natural and legal persons in a group, with a term and number of quotas previously determined, promoted by a consortium administrator, with the purpose of providing its members, in an isonomic way, the acquisition of assets or services through self-financing.

[5] In the standard form contract, one of the parties has to accept, in block, the clauses established by the other, adhering to a contractual situation that is defined in all its terms. In the words of Fran Martins the standard form contract or contract of adhesion "means a restriction to the principle of the autonomy of the will, enshrined in the French Civil Code, since the will of one of the parties cannot manifest itself freely in the structuring of the contract" (Fran Martins, Contratos e Obrigações Comerciais, 8º edição, Rio de Janeiro, Forense, 1958, p. 99).

Code); and (3) Multi-ownership or multi-use condominiums (Articles 1.331 to 1.358 of the Civil Code, and when applicable, Articles 1 to 27 of Law 4.591/1964).

The legal incorporation of a multi-ownership or multi-use condominium is vague in the law and poorly developed in the literature. Such a condominium is considered a legal entity, a *persona ficta* different from the titleholders of each of the autonomous units, not counting as a legal person in a strict sense.

In the hypothetical model for a Community Land Trust management, the most appropriate type of condominium is the "condominium of lots" (*condomínio de lotes*), as defined in Law 13.456/2017, the new national legal framework for land regularization.

In this legal framework, a lot is considered an autonomous unit within the condominium, and may or may not have buildings. In this way, lots that make up the condominium's land can be for the exclusive use of the lot owner – each lot has its own registration. Furthermore, a multi-ownership or multi-use condominium can be created with areas of exclusive common use, distinct from the common use areas of a condominium of lots. To use the legal framework of condominiums, the condominium's land must be the property of the legal person of the CLT and not of each individual owner. In this way, the defined legal person guarantees not just the instrument's continuity, but also the security of tenure with the necessary price ceiling. The use of a condominium model also allows the CLT's legal person to manage the condominium.

2.3 Brief comments on the organization of the legal person

Diverse types of associative organizations can be adopted for the formation of a legal person to manage or institute a Community Land Trust; therefore, one should be attentive to the limits and possibilities of each type when choosing between them. One should ask, for example: whether the CLT should be constituted by a specific type of associate (as in the case of social cooperatives); whether the type chosen has exemptions or economic incentives with respect to profits, division of surpluses or even property in case the legal entity is dissolved, and whether the entity can form partnerships with other organizations or with the government, among other considerations.

	Association	Foundation	Cooperative	Consortium	Condominium
Definition	Union of persons for a	Allocation of equity for a	Organization constituted	The consortium	Goods or buildings of

	certain purpose.	specific purpose.	by members that aims to perform, for common benefit, a certain activity.	group is an unincorporated society that is represented by its administrator.	exclusive property and common property of the condominium owners.
Formalization	Bylaws (Registration Office of Legal Entities)	Bylaws (Public Deed)	By-Laws (Board of Trade)	Contract (Board of Trade)	Registration of deed in the Real Estate Registry Office
Purpose	Not for profit, of public or mutual interest (of associates).	Non-profit, in the public interest.	Non-profit (distribution of surplus).	Purpose of creating savings to be used for the acquisition of goods, real estate or services.	Purpose in the management of a common good.
Federal Taxation	1. IRPJ - Income Tax on Legal Entities 2. CSLL – Social Contribution on Net Income 3. PIS – Social Integration Program 4. COFINS – Contribution to Social Security Financing.	1. IRPJ - Income Tax on Legal Entities 2. CSLL – Social Contribution on Net Income 3. PIS – Social Integration Program 4. COFINS – Contribution to Social Security Financing.	1. IRPJ - Income Tax on Legal Entities 2. CSLL – Social Contribution on Net Income 3. PIS – Social Integration Program 4. COFINS – Contribution to Social Security Financing.	1. IRPJ - Income Tax on Legal Entities 2. PIS – Social Integration Program 3. COFINS – Contribution to Social Security Financing.	The condominium that has employees is a contributor to PIS, COFINS and CSLL; as well as being obliged to make a withholding of income tax if there is an effect on salaried work.
Limitations		- Control on property exercised by the *Public Prosecutor*	- Need for minimum capital	- Time limit and number of quotas (for the acquisition of land)	- Municipal and federal urban development rules, as well as charges arising from the

		- Obligatory destination of goods in case of extinction		previously determined - Need for a consortium administrator - Control and supervision by the Central Bank of Brazil	urbanization process (Article 2, IX, of Law 10.257 of 2001)
Potentials	- Signing partnerships with public entities to obtain resources	- Signing partnerships with public entities to obtain resources	- Signing partnerships with public entities to obtain resources	- X -	- X -

3. Land Acquisition

Land acquisition by a legal person created to manage and/or establish the CLT or Community Land Trust is one of the main challenges of the institution of this model in Brazil. This is due to two main factors: (i) the general scenario of land irregularity that afflicts Brazil, especially subnormal agglomerations,[6] and (ii) the political and legal difficulties of recognition of the institute, given the conservatism that governs legal and administrative practices in Brazil. In the following section, we present a number of possibilities, in terms of legal instruments, to enable the CLT model in Brazil, with a focus on subnormal agglomerations.

[6] The official term applied by the Brazilian Institute of Geography and Statistics – IBGE – to describe areas characterized by low-income housing with more than 50 households and the absence of various urban facilities (IBGE, 2010).

3.1. Land Regularaization

As previously mentioned, land irregularity is a widespread reality in Brazil – especially in subnormal agglomerations – and a particular challenge to the institution of a CLT model in the country.

Given that the CLT presupposes private property, including its dismemberment between land and buildings, land regularization becomes a critical question in the process. That is, the potential of discussing any legal arrangement for a CLT model in the country depends on the potential to regularize the area that will accommodate the model.

Land regularization in Brazil is currently regulated by federal Law 13.465/2017. This recent law emphasizes individual titling through full private ownership, prioritizing registry regularization to the detriment of other dimensions of land regularization, especially those related to measures of territorial improvements and social assistance to residents, brought by the previous normative framework, Law 11.977/2009.

Like every legal instrument, this model is marked by disputes and contradictions. While this new land regularization model directly undermines security of tenure and the guarantee of low-income residents' rights, it also makes it possible to mold a CLT model, effective precisely in guaranteeing the rights and security of tenure of vulnerable populations.

This contradiction becomes operative insofar as the emphasis on ownership regulation via full private property leaves irregular territories vulnerable to market forces – which tends to promote the removal of the poorest residents by raising the cost of living – while simultaneously enabling the creation of the conditions for the implementation of a CLT model because it facilitates and reduces the costs of land and/or property registry regulation processes.

Another point of special interest in the new law is the indication that the Union should promote the regularization of its occupied lands and that it should provide, free of cost or by taxation, areas that are of particular interest. This indication, which tends to extend to states and municipalities, could eventually facilitate land acquisition for legal entities established for the management of the CLT or Community Land Trust.

3.2. Purchase and sale

Assuming that land is regularized, one option for the CLT to obtain land is through purchase and sale. This will consist of a contract between private parties regulated by the National Civil Code (Articles 481 and following Law 10.406/02), which could be carried out directly by the legal entity constituted for the management of the CLT or *Termo Comunitário Territorial*.

The major challenge of this option is obtaining resources for the acquisition of these lands.

Another possibility is buying and selling involving private parties and public entities, a transaction encouraged by the new legal framework on land regularization, Law 13.465/17, previously introduced. This hypothesis involves a slightly longer process, governed by the rules of administrative law, and involves a preliminary assessment of the land and a competitive bidding process among individuals to guarantee that such areas are sold at the highest possible price among the interested parties in order to preserve public interest.

However, there is legal provision that exempts such requirements for acquisition cases of social interest (Law 13.465/17), allowing a kind of free conveyance that could be of interest for the CLT since it dispenses the resource requirement for such a transaction.

It should be noted that this type of free conveyance provided in Law 13.465 includes the transfer of Union areas to states and municipalities with the purpose of promoting land regularization, as provided in Article 101 of Decree 9310/2018.

The legal provision for this type of free transfer of public lands has the potential to put a great quantity of land and property on the market, with many of them occupied by low-income populations. In this sense, the construction of a CLT model becomes even more important in order to protect this population's security of tenure, to guarantee their access to land and, consequently, their right to housing and to the city.

From a tax point of view, it should be noted that, in cases of purchase and sale, there is an incidence of ITBI, a tax on the transfer of real estate, for the buyer within municipal jurisdiction. Its rate varies according to the regulations of the collecting municipality. For

example, in the municipality of Rio de Janeiro, the current rate is at 3% of the declared value of the transferred property.

3.3. Donation

This option is applicable to cases where lands intended to constitute the CLT may be private or public, with the latter being rather common in subnormal agglomerations in Brazil.

Civil or administrative law, depending on whether the donor is a private or public entity, may govern the transaction. In the case of public entities, proof of social interest is essential in order to characterize the public interest in the operation.

The negative aspect of this land acquisition option is that it relies on the individual or administrator's discretion, thus requiring a good dose of political articulation with the particular entity or owner of the land in order to make it feasible.

In regards to tax, donations are taxed via the ITCMD (gift causa mortis or donations tax), of state jurisdiction; the basis of the calculation is the real property value (value estimate made by public authority) and the variable rate according to the state where the area is located. According to Senate Resolution 9/92, ITCMD's maximum tax rate cannot exceed 8% of the real value of donated properties.

3.4. Transfer by residents

This is an option that is highlighted in the scope of the new land regularization law that, as previously explained, emphasizes individual titles based on full private property. In this scenario, the public sector could regularize the area in which a CLT is planned based on individual titling. In this case, a system of land ownership transference from the residents to the legal entity constituted for the management of the CLT may be an option.

This transfer may take the form of purchase and sale or donation; the former case will have an ITBI incidence and in the latter case an ITCMD incidence, as previously explained.

In addition to the tax costs, another issue that cannot be ignored in this hypothesis relates to the difficulties imposed by the ideology of private property dominant in Brazilian

society. It can be difficult to achieve group involvement to the point that members agree to give up property titles to a legal entity, even though they will participate directly in its management. Therefore, the practical feasibility of this legal possibility will depend directly on the level of community interest and engagement in the project.

4. Instruments to Facilitate the Community Land Trust

Once a legal entity has been organized and the challenge of obtaining land through one or more of the aforementioned routes is overcome, the issue of which instrument is the most appropriate to mobilize the main characteristic of the CLT comes into question; such characteristic is the separation between land owner and benefactor, the first being collective in perpetual character and the second being individual, with transaction limitations.

4.1 Surface Rights

The CLT can be instituted through the utilization of surface rights, which is a real right, that is, a right over a property, as shown in Articles 1.369 and 1.377 of the Civil Code. Surface rights are also among the legal and political instruments brought by Article 4, V, Item "l" and Articles 21 and 24 of the City Statute (Law 10.257, July 10, 2001).

It can be defined as the right to have as one's property, separately from land ownership, a construction or plantation erected over another's land, be they preexisting or the result of the exercise of a concession to build or to plant for an extended period of time (with adjustment and mutual agreement), by a public deed duly registered in the Registry of Real Estate.[7]

Surface rights can be instituted for free or through payment, and the beneficiary of the surface area must cover all charges and taxes over the property as a whole, including land and construction, as if they were the owners. The payment of the charges may or may not be agreed upon between the parties, so a possibility for the CLT is that the legal entity assumes these fees in place of the beneficiary. Surface rights can also be transferred to third parties and, in the

[7] Payment of the municipal transfer tax of 2% of the property value.

event of the beneficiary's death, to his/her heirs, which is favorable in the management of the CLT since it does not raise difficulties in the change of beneficiaries.

The surface may be constituted by any contractual means suitable for the transfer of property ownership, as mentioned above. If the surface is destroyed, the owner will have full ownership of the land, construction or plantation, regardless of compensation, unless the parties have stipulated otherwise.

Paid-for surface rights will require payment of the transference tax (ITBI) at the time of signing. In turn, if it is a gift, it will require payment of the donation tax (ITCD).

It should be mentioned that surface rights could be obtained by a legal entity under domestic public law, which would simplify the possibility of creating CLT arrangements involving public entities.

4.2. Commodatum

A commodatum is the gratuitous loan of individualized things. Pursuant to articles 579 to 585 of the Brazilian Civil Code, lending has as its objective the delivery of a thing for use and with its subsequent restitution. The commodatum (*commodum datum*, that is, given for ease and benefit) is a unilateral agreement by which one party delivers a tangible or intangible asset or item to another in order for the recipient to benefit, over a defined or undefined period, having to return the item to the original party when the term of the contract expires or the owner ends the agreement.

Silvio de Salvo Venosa teaches that:

"The Brazilian Civil Code allows for the loan agreement to be a free loan of intangible assets in line with the normal custom of the asset (Article 579). If there is no conventional term, lending is then automatically presumed for the time required for the use granted (Article 581). In addition, the lending contract has an assumed *intuitu personae* (i.e. the individual receiving the loan is an essential term of the contract itself) since the lender has a fiduciary investment in the recipient, clearly implied in the nature of the free contract. It therefore translates as personal favor to the recipient. This benefit, unless ratified by the lender, does not extend to the

successors of the borrower." (Sílvio de Salvo Venosa, Direito Civil: Contratos em espécie. 3. ed. São Paulo: Atlas, 2003, p. 225).

We see then that the establishment of a CLT via commodatum is possible as long as the term and use are well defined, which may not only be included in the loan agreement between CLT members but also in its administrative regulation.

Since it is an informal contract that is terminated once having carried out its term, by rescission owing to the recipient defaulting, by unilateral declaration of the recipient, and, as it is a contract made taking specifically into account the contracted person, by death of the this person, it is necessary that in the *Termo Comunitário Territorial* (CLT) the possibility to change members, especially in the case of death, is taken into consideration.

In spite of the above, the commodatum arrangement represents a fragile agreement with regards to the recipient, who incurs obligations wholly but has no guarantee that the contract will be kept or continued, at the sole discretion of the recipient. At the same time, lending is a non-onerous solution for the CLT since there are no taxes on the conveyance of possession rights by the lender.

4.3. Tenancy

A tenancy contract, regulated by Law 8.245/1991, could also be a useful instrument in the application of CLTs, since it is the way in which the landlord concedes to the lessee the use and enjoyment of a certain asset (received for a specific consideration, during a determined period of time). The application of a lease would occur with the acquisition of property by the legal entity set up to manage the CLT and subsequent assignment of property ownership to the participants of the CLT through an amount that would cover the maintenance costs of the property and other necessary issues relating to the management of the assets (costs necessary to maintain the CLT such as expenses for Internet, transport, rent, telephone, water and electricity consumption and the remuneration of accountants and solicitors, amongst others).

Such an arrangement allows for collective ownership and management (by the legal person), the individual use of plots or real estate units, as well as avoiding the vulnerability generated by fluctuations in the real estate market.

It is important to mention that this kind of contract must include provisions regarding the term of the lease, the possibility or not for subletting, in case of death of the lessee, as well as forms of rescission or termination of contract.

	Surface Laws	Loan	Lease
Ratification	Surface right assignment agreement	Loan Contract	Lease Contract
Limits	Requires formal entry in the Registry of Real Estate with incidence of taxes (ITBI or ITCD).	Fragility of the contract as it is unilateral and imposes obligations only on the recipient.	Because it is an onerous contract, it is necessary to predetermine rental values.
Possibilities	Free or burdensome contract	- Free contract - Possibility of being a verbal agreement - Does not involve any taxes	- Possibility of being a verbal agreement - Does not involve any taxes

4.4. Zones of Special Social Interest as instruments to ensure diversity

The Zones of Special Social Interest (ZEIS) or Areas of Special Social Interest (AEIS) are among the legal and political instruments brought by Article 4.5 item ‘f’ of the City Statute (Law 10.257/2001). These zones are primarily based on including in the zoning of the city a category that, through a specific upgrading plan, establishes the creation of special upgrading standards for certain settlements. In addition to this, they define the specific use of the structures in these settlements; that is, for social use, so as to protect the area from eventual market-oriented interests in those informal settlements established in valuable areas of the city. In this way, this instrument is effective for CLTs in recognizing the diversity of occupations that exist in a city and enabling the development of a legality that corresponds to and protects these settlements, and moreover, guarantees their residents’ rights.

Among the objectives for the creation of ZEIS that align with the objectives of CLTs are to: (a) allow the inclusion of segments of the population previously marginalized from the city; (b) allow the introduction of services and urban infrastructure in areas where they were not previously available; (c) regulate urban land markets, since by reducing the differences in quality between different occupation patterns, the price differences between them will also be reduced; and (d) introduce mechanisms for the direct participation of residents in the process of defining public investments in urban development to consolidate settlements.[8]

Establishing a ZEIS or AEIS in areas where CLTs will be implemented may be a way to assist in assuring the maintenance of a specific type of occupant in the region. Thus, once a ZEIS is established by law or by act passed by a city's mayor demarcating an area and establishing specific parameters for a zone, it is necessary to articulate strategically and politically with the municipal public sector not only for the implementation of the ZEIS or AEIS, but principally so that in its regulation it guarantees the social and environmental development of the region.

5. The Importance of a Novel Legislative Model for the Instrument

As discussed throughout the present report, we have sought to propose possible approaches to the implementation of a CLT model through the currently existing instruments and institutions in the Brazilian legal system. However, it is clear that the ideal scenario would be the approval of a law specifically on this subject, containing its own regulations that could facilitate not only the implementation of a CLT in favelas, but also the spread of this instrument to other vulnerable populations facing challenges of tenure insecurity throughout the country.

In this sense, although the political scene in Brazil is going through a moment of deep instability and the approval process for this type of legislation takes time, an opening currently exists for a CLT-related proposal.

This is due to the recently approved – without any popular participation and in an extremely complicated parliamentary process – Law 13.456/17, which has been discussed previously in this analysis. This law generated important political reactions, especially among the leftist camp who were contrary to several of the law's arrangements, especially those related

[8] Source: DPH, accessed on 19th March 2018 http://base.d-p-h.info/pt/fiches/dph/fiche-dph-6767.html

to the easing of transfers of public property and the privilege of ownership regularization, in lieu of promoting a full vision of land regularization which includes terrorial and social investments.

In the realm of the opposition to this law, in the leftist camp, we perceive it is viable to enter into dialogue with political representatives with the aim of proposing specific legislation on the creation and dissemination of Community Land Trusts. Therefore, it would be desirable to design a preliminary bill on the topic and begin to establish contact and awareness amongst the relevant politicians on the importance of this subject. This could involve presenting a draft of the bill, and then seeking support for its further discussion before the legislative body of the respective public entity.

With regards to the technical aspects of the plan, the proposed legislation can be presented at the federal, state, and/or municipal level, although with different scope and different effects.

A federal law proposal, if approved, might regulate land owned by the Union, as well as serving as a national model for the application of CLTs in states and municipalities. Beyond this, a federal law could facilitate a federal tax exemption, without addressing the imposition of state and municipal taxes. State and municipal taxes are actually more relevant in practice, because they are directly important for real estate transactions.

A proposal on the state level has the potential to serve as a model for the municipalities within the state, thus making it possible to apply the model on a smaller scale when compared to the federal level law. However, despite the scale issue, *only* state-level legislation could potentially provide an exemption from state taxes that impact real estate transactions. It should be highlighted that states have limited capacity in the realm of urban policy, which is generally constitutionally under the jurisdiction of municipalities, and occasionally, the Union.

Finally, a proposal on the municipal level has the benefit of being the simplest of all the legislative procedures, while at the same time allowing for a law that is more specific and more tailored to the unique realities of the nuclei of implementation. Moreover, municipal laws have the possibility to facilitate the exemption of municipal taxes that affect real estate transactions, thus reducing the costs of implementing CLTs. The disadvantage of this level of legislation is that the law would have limited scope, designated only for the territory of the municipality, with limited potential for the dissemination of the model at a state, let alone national, level.

For the purposes of the project to which this legal briefing belongs, the preparation of a draft of a general law is suggested, which can be presented in conversations with parliamentary participants of any federal entity to raise awareness of the importance of CLTs. Based on the

results of these initial discussions, the preliminary design can be adapted to the specifics of each entity with regards to each one's jurisdiction and competencies. For the national spread of this model, the ideal case would be legislation on the federal level, whereas for the practical implementation of the CLT, including the reduction of costs through tax exemptions, the ideal strategy would be to pursue municipal legislation.

REFERENCES

Associação Brasileira das Administradoras de Consórcio [online]. Available from: http://www.abac.org.br/ - accessed on 8th March 2018.

Bevilácqua, Clóvis. (1929). Teoria Geral do Direito Civil, 2ª edição. Rio de Janeiro: Livraria Francisco Alves.

BRASIL. Secretaria-Geral da Presidência da República. (2014). MARCO REGULATÓRIO DAS ORGANIZAÇÕES DA SOCIEDADE CIVIL: A CONSTRUÇÃO DA AGENDA NO GOVERNO FEDERAL – 2011 a 2014. Laís de Figueirêdo Lopes, Bianca dos Santos e Iara Rolnik Xavier (orgs.). Brasília: Governo Federal.

DINIZ, Maria Helena. (2002). Curso de Direito Civil Brasileiro. V.1, 18. Saraiva: São Paulo.

MIRANDA, Pontes de Miranda. (1999). Tratado de Direito Privado. Por Vilson Rodrigues Alves, Bookseller.

NETO, Vicente C. Lima et al. (2014). Instrumentos urbanísticos à luz dos planos diretores: uma análise a partir de um circuito completo de intervenção. Rio de Janeiro: IPEA.

PINTO, Victor Carvalho. Condomínio de Lotes: um modelo alternativo de organização do espaço urbano. Brasília: Núcleo de Estudos e Pesquisas/CONLEG/Senado, August 2017 (Text for Discussion nº 243). Available from: www.senado.leg.br/estudos - accessed on 8th March 20018

Work team:

Authors

Tarcyla Fidalgo

Renata Antão

Review

Theresa Williamson

Translators

Sharonya Vadakattu

Cara Pears

Laura Bachmann

Theodora Saclarides

Editor

Desirée Poets