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Metropolitan ungovernability[1]

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Abstract: Although most of the population already live in metropolitan areas, in the Brazilian legal framework, there is still no appropriate legal ruling for managing these territories. The federal pact resulting from the Federal Constitution of 1988 established that it was at the prerogative of the states to create metropolitan regions, urban agglomerations and micro-regions, but did not attribute sufficient powers to them so they could conduct public functions of common interest (FPICs, in Portuguese), given the municipal autonomy likewise granted by the Constitution. In no other aspect does this legal conflict appear more evident than in territorial organization, since virtually all the instruments for the control of land use are of exclusively municipal competence. The purpose of this article is to discuss the possibilities of smoothing the way to an understanding on the limits of local autonomy in conurbations, thereby subordinating the "local" interest to the common interest, with regard to the regulating urban occupation. Therefore, we start with a brief analysis of the 1973 Law which set up the first metropolitan areas in Brazil, and thereby seek to identify advances and retrograde steps that the Constitution represented in relation to the division of powers between federal entities with respect to land management. Then, we investigate the role that post-1988 federal law reserves to metropolitan bodies in organizing, planning and carrying out FPICs in order to catch sight of windows of opportunity to bring them into force with regard to regulating the use of land. Finally, we discuss if the Statute of the Metropolis, which has recently been approved, provides the legal framework needed to overcome the antagonisms that criss-cross metropolitan governance.

Keywords: regulating land use; governance; metropolitan areas.

Introduction

The street demonstrations in 2013 showed there is significant dissatisfaction with the quality of life in Brazilian cities. The outburst of demands, although diffuse, included those which demanded improvements in public services and housing conditions, thus shedding light on the inefficiency of the management of these territories. The clamor of the streets ratified the urgency of the debate on the limits of the federal pact resulting from the 1988 Constitution and the gap left as to the forms of organizing the State in metropolitan regions.

The prerogative for creating "clusters of neighboring municipalities so as to integrate the organization, planning and conduct of public functions of common interest"[1], has since the 90s stimulated Brazilian states from to introduce new metropolitan regions and/or expand old ones. According to the *Observatório das*

2 Federal Constitution, Art. 25, § 3º.

Metrópoles report (2015), more than half of the population already lives in formally instituted 71 metropolitan regions (MRs), 3 integrated regions of economic development (RIDEs, in Portuguese) and 4 urban areas (UAs). Despite the absence of clear criteria for such classification (FIRKOWSKI, 2013), studies have, in fact, identified the presence of metropolises which have a strong polarizing capacity in all macro-regions of the country, due to the concentration of functions of high complexity, economic density and the high stock of wealth they have accumulated (RIBEIRO, 2009; ARAUJO; BITOUN; FERNANDES, 2009).

The growing political and economic importance of these territorial units, however, is not matched by public policies that have been adequately structured to serve them. Research by IPEA (Instituto de Pesquisa Econômica Aplicada/ Institute of Applied Economic Research), covering fifteen of the main MRs, points to this mis-match by showing the enormous fragmentation and institutional weakness in the metropolitan management of the country (COSTA; TSUKUMO, 2013). Except for the experience of São Paulo and Belo Horizonte, the political and administrative boundaries have not been translated into consolidating new institutional arrangements that foster the capacity for effective governance. These new arrangements have become all-powerful for metropolitan governance, to the extent that, with the advent of municipal autonomy in the wake of the 1988 Constitution, the previous model of centralized and authoritarian management has become totally obsolete, and has given way to the need for new formats of a type that are more negotiable and entered into by mutual agreement.

However, building consensus around a common agenda and making all stakeholders "play by the same rules", requires more than mechanisms for ensuring liaison between and the participation of federal entities and civil society in the decision-making process. Local political disputes, disparities in the tax and institutional structure of the municipalities, the fiscal crisis of the States, and legal disputes related to the division of powers and allocation of tax collection among the units of the federation, can adversely affect or even derail achieving the objectives of planning (PINTO, 2007; SANTOS JÚNIOR, 2009).

Without intending to exhaust such a vast and complex theme here, given the space limits of this article, we would like to focus our attention on one aspect that causes conflict in interfederative relationships in metropolitan management, namely the power to regulate the use of land.

The provision in the Constitution that gave the municipalities exclusive authority to promote "proper regulation of land by planning and controlling its use, and by apportioning and occupying the use of urban land"[2] restricts planning in the metropolitan scale, since it requires a connection with all local plans that is difficult to achieve, and since there is an even greater unlikelihood of these being compatible with each other. To give an idea of the magnitude of this complication, it is worth remembering that the country's largest metropolitan areas are formed by dozens of municipalities!

3 Federal Constitution, Art. 30, VIII.

To ensure the effectiveness of a metropolitan master plan under these conditions, it would be necessary to coordinate the drafting and approval of local plans and of laws on land use together with dozens of town halls and city councils. In addition, the prerogative of municipal competence in regulating the use of urban land use involves submitting the conduct of large projects, plans or programs, which involve

physical interventions, to compliance with the local norms and for approval by the authorities of each locality.

The issue that has not yet been settled in the legal environment is whether the regulation of land use, in the MRs should be interpreted as one of the public functions of common interest (FPICs), and, therefore, exercised at the supra-local level - as provided for in Article 25 of the Federal Constitution - or whether this remains within the scope of "matters of local interest" - as required by Article 30 which sets out, among other matters, what body has the authority to legislate, and this consubstantiates municipal autonomy.

How are the States which institutionalized metropolitan regions managing to get around this legal imbroglio? Have recent federal regulations on matters of town planning law espoused the thesis of absolute or relative municipal autonomy?

This article seeks to reflect on these questions, without, however, intending to answer them. It seeks only to contribute by examining the debate in more depth and conducting further research. We begin with a brief analysis of how Law Nº. 14/1973 - which established the first metropolitan areas in the country – split the overall responsibility for land management among the federal entities, and which services it typified as being of common interest. Then we investigate how the post-Constitution federal legislation incorporates the theme of interfederative integration into the management of FPICs. Finally, we discuss if Law Nº. 13,089/15, which established the Statute of the Metropolis, contains articles which can quell the existing antagonisms in the regulating the use of urban-metropolitan land.

THE CONSERVATIVE ORIGIN

The creation of metropolitan regions in Brazil was primarily put forward by the Iˢᵗ PND (the abbreviation in Portuguese of National Development Plan) in 1971 as a strategy linked to the efficiency of urban spaces, after they had been recognized as a privileged locus of production. It was, therefore, important to encourage the economies of agglomeration and to prevent their diseconomies. This strategy was made concrete in Complementary Law Nº. 14/1973, which first set up eight MRs[3], to which that of Rio de Janeiro would be added in the following year.

The recommended management model for these regions was centralized and vertical, as it corresponded to the dictatorial nature of the then military regime and the strategic role that they played from the point of view of development. It is worth remembering that, in this period, both the governors as well as the mayors of the state capitals, and those at the head of hydromineral plants and areas considered of national security were appointed by the regime (and not democratically elected). Thus, for each of the MRs, members of the deliberative and advisory councils were appointed. The first was chaired by the Governor of the State and comprised five other members "of recognized technical or administrative capacity" (Article 2, §1), whom the Governor appointed. The second consisted of representatives of the municipalities that formed the MR, and it too was chaired by the Governor.

It fell to the deliberative council to draw up the Integrated Development Plan and to schedule and coordinate implementation of common services, besides programs and projects of metropolitan interest. The advisory council's role was only

4 These are: Belém, Fortaleza, Recife, Salvador, Belo Horizonte, São Paulo, Curitiba and Porto Alegre.

to give opinions and to suggest measures. The councils were to be funded by the State, while implementing programs and projects, as well as common services was to be funded by the Union. The structure of management was complemented by a State body or enterprise, the duties of which were to unify the conduct of common services by means of agreement or concession.

The "common services" to the municipalities that, because of the metropolitan interest would have to be "unified". were: a) planning of economic and social development; b) basic sanitation, including water, sewage and public cleansing services; c) use of "metropolitan" land; d) transport systems and the traffic network; e) production and distribution of piped gas; f) making good use of water resources and controlling pollution of the environment.

It is worth pointing out that this law came into force, in whatever area that evidently would not contradict the Federal Constitution. On the latter being promulgated in 1988, most of the metropolitan common services became a responsibility that was common to the federal entities, it falling to the Union to lay down general guidelines and national systems; to the municipalities to render services of local interest; and to the States to do what it was not forbidden to do and to be exclusively responsible for the distribution of piped gas.

As for land use, it is noted that LC 14/73, a procedural law which has an apparently redundant function which is designated as being "metropolitan". A hypothetical justification for this redundancy would be the intention of the legislator to distinguish scales or specific areas of activity that neither overlap nor are substituted, there being the use of "local" land and the use of "metropolitan" land. Based on this premise, areas neighboring other municipalities or undergoing urban expansion, and areas that influence projects of a supra-municipal scope or are located in the vicinity of railway and metro stations, for example, could have their regulation classified as being of metropolitan and not local interest.

It is important to point out here that the constitutional item to which we referred earlier, which defines the regulation of land by means of planning and controlling the use and occupation of urban land as a municipal competence, is preceded by the phrase "as falls to it". Therefore, if the municipal competence is to promote "as falls to it" the regulation of land, it is admitted that, in certain circumstances, this falls to another federal entity. As we shall see later, this line of argument underpins the justification of a draft bill that grants the management body of the MR of Belo Horizonte broad powers in urban matters without supposedly infringing municipal autonomy.

It is curious to note that LC 14/73 does not include housing among the services common to municipalities despite the magnitude of the process of shanty towns being created which was already seen to be a problem of large cities in the 70s. This serious gap reinforces the idea that emphasis really was on the urban infrastructure that would bring about greater efficiency from the production point of view by reducing transport costs and commuting time, by guaranteeing the supply and rendering of essential services etc. On the other hand, the fact that there was a portentous policy at the federal level, operated by the National Bank for Housing (BNH, in Portuguese), may have contributed to this omission.

The recognition of decent housing as a right, however, would only happen in the following decade, in the midst of the process of drawing up the Constitution, with strong social mobilization led by the National Movement for Urban Reform.

Although not included among the fundamental social rights, the victory of the struggle for urban reform was reflected in the text of the Constitution by including the social function of property as an inalienable clause, and "fostering the construction of housing construction and improving housing conditions and basic sanitation" (Art. 23, IX), as a competence in common, of the Union, states and municipalities.

METROPOLITAN REGULATION IN ORDINARY FEDERAL LEGISLATION

The most important general norm of town planning law that was approved subsequently to the Federal Constitution was Law Nº. 10.257/2001, which established the Statute of the City. As its name suggests, at bottom, it establishes guidelines and tools for the policy of urban development of the municipalities. Of the twelve instruments that it lays down, only two - the special usucapion (acquisitive prescription) of urban property and the right of surface – do not need to be regulated by municipal law and/or have their application restricted to the area bounded by the Master Plan, which is also approved by municipal law.

Secondarily, however, the Statute of the City sets out other dimensions of urban policy, thereby opening some legal loopholes for activity at the state and metropolitan levels. It recognizes, for example, as instruments of urban policy, among others, state plans for regulating territory and the planning of metropolitan regions, urban agglomerations and micro-regions (Art. 4). It also determines that management bodies of metropolitan areas should include the "mandatory and meaningful participation of the population and associations representing various segments of the community" (Art. 45). Finally, it establishes that States and Municipalities should set deadlines for "expediting guidelines for town planning developments, approving projects to parcel and build on land, conducting inspections and expediting the term of verification and completion of works" (Art. 49).

It is worth remembering that the prior consent to the approval of projects for creating land lots and dismembering lots of land, as well as a court hearing in the case of changing rural use to urban use, were already prerogatives of metropolitan authority conferred by Law Nº. 6.766/1979. However, only in the metropolitan regions of Recife and São Paulo did terms of consent condition the registration of real estate in the public notary offices of the region (COSTA; MARGUTI, 2014). Associated with the expedition of guidelines for town planning developments, prior consent may grant a metropolitan body control, even partially, over densifying and expanding the urban sprawl; integrating the road system and environmental impact as well as facilitating increased predictability as to the future investments in infrastructure and public facilities.

In addition to the prior approval and the expedition of guidelines for town planning developments, what is left to the States, as territorial planning instruments, is the creation of Nature Conservation Units (NCU) in accordance with the constitutional precept, ratified by Law Nº. 9.985/2000, which regulates: the listing of areas that my present significant cultural or environmental interest; disappropriation for purposes of public utility or social interest; and also the delineation of areas of special interest, subject to public intervention.

It is opportune to mention that among the NCUs provided for in the aforementioned federal law, Environmental Protection Areas (EPA) are those in which biotic, aesthetic or cultural attributes are verified, in which human occupation is permitted. With a view to disciplining the process of occupying, protecting and ensuring the sustainability of natural resources, after allowing for: "if the constitutional limits are respected, norms and restrictions may be set on using a private property located in an Environmental Protection Area" (Art.15, § 2).

As to bounding the areas of special interest, although commonly used in municipal planning, there is no legal item that prohibits the initiative of the States. The Constitution of the State of Rio de Janeiro, for example, authorizes the State to create areas of special town planning, social, environmental, tourism interest and of public use (Art. 231, VI). In Minas Gerais, the draft Bill Nº. 3.078/2012 pending in the Legislative Assembly – which already has received a favorable legal opinion as to its constitutionality - provides for bounding Zones of Metropolitan Interest, regulation for which will fall to the Metropolitan Development Agency, which has been in operation since 2009.

However, the municipalist view still predominated in the norms that came after the Statute of the City and these defined the national systems and policies directly related to urban development: such as housing, sanitation and transportation. With the exception of solid waste policy, the other policies gave little consideration to the specificity of the conurbation or the metropolitan scale in the management of the public functions that they regulate, and therefore, do not include them as one of the FPICs mentioned in Art. 25 of the Constitution.

Law Nº. 11.124/ 2005 which set up the National System for Social Housing (SNHIS, in Portuguese), for example, only lists the "regional or metropolitan institutions that perform complementary functions or similar duties related to housing" (Art. 5, VI), among those which are an integral part of it. In other words, even the hypothesis of there being a company or metropolitan autarchy acting in the housing area is considered. It also lays down the creation of councils and funds only at the national, state and municipal levels, ignoring, as if this were possible, that the land issue is vital, a determining factor in the siting of social interest housing, and that can hardly be addressed in isolation by municipalities in conurbation regions. This is because changes in the rules of zoning or the application of town planning instruments that lead to restrictions on the real estate business or reducing the potential for construction, if carried out by a single municipality, result in a differential of profitability that directs private investment to other adjacent municipalities that may not have regulated them.

This intrinsic relationship between land use and housing would, however, be observed by Law Nº. 11.977/2009, which created the My House, My Life program (MCMV, in Portuguese), as well as programs and instruments for regulating the land of precarious squatter settlements. But integration with urban policy is only thought about on the municipal scale, based on a series of conditionalities or priority criteria, such as: compliance with the master plan; implementation of the instruments of the Statute of the City; analysis and approval of the project for regulating land of social interest in the town planning process of bounding land and legitimating land ownership; and the creation of a Zone of Special Social Interest, by municipal law.

As to the National Basic Sanitation Policy, set out in Law Nº. 11.445/2007,

it grants that services can be regionalized, but reserves the regulatory functions and inspection to the body belonging to the unit of the federation, whether this is the nominated one or one that has received delegated authority by a cooperation agreement, or then public consortium. Thus, for a metropolitan body to be responsible for organizing, planning and implementing this important FPIC - as stated in the article of the constitution - should be set up as an autarchy or state enterprise, or, perforce. be linked to an inter-municipal consortium, since the official body for the service, in this case, is the municipality.

In the transportation area, Law Nº. 12.587 / 2012, on regulating the National Policy on Urban Mobility attributes to the Union, and not to the States, the task of "promoting implementing collective public transport projects of a large and medium capacity in urban conurbations and in metropolitan regions" (Art. 16, VI) and in these areas it should also prompt "coordinated and integrated actions between municipalities and states ... aimed at common policies for urban mobility "(Art. 16, § 1). That is, although it allows for, unlike for other policies, the importance of coordination and integration in the MRs, it delegates functions of planning and policy liaison of the subnational entities to the federal level, and not - to the contrary of what the Statute of the Metropolis suggests, as we shall see below - to structures of metropolitan governance.

It is worth pointing out that the norms mentioned above that deal with national policies were all designed by the Ministry of the Cities, which, since its inception in 2013, has been structured, in a fragmented way - with national secretariats for housing, sanitation, mobility and urban programs - and that this Ministry has never favored the theme of MRs in its lines of activity. As to the National Policy for Solid Waste, which, as we underline earlier, is the closest to the constitutional article that sets out the management of the FPICs at the metropolitan level, it was drawn up within the heart of the Ministry of the Environment.

Indeed, Law Nº. 12.305/2010, although it has given incumbency to the municipalities for the integrated management of solid waste, it attributes to the States the function of "promoting the integration of the organization, planning and public functions of common interest related to solid waste management in metropolitan regions, urban agglomerations and micro-regions "(Art. 11). Therefore, it includes the MRs' plans for solid waste among the planning instruments which it institutes by delegating to the States how they are drafted, but, mandatorily, with the participation of the municipalities.

It can be concluded that despite the municipalist view that prevailed in the Constitution also making itself present in the laws which instituted the national policies most directly related to urban development, these contributed after a fashion to strengthening the role of the States. This role remains fundamental for institutionalizing MRs to the extent that only this entity can create a metropolitan body that is responsible for a larger number of FPICs. Regarding the regulation of land use, however, although the legal norms allow for some possibilities for state action, they require further clarification with regard to the limits of local and metropolitan interest, and provide greater legal security by reducing margins of conflict and contestation.

To finalize this analysis of federal legislation, we could not fail to draw attention to the creation of 3 Integrated Development Regions (RIDEs, in Portuguese), in

the ambit of the national policy for regional development laid down in Decree Nº. 6.047/2007, the overall responsibility for which was assigned to the Ministry of National Integration by Law Nº. 10.683/2003. As the RIDEs that were created are defined as a "geo-economic and social complex" to which priority treatment in planning and inter-agency coordination will be given, their scope resembles that of the MRs, particularly for the Greater Teresina and the Federal District and its surroundings[4], since they have a large city as the nucleus which structures them.

5 Besides these, the RIDE of Juazeiro/Petrolina includes municipalities of Bahia and Pernambuco.

In addition to the incongruity of the Union's action in these territories with metropolitan characteristics being linked to a separate Ministry from the one which is responsible for urban development policy, the fact is added that the RIDEs can enjoy tax incentives and funding sources that the MRs lack. The actions identified in development plans and programs for the RIDEs, presented by the Chamber for Policies of National Integration and Regional Development, as set out in Decree 6,047/2007, will have the "inclusion of their financial expression in the Multi-Year Plan, and with these being given priority in the Law on Budgetary Guidelines" (Article 5.). They can also receive resources from the Budget of the Union, from the development funds of the Northeast, the North, the Centre-West and Amazonia, and other funds, especially aimed at regional development, as well as fiscal benefits and incentives, as determined in Art. 6 of the said Decree, in line with the measures set out in Art. 43 of the Constitution.

Such a discrepancy in relation to financing the RIDEs and MRs will become even more pronounced with the presidential veto to the creation of the National Fund for Integrated Urban Development – FNDUI (in Portuguese) - the purpose of which is to capture funds and support interfederativa governance actions, which had been laid down in the draft bill of the Statute of the Metropolis, as we shall see below.

THE STATUTE OF THE METROPOLIS

After more than a decade of being processed in the National Congress, the Statute of the Metropolis was finally approved, when introduced by Law Nº. 13.089/2015 which lays down general guidelines for the integrated planning of metropolitan regions and urban agglomerations. One of the main innovations brought in by the Statute is undoubtedly the definition of "interfederative governance" as the "the sharing of responsibilities and actions between the entities of the Federation in terms of the organization, planning and conduct of the public functions of common interest" (Art. 2, IV).

The basic structure of this governance will be found in three separate bodies which have executive, deliberative and technical roles, as well as an integrated system for allocating resources and rendering accounts. The executive board shall consist of representatives of the State and the municipalities which together form the "urban territorial unity", while the deliberative body will include the participation of civil society. As to the technical body, it will have a consultative character and assist decision-making by the executive and deliberative bodies.

Both this structure and its respective administrative organization will be regulated by state complementary law, which shall also include a list of FPICs that will be the object of shared management and the means of social control. The degree

of difficulty that approval of this additional legislation embraces can be imagined, whether because of the wide range of political actors and interests in play, or whether due to the deliberative character that it confers on the participatory body. The fierce political disputes that there will be regarding the composition of the collegiate bodies and their powers, associated with the absence of deadlines defined in the Federal Law to regulate the proposed governance model, result in a high level of unpredictability as to its being brought into effect.

The Statute does not establish what public functions can be classified as being of common interest. It only conceptualizes as "public policy or action inserted therein, the realization of which is not feasible by one municipality alone or causes impact on neighboring Municipalities" (Art. 2, II). What will, therefore, fall to state legislatures is the understanding that the regulation of land use whether or not a function of impacts that generate impacts that may well transcend municipal boundaries, is the only reason that would justify its inclusion as a FPIC, as it is obviously not unfeasible for it to be performed by the municipality.

There is, however, a contradiction. The minimum content by the Federal Law for the integrated urban development plan for the metropolitan region – which is mandatory and approved by state law (Art. 10) - reveals a clear intention to transform it into an effective tool for regulating the use of land. This is because it determines that this plan should include, among other matters: macro-zoning; guidelines on how municipalities should liaise with each other when parceling land and deciding on the use of urban land; and delineating protected areas and areas subject to natural disasters (Art. 12). In addition, it also establishes as an obligation that municipalities which make up the MRs should make their master plans compatible with the plan for the corresponding integrated urban development plan (Art. 10, § 3).

However, recent experience of drafting municipal master plans shows to what a great extent macro-zoning can be vague or even innocuous, if it is not consubstantiated in disciplining the occupation of land, which have been translated into permitted uses, building indices and parameters. Liaison between the municipalities as to the parceling and use of urban land, for its part, can serve the coordination of regulating boundary areas, but it is insufficient to ensure compliance with the guidelines and objectives set out in the metropolitan plan. And the delineation of areas protected because of their environmental or cultural relevance, or because they are risk areas, already has instruments laid down in the norms currently in force such as EPAs, which can be decreed by any federal entity.

Nor does the obligation to make the local master plans compatible with the metropolitan plan ensure that it will be in some way effective with respect to regulating the use of land, given that it may only deal with a set of principles and guidelines, or even town planning actions and instruments which may or may not ever be regulated, which will not result in any practical effect. Moreover, as Salandia (2012) points out, based on a survey of the Ministry of Cities, there are few municipalities that effectively apply the tools laid down the Statute of the City[5].

It is a fact that the Statute of the Metropolis, by transferring to state laws the definition of the functions of common interest that will be managed in an integrated way, leaves the scope of metropolitan management completely open. It may act on a single FPIC or on all of them. If, on the one hand, this flexibility facilitates making agreements on the constitution of the institutional arrangement, on the other, it adds

6 In the case of the onerous granting of the right to build, only 10 in the universe of 1,688 municipalities – equivalent to less than 1% – applied the instrument in 2005.

nothing to smoothing out normative conflicts, in particular as regards the authority to regulate the use of land.

Two other instruments laid down in Law Nº. 13.089/2015 in order to foster integrated urban development, which are more directly related to regulating land - the "consorted interfederative operations" and "zones for the shared application of town planning instruments provided for in Law Nº. 10,257, 2001"[6] – likewise enjoy little concrete reality. In fact, they further aggravate the existing regulatory conflicts.

7 Art. 9º (IV and V).

Art. 24 of the Federal Law in an epigraph changes the wording of the Statute of the City, therein introducing a sole article with the possibility of implementing "interfederative consorted urban operations". However, in our view, it does so insufficiently. This is because it deals with the need for approval of the operation by means of state law, without modifying other articles that determine that only specific municipal law shall delineate and establish the conditions for conducting it, including the counterparts to be required from the proprietors due to the increase in the construction potential. Besides the flaw in the alteration suggested to Law 10.257/01, it is unclear how the metropolitan body will be able to alter town planning parameters and require counterparts, if it does not fall to it to discipline the use of land in the area of operation, and neither the issuance and alienation of Certificates of Additional Construction Potential (CEPAC, in Portuguese).

The same occurs in relation to the proposal to bound zones for "shared application" of the instruments laid down in Law Nº. 10.257/01. There is doubt as to what such sharing would consist of, given that, as noted in the previous section, almost all the instruments laid down in the Statute of the City should be regulated by municipal law, and the areas that its application cover should be defined in the master plan. Law Nº. 13.089/15 was not dedicated to altering the wording of the articles of Law 10.257/01 with regard to allowing for supralocal or shared application of the town planning instruments that it laid down. In fact, this hypothesis would not even plausible for most of these – such as progressive IPTU property tax, transfer of the right to build or onerous granting of the right to build -, since they are based on local prerogatives, whether for collecting IPTU or licensing constructions.

Surprisingly, the final wording of PL 3.460/04, which gave rise to the Statute of the Metropolis, was approved by the Committee for the Constitution and Justice of the Chamber of Deputies, in March 2014.

This, therefore, sums up to the non-definition as to the scope of metropolitan management, particularly with respect to regulating the use of land, the inconsistency of some instruments, the applicability of which will require changes in the legal wording which instituted them. But not only these. The conceptualization and standardization of creating metropolitan regions, contained in Law Nº. 13.087/15, while necessary, has generated an institutional limbo that will also require a normative effort for it to be regularized.

8 Like those of the: The Southeast of Maranahão – MA; Cariri - CE; Campina Grande - PB; Agreste - AL; Vale do Aço - MG; Baixada Santista, Campinas, Sorocaba e Vale do Paraíba – SP; Londrina, Maringá, Carbonífera - PR; Chapecó, Foz do Rio Itajaí, Lajes, Norte/Nordeste Catarinense, Tubarão and Vale do Itajaí – SC; Vale do Rio Cuiabá – MT.

By typifying as a metropolitan region only those territorial units that have "national influence" or are configured as an "area of influence of a regional capital" (Art. 2, V and VII), the Statute of the Metropolis excluded many of those hitherto classified by IBGE or formally constituted as such[7]. The territories that no longer fit into the legal definition of an MR will, for the purposes of federal law, be regarded as urban agglomerations. In relation to the RIDEs, despite the Statute not dedicating any mention of these, the final version of the draft bill approved

in the National Congress allowed for the integration of the Federal District as a hypothetical MR or urban agglomeration (Art. 19). However, this article later received the presidential veto.

Although not the focus of this study, it is worth mentioning that equally the presidential veto to the creation of the National Fund for Integrated Urban Development (FNDUI)[8], was a major frustration to those who have dedicated themselves to the metropolitan cause because of the lack of stable funding sources for the management of the FPICs, given the fiscal crisis of the states and the tax weakness of most municipalities that make up the MRs. The main justification for the veto is that "the creation of funds crystallizes linking them to specific purposes to the detriment of the inter-temporal dynamics of the policy priorities"[9]. The ongoing presence of numerous special national funds, however, suggests that the reasons for the veto arose from the need for contingency than from the fear of crystallizing funds (MOURA; HOSHINO, 2015).

9 Articles 17 and 18.

10 Message Nº 13, of 12 January 2015.

The factual exercise of regulating the use and occupation of land in conurbated urban spaces, either through the transfer of authority to the metropolitan body in specially delineated areas – a large gap left by the Statute of the Metropolis – i.e. because of the complexity of making local master plans and laws on the use of the soil compatible with each other, requires substantial financial resources. Updating and/or creating cartographic bases and georeferenced information systems of the municipalities that comprise the MRs, which is fundamental for diagnosing and delineating areas of intervention, for example, demand hiring specialized engineering services, which can hardly be funded entirely by the budget allocation of the State or municipalities. Similarly, the review of local master plans and laws on the use of land, as well as regulating town planning instruments almost never finds support in the hard-pressed finances of the peripheral municipalities which form part of the metropolitan regions.

Without the existence of a specific fund for investing in and funding FPICs, what remain to the metropolitan governing body is to establish public-private partnerships and to grant concessions of services to make the conduct of public functions viable but none of these are applied to the regulation of the use of land since they imply financial return as a conditionality. The only alternative provided for in the Statute of the Metropolis to attract private resources for regulating the use of land would be the interfederative consorted urban operation. However, besides requiring a number of adjustments to the legal wording, as noted above, its applicability is restricted to highly valued areas or those in which the value of property is expected to increase, since this is founded on the premise that this can be brought about by interesting investors in buying Certificates of Additional Potential Construction (CEPACs).

To complete the examination of the Statute of the Metropolis, it should be noted that in the final provisions of Law Nº. 13,089/15, the coordination of applying the articles that it foresees is assigned to the National System for Urban Development (SNDU, in Portuguese). As the discussion on the latter still remains restricted to the ambit of the Ministry of the Cities, without its creation having been formalized as a draft bill, it is assumed that its applicability is not immediate. However, as one of the main responsibilities for this system was deliberation and audit on the use of FNDUI resources, as a result of the presidential veto on the creation of the latter, its purpose was partially lost. The positive fact is that, in the act of creating the SNDU,

the division of powers between the federal entities with respect to regulating land use may be revised, thereby better defining the limits of municipal autonomy and the attributions of the metropolitan authority in this matter.

CONCLUSION

More than two decades after the Federal Constitution was promulgated, the legal rules relating to urban development still retain the view that was predominant in the progressive political field at that time, which conceived decentralization as the correlate of democratizing the country, founded on the premise that local government, because it is closer, would be the most permeable to social participation. The sanctifying of municipal autonomy inhibited progress in institutionalizing Metropolitan Regions, especially with regard to attributing competences to management bodies of these territories.

As we have seen, not even the constitutional article that determines the integration, organization and management of public functions of common interest in these regions can be adequately regulated in federal norms that have established policies and/ or national systems for housing, sanitation, mobility and the environment. The Statute of the City, which established the guidelines and instruments of urban policy, did not anticipate any space for concrete action in the metropolitan sphere.

The recent approval of the Metropolis Statute of the Metropolis is, therefore, an important milestone in consolidating and standardizing governance mechanisms that have been implemented in several states. The most important aspects of its purpose may be the obligation to draw up the metropolitan development plan, and the participation of civil society in a body with a deliberative character, thus ratifying, more forcefully, guidelines that had already been provided for in the Statute of the City.

However, the regulation of land follows as a great point of vulnerability and conflict when making agreements for new government arrangements, despite its vital importance. The Statute of the Metropolis, which established the prevalence of common interest over the local between the principles of interfederative governance, sought to objectify it in the regulation of land use by means of limited or improbable instruments. It even defined the use of land as the public function of common interest - as the 1973 Law had done - or included it among the instruments that laid down the possibility of delineation of special areas, thereby reserving to the governance bodies the setting of rules for its occupation, as tries to be done in the MR of Belo Horizonte.

Indeed, the draft Law Nº. 3.078/2012 lays down a series of new urban instruments for the unified management of the use of metropolitan land "in the MR, including: the Zones of Metropolitan Interest; the Metropolitan Areas of Economic Revitalization; the Metropolitan Impact Study; and prior consent for change of land use. The underlying assumption in the design of these instruments is that in certain circumstances, the manifestation of which is limited to certain perimeters, the common interest in regulating space is checked, which is why it falls to a supramunicipal body to regulate the use of land. Municipal autonomy is supposed to be preserved due to the fact of keeping the competence of municipalities unchanged when regulating areas not included in the metropolitan zoning.

We can only hope that PL 3.078/2012 will be approved as soon as possible in the

Legislative Assembly of Minas Gerais, since it will serve as a reference for the other States committed to promoting the development of their metropolitan territories. Once the paradigm of municipal autonomy has been broken, the implementation of programs, projects and actions identified as being strategic by the regional, integrated and democratic, the PL will be brought into effect more quickly, efficiently and effectively, thus ensuring one of the primary conditions of metropolitan governance.

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RESUMO: *Embora a maioria da população brasileira já resida em regiões metropolitanas, não existe ainda, no ordenamento jurídico do país, um marco legal apropriado à gestão desses territórios. O pacto federativo resultante da Constituição Federal de 1988 estabeleceu a prerrogativa dos estados na criação das regiões metropolitanas, aglomerações urbanas e microrregiões, mas não lhes atribuiu competências suficientes para a execução das funções públicas de interesse comum (FPICs), face à autonomia municipal igualmente consagrada pela Carta Magna. Em nenhum outro aspecto esse conflito normativo se apresenta de forma mais evidente que na organização territorial, já que praticamente todos os instrumentos para o controle do uso do solo são de competência exclusivamente municipal. O objetivo do presente artigo é discutir as possibilidades de pacificar o entendimento sobre os limites da autonomia local em áreas conurbadas, subordinando o interesse "local" ao interesse comum no que se refere à regulação da ocupação urbana. Para tanto, iniciamos com uma breve análise da Lei que instituiu as primeiras regiões metropolitanas no país, em 1973, buscando identificar avanços e retrocessos que a Constituição representou em relação à divisão de competências entre entes federativos no que tange à gestão territorial. Em seguida, investigamos o papel que a legislação federal pós-1988 reserva a organismos metropolitanos na organização, planejamento e execução das FPICs, no intuito de vislumbrar janelas de oportunidades para atuação dos mesmos no ordenamento territorial. Finalmente, discutimos se o Estatuto da Metrópole, recentemente aprovado, oferece o arcabouço jurídico necessário à superação dos antagonismos que se interpõem à governança metropolitana.*

PALAVRAS-CHAVE: *ordenamento territorial; governança; regiões metropolitanas.*