

**METROPOLIS LAW IN BRAZIL*****METROPOLIZATION AND THE CONSTRUCTION OF THE LEGAL REGIME OF BRAZILIAN METROPOLISES***Patricia Ferreira Baptista<sup>1</sup>Pedro Augusto Setta Dias<sup>2</sup>**ABSTRACT**

The aim of this paper is to discuss the existence and purposes of a law for the metropolises in Brazil. After having presented some of the challenges of contemporary metropolis, *a right to the metropolis* is pointed out as a derivative of Lefebvre's *right to the city*, amplified in its territorial scale, but retaining the same perspectives. Therefore, the idea of a law for the metropolises must have strong connections with the concept of the *right to the metropolis*. The text, then, describes how Brazilian law regarding the metropolises evolved since the 1967 Federal Constitution, passing through the 1988 Federal Constitution and the Supreme Court decision in nº 1842 Constitutional Action, until the enactment of the Statute of the Metropolis in 2015, and the discussions that have been raised so forth. It concludes that an effective Brazilian law for the metropolises is still under construction, challenges remaining yet to be faced and solved, especially those regarding a real metropolitan citizenship and governance.

**Keywords:** Metropolis; metropolization; Metropolitan region; status of the metropolis; right to the city; right to the metropolis; right of the metropolis.

**1. EXTENDED CITIES AND THEIR CHALLENGES**

Being in progress the third decade of the 21st century, the majority of the urban population already lives in agglomerations of cities, many of them expanding (especially in countries with emerging economies). Data on the global situation of metropolises, consolidated by the United Nations

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Program for Urban Settlements (UN-Habitat), reveal that, in 2020, there were 2.59 billion people living in metropolises, about a third of the world's population. Estimates also indicate that, in 2035, 39% of the world's population will be in this situation (3.49 billion), an increase of almost one billion in fifteen years<sup>3</sup>.

At the same time as they expanded, metropolises became more complex. From a territorial point of view, growing urban spaces coalesced. From an economic point of view, interdependent networks for the supply of goods, services, production and distribution of food have developed. The human dimension, in turn, was involved in new flows, interactions and tensions, generated by an unprecedented dynamic of life that often depersonalizes and accentuates inequalities.

The metropolitan space presupposes a complex of relationships that bring together different urban centers. People, economic activities and public services spread across the territory; their demands are indifferent to abstract territorial limits placed to their satisfaction. Furthermore, many of these demands are presented in such a way that its service, on a strictly local scale, would generate undesirable consequences, when it would not be completely unfeasible.

Thus, the metropolis develops as an *urban unit*, in which “cities” start to share infrastructure and activities; but, at the same time, as a *model of division (of production and work)*<sup>4</sup> and *segregation*, with different possibilities of appropriation of spaces and access to goods and services.

Metropolitan dynamics and flows involve specific forms of interaction between space, State and market, demanding specific tools for public management. And the various national socio-political-economic contexts have been seeking to design their own models to deal with the phenomenon<sup>5</sup>.

Nonetheless, solving metropolitan challenges – social and economic – depends, in most cases, on overcoming traditional territorial and institutional limits. Integrated urban development policies

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<sup>3</sup>In 2020 there were 1934 metropolises with more than 300,000 inhabitants, representing approximately 60% of the world's urban population. At least 2.59 thousand million people live in metropolis in 2020, which is equivalent to a third of the global population. 34 metropolis have over 10 million inhabitants; while 51 have a population of 5 to 10 million; 494 from 1 to 5 million; and 1,355 from 300,000 to 1 million (...) It is projected that the number of people living in metropolises in 2035 will increase to 3.47 thousand million, which will represent 39% of the global population and 62.5% of the urban population of the world. Almost a thousand million people will become metropolitan inhabitants in the next few years”. (Free translation) UN-Habitat. **Estado Global de las Metrópolis 2020 – Folleto de Datos Poblacionales**. Available on <[https://unhabitat.org/sites/default/files/2020/08/gsm\\_-\\_folleto\\_de\\_datos\\_poblacionales\\_2020\\_0.pdf](https://unhabitat.org/sites/default/files/2020/08/gsm_-_folleto_de_datos_poblacionales_2020_0.pdf)> Accessed on October 06, 2021.

<sup>4</sup>SANTOS, Milton. **A urbanização brasileira**. São Paulo: Hucitec, 1993, p. 67.

<sup>5</sup>See, on this topic, VIE PUBLIQUE. Republique Française. **Qu'est-ce qu'une métropole?** Fiche thématique. 02 mars 2021. Available on: <https://www.vie-publique.fr/fiches/20129-quest-ce-quune-metropole>. Accessed on October 02, 2021; OHM, Brian W., **Is There a Law of Regional Planning?** (May 24, 2017). Belmont Law Review, Vol. 4, p. 35 (2017), Belmont University College of Law Research Paper No. 2017-16. Available on: <https://ssrn.com/abstract=2973361> Accessed on August 21, 2021; GOMÁ, Ricard. **Del derecho a la ciudad al derecho a la metrópoli**. Barcelona: Metròpolis, Núm. 111, abril 2019. Available on: <https://www.barcelona.cat/metropolis/es/contenidos/del-derecho-la-ciudad-al-derecho-la-metropoli>. Accessed on September 28, 2021

and articulated actions are needed, typical of shared management instruments, which are often difficult to achieve. The lack of previous experiences of this nature aggravates spatial inadequacies and increases the socio-environmental impact of metropolises.

The fragmentation of past power centers in relation to the indivisible socioeconomic complex embodied in the metropolis generates perplexities. Issues central to urban development, such as housing, violence, transport and basic sanitation, started to have the metropolitan whole as a reference. That is why they cannot be adequately addressed except on this scale, and in an integrated manner.

From the citizen's point of view – of the millions of them, who daily experience life in the metropolis – this means the fulfillment or not of relevant existential demands. Basic social rights are at stake, such as decent housing, public safety, efficient transport, and service through sanitation and garbage collection networks.

Like large urban concentrations are endowed with enormous economic potential, these social demands, to some extent, manifest fair expectations of participation in the benefits arising from them.

As it can be seen, the challenges that the metropolises attract to governments and society more broadly are many. It is not by chance that the topic has been on the agenda of academic production in urbanism, geography, public management and also in law, including in Brazil, where metropolization continues to expand.

### 1.1. Brazilian metropolization

Urbanization (and, almost contemporary, metropolization) is recent in the country. As highlighted by Milton Santos in his classic “*A urbanização brasileira*”, it was in the third third of the 20th century that urbanization became widespread in Brazil. The demographic turmoil - the result of the rise in birth rates and the reduction in mortality - together with the tertiarization of the economy, took the population, both coastal and agricultural, to the cities<sup>6</sup>.

The exponential growth of overpopulated cities, however, became more significant from the 1980s onwards. From two cities with more than one million inhabitants in 1960<sup>7</sup>, it became twelve in

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<sup>6</sup> SANTOS, Milton. *A urbanização brasileira*. Ob. cit., p. 9 and on.

<sup>7</sup> Until then, only Rio de Janeiro and São Paulo surpassed the mark of one million inhabitants.

1990<sup>8</sup> and today there are seventeen, which account for 21.9% of the Brazilian population, according to IBGE data with reference to July 1, 2021<sup>9</sup>.

The IBGE also reports that the 28 metropolitan regions, urban agglomerations and integrated development regions (RIDEs) with more than one million inhabitants in the country already surpass one hundred million people, representing 47.7% of the Brazilian population (estimated in 213,3 millions). More than half of Brazilians (57.7% or 123 million inhabitants) are concentrated in just 5.8% of municipalities<sup>10</sup>. The numbers are eloquent and speak for themselves in proof of the accelerated and expressive Brazilian metropolization.

The Brazilian megacities, however, did not expand on their own. They carried with them an extensive network of large and medium-sized cities. The territorial expansion of urban spaces was, thus, producing “metropolitan complexes”, which “compreendem municípios com funções complementares, gestão independente e capacidade financeira desigual”<sup>11</sup>.

### 1.1.1. geographic metropolization

In addition to being fast, the growth of Brazilian metropolises was disorganized, prevailing, as highlighted by Marta Grostein, “a difusão do padrão periférico” and the “significativa concentração da pobreza”<sup>12</sup>. According to the urban planner from São Paulo, precariousness (in infrastructure and

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<sup>8</sup>SAINTS, Milton. Brazilian urbanization. Ob. cit., p. 75.

<sup>9</sup>Another 49 municipalities have more than five hundred thousand residents and three hundred and twenty-six, more than one hundred thousand (totaling these two groups together, 35% more). Available on <https://www.gov.br/pt-br/noticias/financas-impostos-e-gestao-publica/2021/08/populacao-brasileira-chega-a-213-3-milhoes-de-habitantes-estima-ibge#:~:text=Munic%C3%ADpios-,The%20data%20points%20to%20uma%20concentra%C3%A7%C3%A3o%20da%20popula%C3%A7%C3%A3o%20em%20big,more%20of%20100%20thousand%20people>.

<sup>10</sup> **IBGE DIVILGA as estimativas da população dos municípios para 2021**. Agência IBGE notícias, 27/08/2021. Available on: <https://agenciadenoticias.ibge.gov.br/agencia-sala-de-imprensa/2013-agencia-de-noticias/releases/31461-ibge-divulga-estimativa-da-populacao-dos-municipios-para-2021>. Accessed on October 06, 2021.

<sup>11</sup> Comprise municipalities with complementary functions, independent management and unequal financial capacity. (Free translation) GROSTEIN, Marta Dora. **Metrópole e expansão urbana. a persistência de processos "insustentáveis"**. São Paulo em perspectiva, vol.15, no.1, São Paulo, Jan./Mar. 2001. Available on <[http://www.scielo.br/scielo.php?script=sci\\_arttext&pid=S0102-88392001000100003](http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0102-88392001000100003)>. Accessed on October 6, 2019

<sup>12</sup> The diffusion of the peripheral pattern and the significant concentration of poverty. (Free translation) “In just four decades - between 1950 and 1990 - 13 cities were formed with more than one million inhabitants and in all of them the expansion of the urban area took on similar characteristics, that is, it did not result from articulated determinations or projects aiming at the extension of the city, but, on the contrary, the diffusion of the peripheral pattern prevailed, conductor of the urbanization of the metropolitan territory, thus perpetuating the illegal subdivision, self-built housing and the distant popular housing complexes of public production, as its main drivers”. GROSTEIN, Marta Dora. Cit.

public services offered) and illegality (in the informal patterns that characterize the growth of the periphery) are genetic components of Brazilian metropolises<sup>13</sup>.

In the latest edition of the Cities' Regions of Influence survey (Regiões de Influência das Cidades - REGIC), held in 2018, but whose definitive results were only published in 2020<sup>14</sup>, IBGE recognizes, following technical-geographic criteria, the existence of fifteen metropolitan regions in the country. Almost all state capitals, the only exception being Campinas, in São Paulo. To the list, which until 2018, included twelve metropolises<sup>15</sup>, three more were added: Vitória, Florianópolis and Campinas itself<sup>16</sup>.

REGIC highlights, above all, the diversity and complexity of Brazilian geographic metropolises: vary in territorial extension, in demographic densities, in the size of their economies and in the amplitude of their zones of influence, which in some cases, even overlap.<sup>17</sup> The research identifies the metropolises as centralities, based on the management functions and the attractiveness they exert on other cities, large, medium, and small. Understood in this way, the metropolises exert influence over areas that, together, cover practically the entire territorial extension of the country<sup>18</sup>.

From the metropolises, the entire Brazilian urban network is structured in a hierarchical way. For IBGE, metropolises constitute “o elo final de cada rede para onde convergem as vinculações de todas as Cidades presentes no Território Nacional”<sup>19</sup>.

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<sup>13</sup> Ob. cit.

<sup>14</sup> IBGE – INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA. **Regiões de influência das cidades**: 2018. Rio de Janeiro: IBGE, 2020. Available on: <<https://biblioteca.ibge.gov.br/visualizacao/livros/liv101728.pdf>>. REGIC 2018 is the fifth edition of a survey that began in 1972 and editions in 1987, 2000, 2008 and the last, in 2018, with the objective of mapping the Brazilian urban network. For the identification of technical-geographic criteria adopted in the mapping and identification of Brazilian geographic metropolises, see Technical Note at pp. 69 and on.

<sup>15</sup> São Paulo, Rio de Janeiro, Brasília, Belo Horizonte, Belém, Curitiba, Fortaleza, Goiânia, Manaus, Porto Alegre, Recife and Salvador.

<sup>16</sup> **PAÍS tem três novas metrópoles: Vitória, Florianópolis e Campinas**. Valor Online, 25 jun. 2020. Available on <<https://g1.globo.com/economia/noticia/2020/06/25/pais-tem-tres-novas-metropoles-vitoria-florianopolis-e-campinas.ghtml>> Accessed on July 20, 2021.

<sup>17</sup> IBGE – INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA. **Regiões de influência das cidades**: 2018. Cit. p. 11.

<sup>18</sup> *idem, ibidem*

<sup>19</sup> The final link of each urban network, where the links of all Cities in the National Territory converge. (Free translation) “The Metropolises are the heads of the network, the final links of the urban network, so that all urban centers in the country end up heading to a Metropolis directly or indirectly, even if they pass through several Cities as intermediaries on this path”. (Free translation) IBGE. Cit., p 78.

### 1.1.2 Institutional Metropolization

Alongside the process of geographic metropolization, as studied by the IBGE, a process called “institutional metropolization” was developed in parallel in the country<sup>20</sup>.

The Brazilian institutional metropolization originates from the insertion of the figure “metropolitan region” as a legal category in the 1967 Constitution, as will be detailed further on (item 3.1.). As a result, in the 1970s, the Federal Government created, by law, nine metropolitan regions; number that remained unchanged until 1994. As Ferro and Saleme point out, at the time the metropolitan phenomenon was understood as a national issue, while it was intended to be instrumental in achieving economic development goals<sup>21</sup>. The creation of metropolitan regions, at that time, represented much more an element of decision-making centralization, to the detriment of local power.

The scenario began to change with the 1988 Constitution, which transferred the competence to establish metropolitan regions to the States. From 1994 onwards, dozens of other metropolitan regions were created, a phenomenon mainly driven by political and economic criteria (see item 5.1 below).

According to the biannual update of Brazilian territorial sections, carried out by the IBGE, in May 2021 the country had 74 metropolitan regions.<sup>22</sup>. As will be discussed below, although the Statute of the Metropolis has tried to approximate the geographic and institutional criteria, it was forced to retreat, so that it is not possible to see, in a short space of time, the overcoming of the existing gap between the 15 geographic metropolises and the 74 institutional metropolitan regions.

It is interesting to note that, while criticizing the artificiality of the nine metropolitan regions imposed by the Federal Government in the 1970s – Milton Santos, for example, claimed, in the 1990s,

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<sup>20</sup>COSTA, M. A.; FAVARÃO, C. B.; TAVARES, S.; BLANCO JUNIOR, C. Do processo de metropolização institucional à implementação do Estatuto da Metr pole: dois balanços, suas expectativas e incertezas. In: MARGUTI, B. O.; COSTA, M. A.; FAVARÃO, C. B. (orgs.). **Brasil metropolitano em foco: desafios à implementação do Estatuto da Metr pole**. v.4. Brasília: Ipea, 2018, p. 19-54. Available on: <http://www.ipea.gov.br/portal/images/stories/PDFs>. Accessed on September 28, 2021.

<sup>21</sup>FERRO, R. R.; SALEME, E. R. A fragmentação do poder e a complexidade de governar nas regi es metropolitanas. **Revista brasileira de estudos urbanos e regionais**. v. 22, E202012, 2020. Available on: <https://rbeur.anpur.org.br/rbeur/article/view/6063/5300>, p. 8 Access on September 28, 2021.

<sup>22</sup>In addition to 4 urban agglomerations and 3 integrated economic development regions (RIDE): “Currently, there are 74 Metropolitan Regions in the country, the state with the highest number of them is Para ba (12), followed by Santa Catarina (11), Alagoas (9) and Paran  (8). In addition, there are a total of five Urban Agglomerations, three in the state of S o Paulo and two in Rio Grande do Sul. There were no changes in the three Brazilian Integrated Development Regions (RIDEs), nor in the other Metropolitan Regions of the Brazilian states.” Available on: <https://agenciadenoticias.ibge.gov.br/agencia-noticias/2012-agencia-de-noticias/noticias/30748-updacao-dos-recortes-territoriais-amplia-regiao-metropolitana-do-sudoeste-maranhense>

that Brazil had many more metropolitan regions than just those nine<sup>23</sup>— there are also objections to what has been called the “banalization” of metropolitan regions. As highlighted by Eduardo Cordeiro, most metropolitan regions created in the last two decades reveal themselves as “spaces without a metropolitan configuration” whose host cities would be no more than “paper metropolises”<sup>24</sup>.

Hoje parece haver um consenso de que a adoção de critérios meramente políticos na instituição de Regiões Metropolitanas é prejudicial ao planejamento do território interfederativo. Sob o discurso da integração e o desenvolvimento regional, há uma pasteurização das unidades territoriais que dificulta sua gestão e a eleição de prioridades, uma vez que áreas com diferentes características precisam de tratamentos e legislações diferenciadas.<sup>25</sup>

Therefore, in less than 30 years, the legal-institutional plan of metropolises in Brazil migrated from one artificiality to another: from authoritarian metropolises imposed from above by the dictatorship, to metropolises, so to speak, “parochial”<sup>26</sup>, whose formalization resulted from political and economic interests that did not match the purposes of the institution.

## 2. FROM THE RIGHT TO THE CITY TO THE RIGHT TO THE METROPOLIS

In 1968, French philosopher and sociologist Henri Lefebvre published his classic “Le Droit à la ville” – a work that became a reference, and raises a debate that remains current. Lefebvre constructs the idea of the right to the city in a broad perspective, as a right to fully experience the urban phenomenon, and to the insertion of the individual in the peculiar sociability found in this type of

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<sup>23</sup>SANTOS, Milton. **A urbanização brasileira**. Ob. cit., p. 75.

<sup>24</sup>CORDEIRO, E. C. **Da banalização das regiões metropolitanas ao Estatuto da Metrópole: será o fim das “metrópoles de papel”?** Geosp – Espaço e Tempo (Online), v. 23, n. 1, p. 040-058, abr. 2019. ISSN 2179-0892, p. 41.

<sup>25</sup> Today there seems to be a consensus that the adoption of purely political criteria in the institution of Metropolitan Regions is harmful to the planning of interfederative territory. Under the discourse of integration and regional development, there is a pasteurization of territorial units that makes their management and the choice of priorities difficult, since areas with different characteristics need different treatments and legislation. (Free translation MORAES, Sergio Torres; GUARDA, Antonio; ZACCHI, Gabriela Stein. A caracterização das regiões metropolitanas catarinenses e o estatuto da metrópole. **Geosul**, Florianópolis, v. 33, n. 67, p. 38-60, mai./ago. 2018. Available on: <http://dx.doi.org/10.5007/2177-5230.2018v33n67p38>. Accessed on July 20, 2020, p. 57. The authors also point out, along the same critical line, that “despite the legal existence of metropolitan regions, in Santa Catarina they show themselves in propositional and organizational terms that are ineffective. So far they have not generated any regional plan despite the requirement of the Statute of the Metropolis to carry out the PDUI” (Free translation) (p. 55).

<sup>26</sup> However, seeking to see in this “regionalization” of metropolitan regions the presence of elements that configure the effective presence of the metropolis, see SILVA, Paulo Rogerio de Freitas Silva. **A Regionalização como expressão do livre arbítrio nas institucionalizações das regiões metropolitanas do Estado de Alagoas**. *Revista de Geografia* (Recife) V. 34, No. 2, 2017.

space. The right to the city of Lefebvre is the right of appropriation of urban spaces, of access to infrastructure and culture, and of understanding the urban as a "place of reencounter"<sup>27</sup>:

O direito à cidade se manifesta como forma superior dos direitos: direito à liberdade, à individualização na socialização, à habitação e a habitar. O direito à obra (a atividade participativa) e o direito à apropriação (bem distinto do direito à propriedade) se inserem no direito à cidade. (ibid., p. 140).

(...)

Entre esses direitos em formação figura o direito à cidade (não à cidade antiga, mas à vida urbana, à centralidade renovada, aos lugares de reencontro e de trocas, aos ritmos de via e ao emprego de tempo que permita o uso pleno e inteiro desses momentos e lugares etc.). (ibid., p. 146)<sup>28</sup>.

The right to the city embodies, above all, an egalitarian concern: “um direito igual à centralidade urbana”<sup>29</sup>. It also incorporates a participatory dimension of the democratic construction of urban life. The individual inserted in the city must have access to its goods, services and spaces. But, beyond mere access, it must have the possibility of transforming them, and of transforming and directing their surroundings, through the exercise of a profoundly democratic collective power.<sup>30</sup>

Lefebvre’s criticism was addressed to the conditioning of urban life by exclusively economic logics at the expense of the humanist perspective. The right to the city thus appears as a social utopia<sup>31</sup> and experimental<sup>32</sup>, and with a socio-political burden much more than a legal one. Lefebvre's

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<sup>27</sup> DEMAZIÈRE, Christophe; ERDI Gülçin; GALHARDO, Jacques; GAUDIN, Olivier. 50 ans après: actualités du droit à la ville d’Henri Lefebvre. **Métropolitiques**, 5 décembre 2018. Available on: <https://metropolitiques.eu/50-ans-apres-actualites-du-droit-a-la-ville-d-Henri-Lefebvre.html>. Accessed on October 02, 2021.

<sup>28</sup> The right to the city manifests itself as a superior form of rights: the right to freedom, individualization in socialization, dwelling and housing. The right to work (participatory activity) and the right to appropriation (quite distinct from the right to property) are part of the right to the city. (ibid., p. 140). (...) Among these emerging rights is the right to the city (not to the old city, but to urban life, to renewed centrality, to places of meeting and exchange, to the rhythms of the path and to the use of time that allows whole and full use of these times and places etc.). (ibid., p. 146) (Free translation) LEFEBVRE, H. **Le Droit à la ville**, Paris: Anthropos, 1968. *Apud* DEMAZIÈRE, Christophe; ERDI Gülçin; GALHARDO, Jacques; GAUDIN, Olivier. Cit. (translated from the original in French)

<sup>29</sup> DEMAZIÈRE, Christophe; ERDI Gülçin; GALHARDO, Jacques; GAUDIN, Olivier. Cit.

<sup>30</sup> HARVEY, David. O direito à cidade. **Piauí**, edição 82, julho de 2013. Available on <https://piaui.folha.uol.com.br/edicao/82/>. Accessed on October 2, 2021: “The right to the city is much more than the individual freedom to have access to urban resources: it is a right to change ourselves, changing the city. Furthermore, it is a collective and not an individual right, as this transformation depends on the exercise of collective power to reshape the urbanization processes. The freedom to make and remake our cities, and ourselves, is, in my view, one of our most precious and at the same time most neglected human rights. (...) For Lefebvre, the right to the city had to mean the right to command the entire urban process, which was expanding its control over the countryside, through phenomena such as agribusiness, country houses and rural tourism. (Free translation)

<sup>31</sup> INSTITUTO PÓLIS. **O que é direito à cidade?** 2020. Available at: <https://polis.org.br/direito-a-cidade/o-que-e-direito-a-cidade/>. Accessed on Oct 02. 2021.

<sup>32</sup> DEMAZIÈRE, Christophe; ERDI Gülçin; GALHARDO, Jacques; GAUDIN, Olivier. Cit.



proposition, says Matthias Lecoq, is not legalistic in origin<sup>33</sup>, but over time it has achieved institutional and legal recognition, in national contexts and in international forums<sup>34</sup>.

The migration from the urban to the metropolitan dimension, as highlighted above, brings with it a new catalog of issues. However, most of the problems that inspired Lefebvre for the right to the city remain, some more acute or aggravated. The increase in the size of urban space makes it even more difficult for metropolitan populations to appropriate it, and makes the inequality that impedes access to metropolitan goods even more dramatic.

Metropolises heighten tensions in cities. In the metropolis, says Ricard Gomá, " se produz o combate entre habitabilidade e especulação, entre justiça socioespacial e gentrificação, entre medo e esperteza"<sup>35</sup>. The challenge of establishing a democratic logic and an agenda that puts the citizen at the center of metropolitan policies has proved to be even greater.

The metropolitan citizen, whose identity is not always perceived as such, demands the possibility of enjoying the inexhaustible potential of the space they inhabit, accessing equipment and urban infrastructure in terms of culture; to leisure; and to all other aspects of healthy urban sociability. In metropolitan areas, as seen above, all these goods spread across the territory, without particular obedience to abstract territorial limits.

Likewise, demands for democratic participation, and for defining the direction of the community, also need to be understood on an increased scale, because this community itself assumes this character. In fact, the metropolitan individual maintains, in terms of productive activity, social relations, cultural experience and political project, a life that transcends traditional administrative subdivisions.

That is why, in the metropolitan context, the original agendas of the right to the city are even more current. The right to the city in the 21st century needs to deal with urban issues on a metropolitan scale. According to Gomá, in the 21st century, " o direito à cidade é também o direito à metrópole"<sup>36</sup>.

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<sup>33</sup>LECOQ, Matthias. Le droit à la ville : un concept émancipateur? **Métropolitiques**, 16 décembre 2019. Available on: <https://metropolitiques.eu/Le-droit-a-la-ville-un-concept-emancipateur.html>. Accessed on October 02, 2021.

<sup>34</sup>AMANAJÁS, Roberta; KLUG, Letícia Becalli. Direito à cidade, cidades para todos e estrutura sociocultural urbana. In: COSTA, M. A; MAGALHÃES, M. T. Q; FAVARÃO, C. B. (Orgs). **A nova agenda urbana e o Brasil: insumos para sua construção e desafios a sua implementação**. Brasília: IPEA, 2018, p. 29-44. Available on: <http://repositorio.ipea.gov.br/bitstream/11058/8622/1/Direito%20%C3%A0%20cidade.pdf>. Accessed on October 2, 2021, pp. 29-30

<sup>35</sup> There is a fight between habitability and speculation, between socio-spatial justice and gentrification, between fear and cunning. (Free translation) GOMÁ, Ricard. **Del derecho a la ciudad al derecho a la metrópoli**. Barcelona: Metròpolis, Núm. 111, abril 2019. Available on: <https://www.barcelona.cat/metropolis/es/contenidos/del-derecho-la-ciudad-al-derecho-la-metropoli>. Accessed on September 28, 2021

<sup>36</sup> The right to the city is also the right to the metropolis. (Free translation) *Idem, ibidem*.

The right to the metropolis thus appears, in David Cunningham's view, as a rewritten right to the city. A right that, in the words of the author, " nos permitirá conceber a possibilidade de novos tipos de relação entre as subjetividades individual e coletiva e o desenvolvimento de formas sociais abstratas"<sup>37</sup>

In the right to the metropolis, as in the right to the city, it is the human dimension of space that takes the lead. The right to enjoy life is considered, in its metropolitan dimension, as an imperative for citizenship. Its full realization, therefore, cannot run into imaginary spatial divisions, parochial power struggles, or economic disparity between neighboring federative entities.

The same applies here as to the non-legalistic origin of the expression. By right to the metropolis there is, more than a formal concept of legal order, a political-sociological perspective, which is not exhausted in the normative treatment given to metropolises. Even so, the *right to the metropolis* aspires to direct and condition normativity to the achievement of its purposes. This normativity that, in the end, will be consolidated in the metropolis' law, which presents itself, as much as the city's law, as an expression of the order aimed at the normalization of the metropolis' right.

The *right to the metropolis*, therefore, sees itself in the difficult mission of incorporating the perspective of the right to the metropolis, in order to present legal-institutional responses to the challenges faced by public administration and metropolitan citizens. In a word, care is taken to incorporate the metropolitan dimension to the legal system.

Thus, from a legal perspective, if the risk of fragmentation of state functions at the local level is great, the instruments aimed at their integration become even more important. Instruments that do not disregard the role of local authorities – which hold democratic and constitutional legitimacy for their spheres of competence. But that are capable of producing the necessary alignment between their policies, aiming at the common treatment of common needs.

The construction of a legal response for the metropolis and its challenges is still ongoing in Brazil. Among the social tools, law is perhaps one of the main tools for overcoming the problems of inequality, lack of planning, informality, poverty and environmental degradation that characterize Brazilian metropolitan regions. Well-designed legal instruments, designed specifically for this reality, can prove particularly useful to fulfill these goals.

Within the scope of urban and environmental rights – and in its dimension adjusted to the metropolises – some of the main legal debates related to collective life in this century will be held.

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<sup>37</sup> Will allow us to conceive the possibility of new types of relationship between individual and collective subjectivities and the development of abstract social forms. (Free translation) CUNNINGHAM, David. **Spacing abstraction: capitalism, law and the metropolis**. Griffith Law Review, 17 (2). pp. 454-469, 2008. Available on: <https://westminsterresearch.westminster.ac.uk/download/>. Accessed on October 2, 2021, p. 454.

What it does the beauty and richness of public law is that it aims to serve as a guide for solving problems that impact people's daily lives. These people, with regard to the right of the metropolis, are the more than one hundred million Brazilians who experience, on a daily basis, a deficiency in public services and infrastructure in large cities, and especially in their peripheries. Studying and reflecting on the public law of the metropolis is, after all, worrying about all these people.

With the premises of the right to the metropolis in mind, associated with the contingencies of the national reality, next, it will be examined how Brazilian law has been dealing normatively with metropolitan issues. In the end, the objective will be to assess whether the law of the metropolis, in Brazil, is effectively committed to the guidelines of freedom and equality of its inhabitants, with a view to allowing them the appropriation of urban spaces as their own. In other words, to assess whether the metropolis law embodies a true metropolis right.

It seems important to register, here, the observation that Lefebvre's right to the city had in mind the urban reality of the then advanced capitalist economies. It did not take into account difficulties typical of peripheral countries<sup>38</sup> as the typical illegality of the urban growth process in Brazil, which Marta Grostein alludes to<sup>39</sup>.

Still on an international level, it is opportune to observe that the difficulties in the regulation and governance of metropolises are not peculiar to the Brazilian reality, nor to emerging or underdeveloped economies. Just to stay with two examples from developed countries, Brian Ohm narrates that, in the USA, the theme comes up against the absence of legislation and a specific discipline<sup>40</sup>. In France, in turn, there is a record of changes in the legal discipline of the subject in recent years<sup>41</sup>, revealing that the treatment of the matter is still recent, and that metropolitan governance models, abroad and here, are still evolving.

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<sup>38</sup>INSTITUTO PÓLIS. **O que é direito à cidade?** Cit.

<sup>39</sup>Metrópole e expansão urbana. a persistência de processos "insustentáveis". Cit.

<sup>40</sup> See OHM, Brian W., Is There a Law of Regional Planning? (May 24, 2017). **Belmont Law Review**, Vol. 4, p. 35 (2017), Belmont University College of Law Research Paper No. 2017-16. Available on SSRN:<https://ssrn.com/abstract=2973361> Accessed on August 21, 2021.

<sup>41</sup>The law for the modernization of territorial public action and the affirmation of metropolises is only dated January 2014 (MAPTAM Law) and establishes a scheme for intercommunal cooperation. Yet another law, dated February 2017, changed the Paris regulation and its metropolitan arrangement. VIE PUBLIQUE. République Française. **Qu'est-ce qu'une métropole? Fiche thématique.** 02 mars 2021. Available on: <https://www.vie-publique.fr/fiches/20129-quest-ce-quune-metropole>. Accessed on October 2, 2021

### 3. THE LEGAL REGIME OF METROPOLISES IN BRAZIL - BEFORE AND AFTER 1988

#### 3.1. First steps: federal complementary law and centralized administration

As already mentioned, building a legal response for the metropolis and its challenges is an ongoing process in Brazil. Its initial steps - at least the most concrete ones<sup>42</sup> - date back to the mid-1960s, a time of rampant urbanization<sup>43</sup>, in which large urban agglomerations began to assume the scale we know. At that point, geographers were already drawing attention to " o processo de metropolização em curso no país, onde algumas manchas urbanas se espalhavam como uma mancha de óleo ultrapassando limites administrativos dos municípios"<sup>44</sup>

In response to this scenario, the 1967 Constitution institutionalized the figure of the metropolitan region, as a kind of metropolitan arrangement in the Brazilian legal order, in a provision that was maintained, with slight alterations, by Constitutional Amendment No. 1/1969:

CF/1967 - Art 157 §10º. A União, mediante lei complementar, poderá estabelecer regiões metropolitanas, constituídas por Municípios que, independentemente de sua vinculação administrativa, integrem a mesma comunidade sócio-econômica, visando à realização de serviços de interesse comum.

EC nº 1/1969 - Art. 164. A União, mediante lei complementar, poderá para a realização de serviços comuns, estabelecer regiões metropolitanas, constituídas por municípios que, independentemente de sua vinculação administrativa, façam parte da mesma comunidade sócio-econômica<sup>45</sup>.

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<sup>42</sup> The 1937 Constitution contained, in its article 29, a provision in the following sense: "Art 29 - Municipalities in the same region may join together for the installation, operation and administration of common public services. The grouping, thus constituted, will have legal personality limited to its purposes.". It is interesting that already at that time the constituent intended to honor the shared management of public services; however, the rule did not have lasting effects, and was not reproduced in the 1946 Constitution.

<sup>43</sup> INSITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA. **Censo demográfico: 1940-2010**. Available on: <https://seriesestatisticas.ibge.gov.br/series.aspx?vcodigo=POP122>. Accessed on: August 30, 2021.

<sup>44</sup> The metropolization process underway in the country, where some urban patches spread like an oil slick, crossing administrative limits of the municipalities. (Free translation) CASTELLO BRANCO, Maria Luisa; PEREIRA, Rafael Henrique Moraes; NADALIN, Vanessa Grapriotti. **Rediscutindo a delimitação das regiões metropolitanas no Brasil: um exercício a partir dos critérios da década de 1970**. Brasília: Ipea, 2013. p. 12.

<sup>45</sup> CF/1967 - Art 157 §10. The Union, by means of a complementary law, may establish metropolitan regions, constituted by Municipalities that, regardless of their administrative relationship, are part of the same socio-economic community, in order to carrying out services of common interest. EC nº 1/1969 - Art. 164. The Union, by means of a complementary law, may, for the performance of common services, establish metropolitan regions, constituted by municipalities that, regardless of their administrative connection, are part of the same socio-economic community. (Free translation)

Eros Grau points out that the above norms were responsible for the insertion, in the Brazilian constitutional system, of a “new content”. The federative entities grouped in the metropolitan region – at that time, by decision of the Union – would be obliged to establish a relationship aiming at the integration of common services.<sup>46</sup> Decades later, at the turn of the century, the Federal Supreme Court would confirm this thesis in the judgment of ADI 1841<sup>47</sup>.

Thus, in the formulation of those constitutional provisions, the metropolitan region gained its own legal design. It was characterized as a compulsory grouping of socioeconomically integrated federative entities, in order to better perform services of common interest. A formal legal concept.

Still under the 1967/69 Constitution, and under the aegis of the aforementioned norms, Complementary Law nº 14 was enacted in June 1973, which instituted, from a legal-administrative perspective, the first eight metropolitan regions in the country. They were: São Paulo, Belo Horizonte, Porto Alegre, Recife, Salvador, Curitiba, Belém and Fortaleza. For each one, the aforementioned complementary law listed the grouped municipalities, whose number ranged from 37 (São Paulo) to just 2 (Belém).

By instituting such metropolitan regions, Complementary Law No. 14 brought two relevant provisions regarding their functioning. First, it dealt with its governance structures, following the frame conceived by scholars such as Adilson Dallari<sup>48</sup> and Eros Grau, who intensively studied the issue within the scope of the public administration in the State of São Paulo. The models created at the time, like the current ones to a great extent, were based on collegiate bodies called Councils. LC nº 14, in short, provided for the creation of two of them - one with deliberative functions, the other with consultative functions.<sup>49</sup>

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<sup>46</sup>“The norm of its article 164 - corresponding to that of paragraph 10 of article 157 of the 1967 Constitution - was not characterized as a form of relationship of a compulsory nature and, of course, would be configured as absolutely idle, as it is entirely viable, from a legal-constitutional point of view, the establishment of voluntary relationships between the political-administrative units it addresses.” GRAU, Eros Roberto. **Regiões Metropolitanas: regime jurídico**. São Paulo: Bushatski, 1974. p. 104.

<sup>47</sup>STF. ADI 1841. Full Court. Minister Rapporteur Carlos Velloso. Judgment on August 01, 2002. DJ 09/20/2002.

<sup>48</sup>DALLARI, Adilson de Abreu. **Subsídios para criação imediata de entidades metropolitanas**. Revista de Direito Público, v. 3, n. 12, p. 309-311., abr. jun 1970.

<sup>49</sup>Articles 2 to 4 dealt with the governance of metropolitan regions, stipulating that “There shall be in each Metropolitan Region a Deliberative Council, presided over by the State Governor, and an Advisory Council, created by state law”. The first Council would be responsible for "coordinating the execution of programs and projects of interest to the metropolitan region, aiming, whenever possible, for the unification of common services." The second would basically be responsible for opining on issues considered relevant in metropolitan life. (Free translation)

Based on these initial models, and over the years, the governance structures of metropolitan regions were object of adaptation and improvement, resulting in more multifaceted designs – and with a more democratic and representative nature – as provided for in the Statute of the Metropolis, as will be seen later.

In addition to providing for the governance structure, Complementary Law No. 14 listed, in its art. 5th and subsections, the public services affected as being of metropolitan interest, including: basic sanitation, land use, transport and the road system, production and distribution of piped gas, use of water resources and pollution control. The functions would be performed by the member state, which at the time seems to have been accepted naturally<sup>50</sup>, contrasting – even due to the difference in the distribution of competences at the constitutional level – with the battle waged in recent years on this issue.

In the month following the edition of LC 14/74, came LC nº 20/74, which, in addition to determining the merger between the State of Rio de Janeiro and the then State of Guanabara, created the Metropolitan Region of Rio de Janeiro, in the exact shape of the previous Complementary Law. No new metropolitan regions were instituted until the enactment of the 1988 constitution.

Regarding the administration of metropolitan regions in this initial period, José Afonso da Silva reports that “a União, na verdade, as instituiu, mas não tomou mais, praticamente, conhecimento delas. Os estados é que ficaram responsáveis por sua estruturação e funcionamento, criando empresas ou autarquias para dar-lhes efetividade.”<sup>51</sup>

Even so, the political practice of the military dictatorship seems to have reflected in the conduct of metropolitan affairs by the states. Researchers in the field of economics and urbanism identify, in this historical period, a “planejamento metropolitano *tecnocrata, centralista e autoritário*”<sup>52</sup>. In this sense, Eduardo Fontes Hotz points out:

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<sup>50</sup>“What is important to note is that government functions, which are the object of planning, because of a regional nature, should be performed by the State that comprises its territory of execution, in the case of an intra-state region. (...) it is up to the States to exercise the function of driving agents of planning, in relation to the metropolitan regions that shelter in their territories.” (Free translation) GRAU, Eros Roberto. Op. cit., p. 121

<sup>51</sup> The Union, in fact, instituted them, but practically did not take any further notice of them. The states were responsible for their structuring and functioning, creating companies or autarchies to make them effective. (Free translation) SILVA, José Afonso da. **Direito Urbanístico Brasileiro**. 7ª ed. São Paulo: Malheiros, 2012, p. 152.

<sup>52</sup> Technocratic, centralist and authoritarian metropolitan planning. (Free translation) KLINK, Jeroen. **Por que as regiões metropolitanas continuam tão ingovernáveis?** Problematizando a reestruturação e o reescalonamento do estado social-desenvolvimentista em espaços metropolitanos. In: FURTADO, Bernardo Alves; KRAUSE, Cleandro Henrique; FRANÇA, Karla Cristina Baptista de (ed). Território metropolitano, políticas municipais: por soluções conjuntas de problemas urbanos no âmbito metropolitano. Brasília: Ipea, 2013. p. 83.

Com essas feições, os formatos de gestão definidos logo passaram a ser acusados de centralizadores e pouco representativos das realidades políticas regionais, pela dependência da criação das unidades por meio de lei complementar federal e pela hegemonia dos Executivos estaduais na gestão.<sup>53</sup>

Worn out, this model ended up suffering some depletion, especially in the years of crisis that followed redemocratization. That's why, decades later and already under the 1988 Constitution, new complementary laws – now at the state level – ended up recreating those 9 original metropolitan regions, replacing or reformulating the indirect administration bodies and entities responsible for administering them.

### 3.2. Conformity and purpose under the 1988 Constitution

The 1988 Constitution brought two crucial changes to the legal dynamics of metropolitan regions. The first of them is explicit in the text that dealt with the topic - its article 25, § 3:

Art. 25. Os Estados organizam-se e regem-se pelas Constituições e leis que adotarem, observados os princípios desta Constituição.

(...)

§ 3º Os Estados poderão, mediante lei complementar, instituir regiões metropolitanas, aglomerações urbanas e microrregiões, constituídas por agrupamentos de municípios limítrofes, para integrar a organização, o planejamento e a execução de funções públicas de interesse comum.<sup>54</sup>

As it can be seen, the new Constitution shifted the competence to establish metropolitan regions from the Union to the States. The option turns out to be much more adequate, due to the scale of the public needs in question, and the local peculiarities that must be observed for the success in structuring and managing metropolitan regions.

Next to change of competence, the 1988 Charter brought another change that decisively impacted the functioning of metropolitan regions. This time, it is a norm related not to the institute

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<sup>53</sup> With these features, the defined management formats soon came to be accused of centralizing and unrepresentative of regional political realities, due to their dependence on the creation of units through a federal complementary law and the hegemony of state executives in management. (Free translation) HOTZ, Eduardo Fontes. A organização metropolitana pós constituição de 1988. **São Paulo Em Perspectiva**, vol. 14, nº 4. São Paulo: outubro/dezembro 2000. Available on: [http://www.scielo.br/scielo.php?script=sci\\_arttext&pid=S0102-88392000000400010](http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0102-88392000000400010)

<sup>54</sup> Art. 25. States are organized and governed by the Constitutions and laws they adopt, observing the principles of this Constitution. (...) § 3 The States may, through a complementary law, establish metropolitan regions, urban agglomerations and micro-regions, constituted by groups of neighboring municipalities, to integrate the organization, planning and execution of public functions of common interest. (Free translation)

itself, but to the federative pact as a whole: the rise of municipalities in the federative scenario, as entities endowed with a relevant portion of competences and democratic legitimacy at the local level, increased the challenges of metropolitan management.

So, the way, to the light of the 1988 Constitution and the municipalism that inspired it<sup>55</sup>, would be the creation of instruments so that the will of different federative entities could reach adequate levels of articulation. Among these instruments, the public consortia, cooperation agreements, management contracts, and the metropolitan regions themselves are aligned as legal arrangements that can help in metropolitan management.

The 1988 constitutional text itself, in its article 25 § 3, mentions the creation of urban agglomerations and micro-regions. These institutions, along with metropolitan regions, should be seen as types of urban territorial units – and so are treated by the Statute of the Metropolis (Law No. 13.089/2015).

In article 2, I, of this norm, urban agglomeration is defined as the "unidade territorial urbana constituída pelo agrupamento de 2 (dois) ou mais Municípios limítrofes, caracterizada por complementaridade funcional e integração das dinâmicas geográficas, ambientais, políticas e socioeconômicas<sup>56</sup>". The micro-regions, on the other hand, lack an express definition, but the Statute extends to them the discipline given to metropolitan regions and urban agglomerations (art. 1, § 1, I).<sup>57</sup>

Integrated development regions (RIDEs), in turn, also have no express legal provision, and there seems to be no consensus on their meaning. They are considered by some Executive bodies, and

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<sup>55</sup> MORAIS, Efrain. Município, o Grande Ausente na Política Brasileira. Uma Contextualização História. *In: Constituição de 1988: O Brasil 20 anos depois*. Vol. 2. Brasília: Senado Federal, 2013. Available on <https://www12.senado.leg.br/publicacoes/estudos-legislativos/tipos-de-estudos/outras-publicacoes/volume-ii-constituicao-de-1988-the-brazil-20-years-after.-the-exercise-of-politics/municipality-the-great-absent-in-Brazilian-politics.-a-historical-contextualization>. Accessed on July 20, 2020, p. 8-10 "(...) As Lewis Mumford already demonstrated, the city is the cradle and base of civilization. Municipalism is the attempt, still frustrated among us, to provide greater autonomy to the citizen. Municipalism is citizenship – and this does not truly materialize without it. It is, in the end, citizenship that is the great beneficiary of the decentralization of power. At the municipal level, it is possible to closely watch the governors, demand from them commitments made on electoral platforms. At the state level, this is much more difficult. At the federal level, not even mentioned. Difficult access for voters to elected officials. (...) The emergence of the city, says Murray, makes room for a universal humanity distinct from the agro-pastoral tribe, for an innovative civility distinct from the community closed in tradition and expressed in the management of the *polis* by a body of free citizens. Once again, municipality and citizenship merge into a single and inseparable concept." (Free translation)

<sup>56</sup> Urban territorial unit constituted by the grouping of 2 or more neighboring Municipalities, characterized by functional complementarity and integration of geographic, environmental, political and socioeconomic dynamics. (Free translation)

<sup>57</sup> The treatment of urban territorial units is similar - the Constitution itself does not stipulate any differentiation. Thus, as a rule, what is said about the metropolitan region also applies to urban agglomerations and micro-regions



by part of the legislation, as the equivalent of metropolitan regions, but made up of municipalities belonging to more than one state<sup>58</sup>. On the other hand, RIDE can be specifically associated with the action of the Union, with a view to regional development, pursuant to article 43 of the Federal Constitution<sup>59</sup>. In any case, the institution was implemented, notably, in the creation of the Integrated Development Region of the Federal District and Surroundings (Região Integrada de Desenvolvimento do Distrito Federal e Entorno; LC 94/98).

Aside from urban agglomerations, micro-regions and integrated development regions, it is equally important to mention, as models of metropolitan arrangements, the metropolitan development agencies and public consortia (in the model of Law 11.107/2005). An example always invoked is the experience of the Grande ABC Consortium<sup>60</sup>, founded in 1990 for the planning, articulation and definition of actions of a regional character, in 7 cities of the ABC Paulista<sup>61</sup> - all of them located in populous and conurbated municipalities.

In any case, the treatment given to urban territorial units ends up getting closer (the Constitution, by itself, does not stipulate any differentiation). Thus, as a rule, what is said about the metropolitan region also applies to urban agglomerations and micro-regions, manifesting at the local level the specificities of each urban territorial unit.

All these institutes and the metropolitan region, in particular, need to reflect, on the legal-institutional level, not only the factual interdependence of the municipalities involved, but also the respect for their individualities (in line with an authentic right to the metropolis).

Without prejudice, however, to the rise of the Municipalities, the constitutional text maintained the mandatory adherence as a distinctive feature of metropolitan regions and other territorial units. The municipalities are still bound to adhere to the metropolitan region, and to observe its measures, based on the respective institution by state complementary law. Accordingly, as already mentioned, the Federal Supreme Court defined that " a instituição de regiões metropolitanas,

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<sup>58</sup>CAVALCANTE, Luiz Ricardo. **Regiões metropolitanas e regiões integradas de desenvolvimento: em busca de uma delimitação conceitual**. Brasília: Núcleo de Estudos e Pesquisas/CONLEG/Senado, abril/2020 (Texto para discussão n.º 273). Available on [www.senado.leg.br/estudos](http://www.senado.leg.br/estudos). Accessed on: April 13, 2020, p.

<sup>59</sup>As noted in the course of the legislative process of the Statute of the Metropolis, "it is an instrument of regional development, without a specific focus on the urban character. It concerns the actions of a single entity of the Federation, the Union, and not the governance of public functions that are of common interest to neighboring Municipalities." (Free translation) BRASIL. Câmara dos Deputados. **Comissão especial destinada a proferir parecer ao Projeto de Lei nº 3.460 de 2004 – Estatuto da Metrópole. Parecer do relator**. p. 11

<sup>60</sup>ROSSBACH, Anacláudia; KLINTOWITZ, Danielle; ROYER, Luciana; SCHMIDT, Luiza; e UEMURA, Margareth. Prólogo. In: MARGUTI, B. O.; COSTA, M. A.; FAVARÃO, C. B. (orgs.). **Brasil metropolitano em foco: desafios à implementação do Estatuto da Metrópole**. v.4. Brasília: Ipea, 2018, p. 9-11. Available on: <http://www.ipea.gov.br/portal/images/stories/PDFs>. Accessed on September 28., 2021.

<sup>61</sup> See <https://consorcioabc.sp.gov.br/o-consorcio>

aglomerações urbanas e microrregiões, constituídas por agrupamentos de municípios limítrofes, depende, apenas, de lei complementar estadual<sup>62</sup>", and cannot be conditioned to a referendum<sup>63</sup>, or for approval by the Municipal Councils involved.<sup>64</sup>

Furthermore, once integrated into the metropolitan region and other units, the municipalities must remain in them. Here, there is no voluntary associative character that characterizes, for example, public agreements and consortia, which can be denounced at any time by the federative entities involved.<sup>65</sup> The STF contemplated this differentiation in the decision of ADI 1,842<sup>66</sup>, defining that municipal integration, in order to achieve the common interest, "pode ocorrer tanto voluntariamente, por meio de gestão associada, empregando convênios de cooperação ou consórcios públicos, consoante o arts. 3º, II, e 24 da Lei Federal 11.445/2007 e o art. 241 da Constituição Federal, como compulsoriamente, nos termos em que prevista na lei complementar estadual que institui as aglomerações urbanas<sup>67</sup>"

From these characteristics, another distinctive feature of the metropolitan region emerges. Its creation also implies the creation of permanent instances of inter-federative discussion on matters of common interest. This takes place within the scope of its governance structure, in which the interests of the various entities involved are represented, as well as segments of civil society.

Thus, on the one hand, the compulsory establishment of metropolitan regions avoids transaction costs arising from individual negotiations between federative entities. It also prevents a single one of these entities from hindering, illegitimately, the pursuit of relevant collective projects.

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<sup>62</sup> The institution of metropolitan regions, urban agglomerations and micro-regions, constituted by groupings of neighboring municipalities, depends only on a complementary state law. (Free translation)

<sup>63</sup>STF. ADI 796. Tribunal Pleno. Relatora Ministra Néri da Silveira. Julgamento em 02/02/1998. DJ 17/12/1999.

<sup>64</sup>STF. ADI 1.841. Tribunal Pleno. Relator Ministro Carlos Velloso. Julgamento em 01/08/2002. DJ 20/09/2002.

<sup>65</sup>Deputy Walter Feldman, author of the bill that resulted in the Statute of the Metropolis, expressed himself in the following sense: "I really liked it, because the Statute of the Metropolis, or a metropolitan vision, or the metropolitan space is not resolved with consortia and covenants. This is an occasional, eventual, subject-specific tool that can be used very well. The metropolitan region is much more related to integrated development, which has to answer the question of federative institutionality." (Free translation) BRASIL. Congresso. Câmara dos Deputados. **Notas taquigráficas da audiência pública – reunião nº 1489/13, de 24/09/2013**: comissão especial para elaboração do PL. 3460/04 (Estatuto da Metrópole). Available on <<https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=251503>> Accessed on September 1, 2021. Speaker: Deputy Walter Feldman, author of the Project.

<sup>66</sup>STF. ADI 1842. Tribunal Pleno. Relator Ministro Luiz Fux. Relator para o acórdão Ministro Gilmar Mendes. Julgamento em 06/03/2013. DJe-181 DIVULG 13-09-2013.

<sup>67</sup> Can occur either voluntarily, through associated management, employing cooperation agreements or public consortia, according to arts. 3, II, and 24 of Federal Law 11.445/2007 and art. 241 of the Federal Constitution, as mandatory, under the terms provided for in the state complementary law establishing urban agglomerations. (Free translation)

On the other hand, the participation of all municipalities involved, such as the State, and civil society, in the formation of metropolitan decisions, preserves the democratic and federative principles as much as possible.

Finally, and perhaps more importantly, a permanent institutionality is created, *locus* of public deliberation dedicated, exclusively and obligatorily, to the treatment of common needs on a metropolitan scale.

In general lines, and in clear improvement to the model inherited from the military regime, this is the role assumed, in the current constitutional regime, by the legal institute of the metropolitan region - a role that is summarized in the verb "integrate" in the constitutional provision.

Next, the most important parameters for the functioning of metropolitan regions will be analyzed, shaped in recent years by the Legislative and the Judiciary in the search for the realization of the right to the metropolis.

#### 4. PUBLIC FUNCTIONS OF COMMON INTEREST AND THE PARAMETERS OF ADI 1,842

The objects of action in the metropolitan region are many, and varied. As seen, the right to the metropolis is projected into some of the most essential demands for human dignity. It is also related to the taking of place, by the subject, in the urban sociability that surrounds him/her, and in the definition of the directions of his/her community. From the legal-constitutional point of view, the State responses to meet these public needs, in the metropolitan environment, are indicated in the 1988 text as public functions of common interest.

The integration of these *functions of common interest*— of its organization, planning and execution — is the objective of the metropolitan region, under the terms of article 25, § 3, of the Federal Constitution. The concept adopted by the constituent, it is worth mentioning, is broader and embracing than that of public services, for example.<sup>68</sup> It encompasses, in addition to the state's provision of services, its functions of standardization, planning, development, control, among other.<sup>69</sup>

It means to say that, for the purposes of action in the metropolitan region, the concept of public service of common interest is basically open to any lines of action by the state. And these will

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<sup>68</sup>SILVA, José Afonso da. Ob. cit, p. 159.

<sup>69</sup>ALVES, Alaôr Caffé. **Regiões Metropolitanas, Aglomerações Urbanas e Microrregiões: novas dimensões constitucionais da organização do Estado brasileiro**. Revista da Procuradoria Geral do Estado de São Paulo, São Paulo, set. 1998, edição especial em comemoração aos 10 anos da Constituição Federal. Available on: <<http://www.pge.sp.gov.br/centrodeestudos/revistaspge/revista/tes1.htm>>

qualify as "of common interest" insofar as, by factual impositions, they need to be structured on a metropolitan scale, as a condition for the adequate attendance of the public needs that they intend to protect.

In metropolitan areas, this can be due to innumerable factors such as natural, sociological, technical, economic, financial, operational, among many other. From a sanitation system that requires the transport of water through several municipalities; to urban mobility planning that depends on the population's commuting movements. Or housing measures that impact precarious settlements on a regional scale; or complex projects that demand the mobilization of resources and technical expertise. Finally, economic development policies that cause adverse effects (diseconomies)<sup>70</sup> in neighboring areas; or the prevention and environmental recovery of a water body that receives waste from different municipalities.<sup>71</sup>

These are situations that require measures that go beyond the capacity of individual public entities, whose scope of action is, in general, restricted to their respective territories. Public functions of common interest, therefore, are those characterized by the "necessidade de uma conexão entre as diferentes esferas de poder federativo, político e administrativo, entre si, e, se houver necessidade, em parceria com a iniciativa privada."<sup>72</sup>

That said, it is reiterated that the integration of public functions of common interest is the objective of the metropolitan region's performance – so says the constitutional text. In what way, however, and under what title, does this performance develop? The answer to this question has been gradually built up by the complementary state laws that institute the metropolitan regions. In doing

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<sup>70</sup>"It was also clear that, in addition to benefiting from agglomeration economies, metropolitan headquarters receive more resources per citizen, collect more taxes on their own and spend less on their own administrative machinery. As if that were not enough, the literature points to the concentration of problems – agglomeration diseconomies – in the metropolitan peripheries, highlighting urban violence, the difficulty of urban mobility and the precariousness of housing." (Free translation) FURTADO, Bernardo Alves; Mation, Lucas Ferreira; Monasterio, Leonardo. **Fatos estilizados das finanças públicas municipais metropolitanas entre 2000 e 2010**. In. FURTADO, Bernardo Alves; KRAUSE, Cleandro Henrique; FRANÇA, Karla Cristina Baptista de (ed). Território metropolitano, políticas municipais: por soluções conjuntas de problemas urbanos no âmbito metropolitano. Brasília: Ipea, 2013. p. 309.

<sup>71</sup>Within the scope of Rio de Janeiro, the sustainability of the Guanabara and Sepetiba Bays deserved specific mention among the public functions of common interest assigned to the Metropolitan Region (article 3, VI, of LC nº 184/RJ). These water bodies bathe, by themselves, several municipalities, and receive tributaries that permeate many others.

<sup>72</sup> Need for a connection between the different spheres of federative, political and administrative power, among themselves, and, if necessary, in partnership with the private sector. (Free translation) SLAWINSKI, Pedro Gonçalves da Rocha. **Regiões metropolitanas e serviços públicos de interesse comum**. Revista de Direito da Associação dos Procuradores do Novo Estado do Rio de Janeiro – APERJ, Rio de Janeiro, v. 19, 2008. Available on <https://pge.rj.gov.br/comum/code/MostrarArquivo.php?C=MTQ0MQ%2C%2C>. p. 133.

so, they list the public functions of common interest under their tutelage, and their modes of intervention in each of them.

The subject is sensitive, as it involves the autonomy of federative entities, and urgent public needs - which sometimes constitute very profitable services. Thus, it is not surprising that the judiciary was called to guide this matter, which it did resolutely in ADI 1,842/RJ, producing a true jurisprudential landmark in metropolitan regions in Brazil. In the end, parameters were defined for the regime of public functions of common interest (which will be the focus at this time), and also for the governance of metropolitan regions (discussed next).

The case in focus involved the Metropolitan Region of Rio de Janeiro, structured in Complementary State Law No. 87/97. Briefly, the state legislature determined that, with the institution of the metropolitan region, certain public functions of common interest – specifically, basic sanitation – would be automatically transferred to the ownership of the State, being carried out by it thereafter. The question to be answered in the action, at first, was whether such a transfer would be possible.

The idea was logical. The State, as an entity that encompasses the others, was seen as the one capable of offering the solution for the provision, on a broader scale, of public functions of common interest. Therefore, it would logically follow the competence of the State to manage them in the metropolitan environment.<sup>73</sup> This understanding was opposed to the one according to which the ownership of any function or service would continue in the sphere of individual federative entities. These should exercise this title, in their own right, but in an environment of cooperation, making their respective local solutions compatible.<sup>74</sup>

The Federal Supreme Court, in the end, rejected both understandings. According to Paulo Modesto, the Court "fugiu ao dualismo que apaixonou a doutrina"<sup>75</sup>. Indeed, it recognized the ownership of the service not to the State, nor to individual municipalities, but to the metropolitan region itself, as a multifunctional territorial entity, which brings together these federative entities.

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<sup>73</sup>In this sense: BARROSO, Luis Roberto. Saneamento básico: competências constitucionais da União, Estados e Municípios. Revista de Informação Legislativa, Brasília, p. 255- 270, jan./mar. 2002. Available on <<https://www2.senado.leg.br/bdsf/bitstream/handle/id/496885/RIL153.pdf?sequence=1&isAllowed=y>> Access on October 1, Oct. 2021. In ADI 1842, Minister Maurício Corrêa, the first to cast a vote, fully adopted this thesis.

<sup>74</sup> This was the understanding adopted by justices Nelson Jobim, Eros Grau and Ilmar Galvão – the latter two who, although they did not participate in the judgment of ADI 1,842, had already expressed it on another occasion (STF. ADI 2077 MC). Full Court. Minister Rapporteur Ilmar Galvão, Rapporteur for the Judgment of Justice Joaquim Barbosa, Judgment on March 06, 2013. DJe-197.

<sup>75</sup> Fled from the dualism that the doctrine fell in love with. (Free translation) MODESTO, Paulo. **Região Metropolitana, Estado e Autonomia Municipal: a governança interfederativa em questão**. Revista Colunistas de Direito do Estado, 25 de janeiro de 2016. Available on <http://www.direitodoestado.com.br/columistas/paulo-modesto/regiao-metropolitana-estado-e-autonomia-municipal-a-governanca-interfederativa-em-quesao> Accessed on October 1, 2021

The idea, in Alaôr Caffé Alves' work, cited repeatedly in the ruling of ADI 1,842, is that the institution of a metropolitan region represents an effort, undertaken by federative entities, to create the conditions for the shared management of issues pertaining to the common interest. This effort would be imperative, under article 25 § 3 of the Constitution. Therefore, each municipality, in principle endowed with original granting power in public functions of potential common interest, would transfer this power, in a derivative character, to the new legal-territorial body: the metropolitan region itself.<sup>76</sup>

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So, in what is relevant to the theme under examination – that is, the relationship between the metropolitan region and public functions of common interest – the Federal Supreme Court concluded for the “[r]econhecimento do poder concedente e da titularidade do serviço ao colegiado formado pelos municípios e pelo estado federado<sup>78</sup>”.

Thus, it was established that it is possible for the metropolitan region to unify the ownership and management of a public function of common interest – concentrating in itself all aspects related to its organization, planning and execution. This was decided by the Federal Supreme Court in relation to basic sanitation.

Nonetheless, this unification will not always be necessary. For certain public functions, despite the common interest involved, the measure would not be justified from a technical point of view. Thus, the intervention of the metropolitan region can be limited to more specific aspects, in order to only prevent local measures from causing disruptive effects on the metropolis as a whole. In this case, the management of the function remains at the local level, and the role of the metropolitan entity will be to “velar para que tudo corra bem, para que as soluções buscadas localmente considerem a dimensão metropolitana, só ingressando - assumindo diretamente atividades - caso isso não esteja sendo feito a contento pelos municípios.”<sup>79</sup>

It is outlined, therefore, the decision-making content of the ADI 1842, and mainly, the concrete forms of intervention of the metropolitan region on the urban reality. This intervention translates, legally, into the relationship between this entity and public functions of common interest. It is in these

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<sup>76</sup>ALVES, Alaôr Caffé. Ob. cit.

<sup>77</sup> This logic was expressly mentioned by Minister Gilmar Mendes, on pg. 181 and 182 of the judgment of ADI 1,842

<sup>78</sup> [re]cognition of the granting authority and ownership of the service to the collegiate formed by the municipalities and the federated state. (Free translation)

<sup>79</sup> Ensure that everything runs smoothly, so that the solutions sought locally take into account the metropolitan dimension, only joining - directly assuming activities - if this is not being done to the satisfaction of the municipalities. (Free translation) RIO DE JANEIRO. Procuradoria Geral do Estado. **Parecer n. 02/15-RTAM-PG-2**. 09 mar 2015. p. 32. Nesse sentido, os artigos 3º e 11 da Lei Complementar Estadual nº 184/RJ, de 27 de dezembro de 2018.

areas that the potential of this institution is manifested, in the direction of realizing the right to the metropolis, meeting the serious public needs that have been outlined in this work.

## 5. THE LEGAL DISCIPLINE OF THE STATUTE OF THE METROPOLIS - LAW 13,089/2015

In the process of maturing the law of the metropolis, and after the conformation of jurisprudence in ADI 1,842, the federal legislator also intended to make its contribution. And it did so through Law No. 13,089/2015, self-named "Statute of the Metropolis".

The legislative text originates from Bill No. 3460/2004, presented by Deputy Walter Feldman, and has gone a long and bumpy path in the National Congress, especially in the Chamber of Deputies. The procedure ran parallel to the judgment of ADI 1,842, with the presentation of the PL on May 05, 2004, one month after the beginning of the judgment, and the enactment of the law on January 12, 2015, two years after the delivery of the last vote of the judgment.<sup>80</sup>

After its presentation, the text was analyzed by a large number of committees, filed and unfiled successive times, and profoundly altered by a substitute, presented on November 08, 2013, by deputy Zezéu Ribeiro, rapporteur of the project. The elaboration of this substitute, it is worth mentioning, was the object of wide debate: 04 public hearings were held in the Chamber of Deputies, in addition to 04 regional forums, in São Paulo, Goiânia, Salvador and Florianópolis, and finally, two rounds of technical meetings with experts on the subject, in order to consolidate the text.

Law No. 13,089/2015 is primarily based on the competence of the Union to establish guidelines for urban development, stipulated in article 21, XX, of the Federal Constitution. There is also, in article 1 of the Statute, mention of other provisions that would support it, and that deal with the material intervention of the Union in matters relevant to life in the metropolis – such as sanitation, housing, etc.

This logic resulted in questions regarding the constitutionality of the Statute, due to the lack of an express basis, in the Constitution, for the Union to specifically intervene in the structuring of metropolitan regions.<sup>81</sup> At first, however, the Federal Supreme Court rejected this thesis in 2019, in

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<sup>80</sup>According to Marcela Oliveira Santos, "[as] to what extent it was possible to assess, based on the documents available on the website of the Chamber of Deputies, the National Congress did not explicitly dialogue with the debate undertaken during the aforementioned judgments [of ADI 1842]." (Free translation) SANTOS, Marcela Oliveira. **Análise institucional: estatuto da metrópole e outros instrumentos normativos que tratam da questão metropolitana**. In: MARGUTI, Bárbara Oliveira; COSTA, Marco Aurélio; FAVARÃO, Cesar Bruno (orgs). *Brasil Metropolitano em foco: desafios à implementação do Estatuto da Metrópole*. Brasília: IPEA, 2018. p. 58

<sup>81</sup>RIO DE JANEIRO. Procuradoria Geral do Estado. **Parecer n. 02/15-RTAM-PG-2**. 09 mar 2015. p. 35

ADI 5,857/PA<sup>82</sup>, on the basis of the competence provided for in the aforementioned article 21, XX, CF. This happened, it is true, after the repeal of some of its more “invasive” (and unconstitutional) norms by the supervening Law 13,683/2018.<sup>83</sup> In any case, it seems that the Statute of the Metropolis already has the seal of the STF.

In general terms, and as can be seen from the justification of the bill that originated it<sup>84</sup>, the Statute of the Metropolis presupposes the advances in urban matters brought by the Statute of the City (Law no. 10,257); however, it recognizes that this normative act mainly contemplated the municipal scale, without adding solutions to the joint dimension of agglomerations of cities. Thus,

é urgente que uma complementação, voltada para a regulamentação do universo das unidades regionais, de características essencialmente urbanas, dote o País de uma normatização que, de forma dinâmica e continuada, uniformize, articule e organize a ação dos entes federativos naqueles territórios em que funções de interesse comum tenham de ser necessariamente compartilhadas<sup>85</sup>

### 5.1. The metropolitan region as a metropolitan institutional arrangement

In this context, the Statute intended to discipline the “urban territorial units”, a genre which, as already mentioned, encompasses the institutions provided for in Article 25, § 3, of the Constitution: metropolitan regions, urban agglomerations and micro-regions. In the original wording of the Statute, the metropolitan region would be an urban agglomeration that meets certain technical requirements, defined by the IBGE, which qualify it as a metropolis:

Art. 2º Para os efeitos desta Lei, consideram-se:

I – aglomeração urbana: unidade territorial urbana constituída pelo agrupamento de 2 (dois) ou mais Municípios limítrofes, caracterizada por complementaridade funcional e integração das dinâmicas geográficas, ambientais, políticas e socioeconômicas;

(...)

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<sup>82</sup> ADI 5.857/PA. Plenary. Rapporteur Minister Carmem Lúcia. Judgment in October 11, 2019. Published in October 28, 2019.. In this action, filed by the Governor of the State of Pará, appear as *amici curiae* other 16 states of the federation, and the Federal District.

<sup>83</sup> This was the case of the imputation of administrative improbity to state political agents who failed to comply with certain commands present in the Statute (articles 20 and 21 of Law 13,089).

<sup>84</sup> Justification that accompanied PL No. 3,460/2004. Available on <https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=251503>. Accessed on September 1, 2021.

<sup>85</sup> It is urgent that a complementation, aimed at regulating the universe of regional units, with essentially urban characteristics, endows the country with a standardization that, in a dynamic and continuous way, standardizes, articulates and organizes the action of federative entities in those territories in which functions of common interest must necessarily be shared. (Free translation) Loc. cit.



VII – região metropolitana: aglomeração urbana que configure uma metrópole.  
(original writing)  
(...)

VIII - área metropolitana: representação da expansão contínua da malha urbana da metrópole, conurbada pela integração dos sistemas viários, abrangendo, especialmente, áreas habitacionais, de serviços e industriais com a presença de deslocamentos pendulares no território;

V – metrópole: espaço urbano com continuidade territorial que, em razão de sua população e relevância política e socioeconômica, tem influência nacional ou sobre uma região que configure, no mínimo, a área de influência de uma capital regional, conforme os critérios adotados pela Fundação Instituto Brasileiro de Geografia e Estatística – IBGE<sup>86</sup>;

Note, as relevant, that the Statute expressly defines, separately, metropolitan region and metropolis. In line with what has already been exposed above, although not entirely explicitly, the norm allows for the characterization, in the Brazilian legal order, of the metropolitan region as the legal-administrative expression - legal construction - of the metropolis as a geographic reality. This one that originates the phenomenon, equally geographic, of the metropolitan areas, also conceptualized by the Statute. All that, together, generates the demand for articulation of public functions of common interest.

It should also be noted that the aforementioned Law No. 13,683/2018, enacted 3 years after the Statute, changed the concept of the metropolitan region, adopting a formal concept, which reproduces the content already provided for in the Constitution:

Art. 2º, VII - região metropolitana: unidade regional instituída pelos Estados, mediante lei complementar, constituída por agrupamento de Municípios limítrofes para integrar a organização, o planejamento e a execução de funções públicas de interesse comum; (current writing)<sup>87</sup>

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<sup>86</sup> Art. 2 For the purposes of this Law, the following are considered: I – urban agglomeration: urban territorial unit constituted by the grouping of 2 or more neighboring Municipalities, characterized by functional complementarity and integration of geographic, environmental, political and socioeconomic dynamics; (...) VII – metropolitan region: urban agglomeration that configures a metropolis. (original writing) (...) VIII - metropolitan area: representation of the continuous expansion of the urban fabric of the metropolis, conurbed by the integration of road systems, covering, in particular, housing, service and industrial areas with the existence of commuting in the territory; V - metropolis: urban space with territorial continuity that, due to its population and political and socioeconomic relevance, has national influence or over a region that configures, at least, the area of influence of a regional capital, according to the criteria adopted by the Foundation Brazilian Institute of Geography and Statistics (IBGE – Fundação Instituto Brasileiro de Geografia e Estatística). (Free translation)

<sup>87</sup> Art. 2, VII - metropolitan region: regional unit created by the States, through a complementary law, constituted by a grouping of neighboring Municipalities to integrate the organization, planning and execution of public functions of common interest; (current writing). (Free translation)

With the new text given to the Statute of the Metropolis, Law No. 13,683/2018 seems to have removed the consistency of the system originally thought by the legislator, as it again disassociated the metropolitan region from the geographic concept of metropolis in the light of the IBGE.

Indeed, there was originally, on the part of the legislator of the Statute of the Metropolis, a concern to clearly define the figure of the metropolitan region, and especially, to establish general criteria for its legal-institutional formalization. It was intended, therefore, to stipulate minimum factual requirements for its institution, in order to reduce the gap between the processes of real metropolization and that of institutional metropolization in the country.

From the 2000s onwards, a certain abuse began to be observed in the creation of new metropolitan regions via state complementary laws. The problem was aggravated during the period in which the Statute itself was being processed: new regions were created without any reasonable factual substrate, in terms either of socioeconomic integration or of sharing public needs.

The reason for this is primarily associated with the ease of access to credit offered by the Union, which, according to reports, promised to favor municipalities that are part of metropolitan regions in the allocation of resources in development programs.<sup>88</sup> This resulted in the creation of dozens of metropolitan regions during the 2010s, often leaving the real purposes of this institute in the background – resulting, as already seen, in the phenomenon of “paper metropolises”.

Dissatisfied with this scenario, the federal legislator intended to impose limits on the creation of new metropolitan regions, making it conditional on the verification of certain factual requirements. This objective was intensely discussed at public hearings during the legislative process.<sup>89</sup> That is why, in the final version of the project, the legal concept of metropolitan region ended up being associated with the geographical concept of metropolis, at the discretion of IBGE, as mentioned above (art. 2, V and VII – original text).

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<sup>88</sup>“As seen in the previous section, some Metropolitan Regions were created in the 1990s, but it was in the late 2000s – when being an RM became a criterion for federal programs with large amounts of resources for infrastructure – that the number of regions in Brazil began to grow. This would be intensified from 2009, with the Minha Casa Minha Vida Program, resulting in the expansion of the institutionalization process of new MRs in the country, without a clear criterion beyond the fact that they could be created by state governments.” COSTA, Marco Aurélio; FAVARÃO, Cesar Bruno; TAVARES, Sara; BLANCO JÚNIOR, Cid. **Do processo de metropolização institucional à implementação do estatuto da metrópole: dois balanços, suas expectativas e incertezas**. In: MARGUTI, Bárbara Oliveira; COSTA, Marco Aurélio; FAVARÃO, Cesar Bruno (orgs). *Brasil Metropolitano em foco: desafios à implementação do Estatuto da Metrópole*. Brasília: IPEA, 2018. p. 34.

<sup>89</sup> Available on <<https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=251503>>. Accessed on September 1, 2021. The public hearings pertaining to the Statute of the Metropolis had very qualified exhibitors, both in academia and in public administration. They also had representatives of the various political interests involved in the discussion about the Brazilian institutional metropolization – such as ministers and secretaries of state, mayors, and representatives of the national association of municipalities.

At the same time, Article 5, § 2 of the Statute seemed to prohibit the creation of new metropolitan regions that did not comply with this criterion, stipulating that "[r]espeitadas as unidades territoriais urbanas criadas mediante lei complementar estadual até a data de entrada em vigor desta Lei, a instituição de região metropolitana impõe a observância do conceito [do IBGE] estabelecido no inciso VII do caput do art. 2º<sup>90</sup>".

Judging by the records of the legislative process, the intent of the federal legislator appears to have been genuine, as well as timely. In fact, the existence of seventy-four metropolitan areas, established in the formal legal level, is surprising, while the IBGE recognizes only fifteen metropolitan areas in the country.

This scenario ends up distorting the institute of the metropolitan region, so important for the current urban dynamics, even generating the banalization of this figure.<sup>91</sup> As seen, in light of the geographic criteria adopted by the IBGE, the metropolises are the heads of economic and social networks at the national level; the final links of the urban system. Thus, the legal instruments discussed here should serve to address the factual peculiarities that result from this condition. Most of the metropolitan regions now institutionalized in the country, however, lack a structure capable of carrying out their principles and purposes.<sup>92</sup>

Notwithstanding, the intended limitation in the original text of the Statute of the Metropolis, at this point, even had dubious constitutionality. Especially, in light of article 25, § 3 of the Federal Constitution, which attributes to the States the judgment of creation of the metropolitan region. For this very reason, and in order to remove doubts about constitutionality, the Statute was eventually amended by the supervening Law No. 13,683/2018. In the end, as already mentioned, the concept of metropolitan region, previously associated with that of a metropolis, under the terms of the IBGE, now only reproduces what the Federal Constitution says about it, without adding more factual or technical criteria.

However, nothing prevents States from establishing requirements of this nature for the creation of new metropolitan regions, or for the entry of municipalities into those that already exist,

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<sup>90</sup> Respected the urban territorial units created by state complementary law until the date of entry into force of this Law, the institution of metropolitan region imposes the observance of the concept [of the IBGE] established in item VII of the caput of art. 2º<sup>nd</sup>. (Free translation)

<sup>91</sup> CORDEIRO, E. C. **Da banalização das regiões metropolita ao Estatuto da Metr pole: ser  o fim das "metr p les de papel"?** Geosp – Espaço e Tempo (Online), v. 23, n. 1, abr. 2019. p. 040-058.

<sup>92</sup> An overview of the degree of institutional development of some of the main institutional metropolitan regions in Brazil can be found in INSTITUTO DE PESQUISA ECON MICA APLICADA. **Brasil Metropolitano em foco: desafios   implementa o do Estatuto da Metr pole.** Bras lia, 2018. And on the portal <<http://brasilmetropolitano.ipea.gov.br/>>, which has dossiers on the main metropolitan regions of the country, and monitors the process of building and adapting their governance structures.

which is desirable. And they can do so through their respective constitutions, or even in the complementary state laws that institute urban units.

This is what is seen in the Constitution of the State of São Paulo, whose article 153 deals with urban territorial units. The provision stipulates indeterminate legal concepts such as “highlighted national expression”, “high demographic density”, and “significant conurbation”, which can serve as limitations to legislative discretion in the creation of new metropolitan regions.

In Rio de Janeiro, an amendment to the State Constitution was considered to change its article 75, with the objective of “*evitar que municípios ingressem na RM sem que, materialmente, tenham se dado os fenômenos geográficos que caracterizam uma região metropolitana (como a conurbação)*”<sup>93</sup>. The proposal, however, did not work.<sup>94</sup> For the rest, most state constitutions did not have this concern, limiting themselves to reproducing the requirements of the text of the Federal Constitution.<sup>95</sup>

## 5.2. Full management and governance of the metropolitan region

Back to the Statute of the Metropolis, and also in the effort to encourage the adequate structuring of metropolitan regions, this law created the mechanism of “full management”. It is a qualification, granted to metropolitan regions that meet certain minimum requirements, considered by the legislator as the most relevant to the institute. Note its Article 2, III:

- III – gestão plena: condição de região metropolitana ou de aglomeração urbana que possui:
- a) formalização e delimitação mediante lei complementar estadual;
  - b) estrutura de governança interfederativa própria, nos termos do art. 8º desta Lei; e
  - c) plano de desenvolvimento urbano integrado aprovado mediante lei estadual;<sup>96</sup>

The intention of the legislator was to enable a reward sanction mechanism<sup>97</sup> to encourage the improvement of existing metropolitan regions. In article 14 of the Statute, the union's support – which

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<sup>93</sup> Avoiding municipalities from entering the MR without, materially, having occurred the geographic phenomena that characterize a metropolitan region (like the conurbation). (Free translation)

<sup>94</sup> The possibility is discussed in RIO DE JANEIRO. Procuradoria Geral do Estado. **Parecer n. 02/15-RTAM-PG-2**. 09 mar 2015. p. 26/27.

<sup>95</sup> CORDEIRO, EC Op. cit.

<sup>96</sup> III - full management: condition of a metropolitan region or urban agglomeration that has: a) formalization and delimitation by state complementary law; b) own inter-federative governance structure, pursuant to art. 8 of this Law; and c) integrated urban development plan approved by state law; (Free translation)

<sup>97</sup> LONGO FILHO, Fernando José. **Regiões Metropolitanas: armadilhas, democracia e governança**. 1.ed. Belo Horizonte: Fórum, 2019. Available on: <<https://www.forumknowledge.com.br/livro/3988>>. Accessed on: September 23, 2021. p. 104.

has always been a factor causing the proliferation of these entities – is limited to those that have full management.

From the device transcribed above, the provision of the governance structure stands out, an extremely important topic for the construction of the metropolitan dynamics, which will be discussed below in its essential aspects.

Of all the purposes pursued in the course of the legislative process of the Statute of the Metropolis, the one that was most striking, in the final product, was to parameterize the metropolitan governance systems. As already mentioned, it is in the governance structures of the metropolitan region that concretizes, on the one hand, the distribution of power among the federative entities involved, and on the other hand, the public and democratic deliberation about the direction of the metropolis. In the words of José Longo Filho:

Assim, a governança interfederativa é o locus em que a comunidade metropolitana se reconhece e se encontra para deliberar sobre os assuntos e questões relativas a essa comunidade. É uma parceria de direito público, pois o conjunto de obrigações é mais amplo, uma vez que as obrigações são perante a comunidade. Os princípios e diretrizes específicas para a governança interfederativa devem ser compreendidos no âmbito desse contexto de parceria, pacto federativo.<sup>98</sup>

Proper governance is essential to the incorporation of the metropolitan dimension in Brazilian public law, and the realization of the right to the metropolis in the country. Hence, the Statute has been intensely dedicated to the theme, in its articles 6 (principles); 7 (specific guidelines); and 7–A (guidelines regarding public functions of common interest).

This discipline is also supported by the ADI 1,842. In this judgment, far beyond just deciding the ownership of public services, the Federal Supreme Court guided the dynamics of interaction between the federative entities that make up the metropolitan region. Despite not having dialogued with each other, the legal and jurisprudential frameworks seem to converge on the most relevant issues, which will briefly be analyzed below.

The first is the great point of tension in the metropolitan institutional dynamic: the prevalence of common interest over the place, *versus* the autonomy of federated entities. Indeed, the purpose of integration in a metropolitan region is to honor solutions in favor of the common interest, before a

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<sup>98</sup> Thus, interfederative governance is the locus in which the metropolitan community recognizes itself and meets to deliberate on matters and issues relating to that community. It is a public law partnership, because the set of obligations is broader, as the obligations are towards the community. The specific principles and guidelines for inter-federative governance must be understood within this context of a partnership, a federative pact. (Free translation) LONGO FILHO, Fernando José. Op. Cit.

unified urban reality. Therefore, it is not feasible that interests peculiar to certain components make it impossible to protect the interest of the whole.<sup>99</sup>

Thus, the metropolitan environment imposes that federative autonomy be reinterpreted, and "*ampliada em sua complexidade*"<sup>100</sup>. Accordingly, José Vicente Santos de Mendonça emphasizes that the metropolitan region does not suppress the autonomy of federative entities - rather it reinforces it, through a more effective and rational provision of public functions of common interest.<sup>101</sup> Hence, the Federal Supreme Court concluded that *the common interest and mandatory metropolitan integration are not incompatible with municipal autonomy*.<sup>102</sup>

Even so, even though there is no incompatibility, municipal autonomy ends up imposing limits on the prevalence of the common interest, and constraints on metropolitan governance. Especially, ensuring the participation of all federative entities in their decisions.

This, incidentally, leads to another principle stipulated in the Statute of the Metropolis: the sharing of responsibilities and management for the promotion of integrated urban development (art. 6, II; and 7-A, II). As seen, it is the power and influence in decisions related to the common interest that legitimizes the action of the metropolitan region in the face of the entities that comprise it. Thus, they must be assured effective participation in the deliberation and management processes of public functions of common interest, which take place in their governance structures.

According to the Federal Supreme Court, this participation need not be equal - points out that it is essential for the construction of governance mechanisms adapted to local peculiarities. However, it is necessary to avoid that the decision-making power and the granting power are concentrated in the hands of a single entity, in order to preserve the self-government and self-administration of the municipalities.<sup>103</sup>

It's worth mentioning, also among the principles, the demand for an "integrated system for allocating resources and rendering accounts" (Free translation. art. 7, III), which intends to rationalize the indispensable mechanisms for financing the structure and activities carried out by metropolitan regions. According to Marco Aurélio Costa, a researcher at IPEA:

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<sup>99</sup> The ADI 1,842 stated that "[the] common interest is much more than the sum of each local interest involved, as the poor management of the basic sanitation function by only one municipality can jeopardize the entire effort of the group, in addition to consequences for public health throughout the region." (Free translation)

<sup>100</sup> *Amplified in its complexity*. (Free translation) ALVES, Alaôr Caffé. Op. cit.

<sup>101</sup> Verbal statement in a lecture on the subject at the Escola Superior de Advocacia Pública at PGE/RJ. Available on <[https://biblioteca.pge.rj.gov.br/bnportal/pt-BR/search/107224?exp=regi%C3%A3o%20metropolitan&exp\\_default=%5E\(LEG%2FTIPO%2BJUR%2FTIPO%2BPER%2FTIPO%2BFAS%2FTIPO%2BBDS%2FAREACON\)\\*](https://biblioteca.pge.rj.gov.br/bnportal/pt-BR/search/107224?exp=regi%C3%A3o%20metropolitan&exp_default=%5E(LEG%2FTIPO%2BJUR%2FTIPO%2BPER%2FTIPO%2BFAS%2FTIPO%2BBDS%2FAREACON)*)

<sup>102</sup> ADI 1,842/RJ.

<sup>103</sup> Loc. cit.

Nas áreas metropolitanas, o financiamento é o nó górdio do desenvolvimento urbano-metropolitano. Os recursos demandados para a disponibilização de infraestrutura urbana e para habitação são vultosos. No caso da infraestrutura, a depender de seu perfil, sua disponibilização no território irá ampliar ou reduzir as possibilidades de geração de mais-valia associada à produção do espaço e poderá implicar a conformação de territórios urbanos marcados pela segregação socioespacial, a depender das características das políticas urbanas e da política habitacional<sup>104</sup>

It is, therefore, an essential issue for the purposes of the metropolitan region itself - and which involves relevant discussions in the field of public finance, especially in its tax aspect.<sup>105</sup> It also involves elaborate mechanisms of resource contributions, by the federative units encompassed by the metropolitan region. And still, broad political debates, regarding priorities in the application of these resources in the face of socio-spatial precariousness.

It should be noted that the existence of an integrated resource allocation system is a condition for full management status (articles 2, III, and 8, IV of the Statute) and, therefore, for obtaining support from the Union for metropolitan governance. In general, in metropolitan regions throughout Brazil, this is achieved through a state fund, although it has been found that, in many of them, this fund does not exist or is not operational.<sup>106</sup>

One last principle to be mentioned comes from the point of view of the citizen - the subject of the metropolitan experience. Accordingly, and in line with the formulation of the right to the metropolis already exposed, the Statute ensures the democratic management of the city (art. 6, V). The principle is even reflected in the requirement for the participation of civil society representatives in the planning and decision-making processes (Article 7, V; and 8, II).

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<sup>104</sup> In metropolitan areas, financing is the heart of urban-metropolitan development. The resources required for the provision of urban infrastructure and housing are substantial. In the case of infrastructure, depending on its profile, its availability in the territory will expand or reduce the possibilities of generating added value associated with the production of space and may imply the conformation of urban territories marked by socio-spatial segregation, depending on the characteristics of the urban policies and housing policy. (Free translation) COSTA, Marco Aurélio. **Financiamento metropolitano no Brasil: um panorama de suas condições, seus desafios e suas perspectivas**. In: MARGUTI, Bárbara Oliveira; COSTA, Marco Aurélio; FAVARÃO, Cesar Bruno (orgs). *Brasil Metropolitano em foco: desafios à implementação do Estatuto da MetrÓpole*. Brasília: IPEA, 2018. p. 137.

<sup>105</sup>For an analysis of the disparity between municipalities in the fiscal aspect, based on the distribution of revenue among federal entities, see FURTADO, Bernardo Alves; Mation, Lucas Ferreira; Monasterio, Leonardo. **Fatos estilizados das finanças públicas municipais metropolitanas entre 2000 e 2010**. In: FURTADO, Bernardo Alves; KRAUSE, Cleandro Henrique; FRANÇA, Karla Cristina Baptista de (ed). *TerritÓrio metropolitano, políticas municipais: por soluções conjuntas de problemas urbanos no âmbito metropolitano*. Brasília: Ipea, 2013.

<sup>106</sup> COSTA, Marco Aurélio; FAVARÃO, Cesar Bruno; TAVARES, Sara; BLANCO JÚNIOR, Cid. **Do processo de metropolização institucional à implementação do estatuto da metrÓpole: dois balanços, suas expectativas e incertezas**. In: MARGUTI, Bárbara Oliveira; COSTA, Marco Aurélio; FAVARÃO, Cesar Bruno (orgs). *Brasil Metropolitano em foco: desafios à implementação do Estatuto da MetrÓpole*. Brasília: IPEA, 2018.

The idea, embraced by the Statute, is to promote the popular legitimacy of the metropolitan entity. This is closely related to the participatory dimension of the right to the metropolis: it is related to taking a position, on the part of the metropolitan subject, in defining the direction of his/her own community. Obviously, this legitimation does not happen automatically. An effective and open functioning of metropolitan governance will be necessary in order to produce some level of engagement of the population.

## 6. THE LAW OF THE BRAZILIAN METROPOLIS UNDER CONSTRUCTION

After tracing the evolution of the legal dimension of the metropolises in Brazil in the last fifty years or so, some progress can be seen. It started from a bureaucratic, centralizing and authoritarian perspective, prevalent from the late 1960s until the 1988 Constitution, to search for a more horizontal model for sharing *functions of common interest*.

After a tumultuous period, marked by conflict and judicialization around the matter, the legal discipline of the metropolis reached a certain degree of stability and security. Today, it is supported by a normative complex that involves state laws, paradigmatic court decisions, and a relatively new federal law. In this context, the edition of the Statute of the Metropolis in 2015 incorporates a more democratic perspective, albeit very timid, for the management and organization of Brazilian metropolises.

The good intentions of the legislator, however, are still insufficient towards an effective *right to the metropolis* in the country.

Indeed, reading the Statute of the Metropolis – like the other normative frameworks mentioned – reveals a much greater concern with the organizational aspect and governance of metropolitan regions, than effectively with the challenges of citizenship in these spaces. These are norms that sought to create a metropolitan management model that would work – which, it is true, was an advance that had not been achieved until then.

Even so, limiting the discipline of the right to the metropolis to the level of governance, without dealing directly with the challenges of citizenship, means leaving aside its more concrete and current purposes. Thus, the human dimension of metropolises, from a spatial, cultural and ecological perspective, is largely absent from the Statute of the Metropolis.



Furthermore, as shown by Ferro and Saleme<sup>107</sup>, even the feasibility and effectiveness of metropolitan management are at stake. This results from the fragmentation of political power, the low cooperation between federative entities, the scarcity and dispute for resources, the absence of normative capacity, among other difficulties for the Brazilian metropolitan model to really work.

Portanto, a grande questão a que se pretende responder aqui é: como superar a fragilidade institucional das regiões metropolitanas se a fragmentação do poder e a complexidade de governar as respectivas regiões fazem parte historicamente do cenário político brasileiro, marcado por uma política bem compartimentada e de difícil integração entre os entes federativos<sup>108</sup>

In short, in Brazil, the *right of the metropolis* – normative dimension – remains far from meeting the demands of the *right to the metropolis* – political-sociological dimension.

Among the main obstacles, there are resistant political practices of isolationism and compartmentalization of the exercise of power, incompatible with its necessary integration in the metropolitan environment. Another obstacle is the absence, at the normative level, of confronting the issues of metropolitan democratic citizenship – an omission that, incidentally, becomes even more serious given the continuous process of Brazilian metropolization, which, it seems, is still unsaturated.

The law is responsible for monitoring geographic movements, and providing society with tools that meet the needs of urban agglomerations. In addition to their own problems, metropolitan dynamics enhance many others inherent to contemporary societies: environmental issues, urban justice. They are all urgent, and all growing, in the face of an expansionist metropolization.

Therefore, as a corollary of the right of the city, the right of the metropolis should not only take care of the functioning of metropolitan structures, but ensure that *fair, efficient and sustainable* metropolises are developed. Metropolises that are for everyone – for their centers and peripheries, omnipresent among Brazilian metropolises – and in which access to quality services, collective spaces and cultural goods is democratized.

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<sup>107</sup> FERRO, R. R.; SALEME, E. R. A fragmentação do poder e a complexidade de governar nas regiões metropolitanas. Cit., p. 15: “There is also a perceived lack of political maturity to deal with the metropolitan phenomenon when the entity with greater financial capacity enters into political conflict for having to contribute with larger investments to deal with certain FPICs to the detriment of the one with less capacity, since that this fact is common in the governance format established by the Statute, by fostering solidarity and cooperation to obtain greater efficiency (OLIVEIRA, 2015, p. 642).” (Free translation)

<sup>108</sup> Therefore, the big question that we intend to answer here is: how to overcome the institutional fragility of metropolitan regions if the fragmentation of power and the complexity of governing the respective regions are historically part of the Brazilian political scenario, marked by a well-compartmentalized and difficult integration between federative entities. (Free translation) Idem, p. 7.

The normative dimension - as a legal projection of major social demands, condensed into a *right to the metropolis* - has a fundamental role to play in this effort. As it turned out, there is still a lot of work to do.

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