



# FAVELA'S<sup>1</sup> INDIVIDUAL AND COLLECTIVE ACCESS TO JUSTICE UNDER THE BRAZILIAN DEMOCRATIC CONSTITUTION: AN OVERVIEW OF 30 YEARS OF INSURGENT PERIPHERAL LITIGATION

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## Abstract

This paper discusses the democratization of the judiciary in Brazil considering its access for people who live in favelas. We used a temporal and spatial analysis of the civil decisions rendered by the Court of Appeals of the State of Rio de Janeiro (TJRJ). The analysis takes two perspectives: (1) the access to justice – whether individually or collectively; and (2) the response of judges to the claims filed. The results suggest a connection between: (1) the increasing access by favela dwellers to the judiciary and the improvement of social development levels; (2) low incidence of collective claims and negligence by judges regarding this kind of claim; (3) lack of consistency between the precedents and the favela reality and social changes over the past few years; and how these findings (4) challenged some academic common-sense beliefs on "access to justice" in Brazil.

## Keywords

Access to Justice, Favela, Rio de Janeiro, Precedents, Court, Judiciary

## 1. Introduction

The Brazilian Federal Constitution (1988), which is a symbol of the country's democratization, extended the list of civil, political, economic, social and cultural rights, besides the so-called third-generation rights (Santos, 2008). Some Brazilian scholars believe that, after the enactment of the Federal Constitution, deep social transformations were about to happen (Verbicaro, 2008). Along with this thought, comes the belief that the judiciary has a preponderant role because democratization is an enacted norm: the Federal Constitution. Therefore, a social, fair State and society would be enhanced by the participation of the judiciary via judicial decisions based on the Constitution. (Faria, 1989b; Santos, 2008). However, the judiciary would only boost the democratization of the country if the courts could be accessed as a service by all citizens on an equally democratic basis. Thus, the democratization of the judiciary would only be conceivable in a context of a democratic society (Santos, 2008). Considering that we are talking about a significantly unequal society, how to conceive this project of social justice democratization through judicial decisions? Recent studies on the subject have found that fewer and fewer victims of rights violations "*would resign themselves to the mourning of exclusion*" (Santos, 2008, pg.10). Urbanized peripheries are increasingly aware of their status as excluded and are increasingly challenging impunity and demanding to be heard in court (Holston, 2008). Santos (2008) states that the expansion of the rights and guarantees provided by the Federal Constitution tends to increase citizens' expectation of having their rights fulfilled, "*in such a way that the deficient or non-existent implementation of social policies can be a reason to resort to the courts*" (Santos, 2008, p.18). As the courts emerge as an alternative to the distribution of rights when the State does not promote them, they assume a new political and social role: the role of distributing rights. (Santos,

<sup>1</sup> Favelas in Brazil are subnormal settlements considered a consequence of unequal income distribution and the housing shortage in the country. Another word used to translate "favela" is slum, but it is not quite the same

2008). Thus, the government's inability to "deal" with the new social demand for rights, now supported by the Federal Constitution, would lead to a certain transfer of attributions from the Executive and Legislative branches of the State to the Judiciary. "Such a move creates great positive expectations in relation to the justice system, hoping it will solve problems that the political system cannot solve". (Santos, 2008, pg. 21). Thus, as people become more aware of their rights, they also resort more frequently to the courts to protect their rights or claim their effective application (Santos, 2008, pg.19). Based on this theoretical discussion, we formulated our hypothesis: If the legitimacy to claim rights is being transferred from the political system to the judiciary, state courts should be increasingly demanded by peripheral individuals and social groups, that is, in the case of Rio de Janeiro, residents of favelas or peripheries. Therefore, our experimental question: "Is the Court of Appeals of the State of Rio de Janeiro (TJRJ) meeting the needs of these claimants by effectively occupying the role of democratic rights guarantor (and social justice maker)?"

## 2. Material & Methods

This investigation was carried out in two axes: (1) collection of historic data about the urban context addressed: the favelas in Rio de Janeiro; (2) collection of civil claims at the Court of Appeals of Rio de Janeiro (TJRJ) related to favelas or their dwellers.

### 2.1. Collection of data about the urban context addressed: the favelas in Rio de Janeiro.

The investigation was performed from two perspectives: (1.1) temporal, studying the history of the favelas in Rio de Janeiro; (1.2) geospatial, contextualizing favelas socio-economic scenario, considering its location in different areas of the city.

#### 2.1.1. Historical study

The genealogy of Rio de Janeiro's favelas was based on secondary sources of information – books and articles. Our focus was to analyze such favelas in a comprehensive way (Santos, 1988; Burgos, 1999; Zaluar & Alvito, 1999; Ribeiro, 2001; Cezar, 2002; Abramo, 2003; Pandolfi & Gryszpan, 2003; Perlman, 2003; Besserman & Cavalliere, 2004; Valladares, 2005; Cavallieri & Lopes, 2006; Moreira, 2006, Baumann, 2009).

#### 2.1.2. Geospatial contextualization

The contemporary context of Rio de Janeiro's favelas was carried out by crossing primary data: comparing the evolution of birth rate and territorial expansion of favelas in different areas of the city. (Cezar, 2002; Abramo, 2003; Pandolfi & Gryszpan, 2003; Perlman, 2003; Besserman & Cavalliere, 2004; Valladares, 2005; Cavallieri & Lopes, 2006; Moreira, 2006; Cavalliere & Lopes, 2008; Cavalcanti, 2009; Vial & Cavallieri, 2009; Dias, 2010; Neri, 2010; Viva-Rio, 2010). The collected data was analyzed considering the different social development indexes in the different areas of the city of Rio de Janeiro. Based on this, we drew a parallel between these different indexes of social development and the corresponding differences in State treatment and civil society claims from favelas in different regions of the city. (Viva-Rio, 2010; Observatório de Favelas, 2010). This step of the research included field observation at Rocinha and Complexo da Maré, favelas situated in South and North Zones of the municipality of Rio de Janeiro. The City Hall of Rio de Janeiro split the municipality into 5 Zones (APs): AP1 – Downtown; AP2 – South Zone; AP3 – Southwest Zone; AP4 – North Zone; AP5 – West Zone. We used the same official territorial division for data analysis in this work.

### 2.2. Collection of claims at TJRJ related to favelas and their dwellers.

This investigation was also carried out in two perspectives: (2.1) investigation of favelas dwellers' access to the TJRJ over time; (2.2) investigation of favelas dwellers' access to the TJRJ in different urban geographic spaces – city zones.

#### 2.2.1. Favela dwellers at court over time

To investigate the access by favelas dwellers to the TJRJ, we searched the civil case law archives<sup>4</sup> available at the court official website from 1980 to 2009. Such period was split in decades for comparative analysis purpose: from 1980 to 1989; from 1990 to 1999; and from 2000 to 2009. The keyword used for this search was: "favela"<sup>5</sup>.

<sup>4</sup> As to civil justice, far beyond than in criminal justice, it is possible to conceive actual or potential search for justice (Santos, 1989). Although there is an even greater number of tried cases in criminal justice featuring the word "favela", in most of them favela dwellers appear as defendants (Lopes, 1989; Santos, 1989).

<sup>5</sup> The word "favela" was chosen rather than the word "comunidade" [community], for the latter entailed countless other tried cases related to a wide variety of communities, among which few were related to favela communities. To better fulfill the purposes of this research, we opted for the keyword "favela" [favela] to collect data about the TJRJ tried cases.

Few reasons underlie the choice of the 1980s to launch our case law research. Besides the fact that the democratization of Brazil and the enactment of the current Constitution took place at that decade, it was also in the late 1980s that the judicial system gained strong prominence in many Latin American countries by receiving, from then on, several financial investments (Santos, 2008). Therefore, many specialists have a positive expectation regarding the 1980s as the decade of distribution of rights and the country's democratization in Brazil. As we started the case law search, however, we found that there is no tried case in the TJRJ featuring the word "*favela*" earlier than the 1980s. Thus, even if we had intended to comprehend a greater period, we would not have found any tried case.

As a method to analyze the material collected from the website, we opted for a quantitative analysis of the heading of judicial decisions and a quali-quantitative<sup>6</sup> analysis of the syllabus of such decisions.

For the quantitative analysis of the headings of the tried cases, the following primary analytical categories were applied: (1) year of appeal, (2) type of appeal, (3) year of the original case from which the appeal unfolds (4) year of the trial of the appeal, and (5) the appellate judge who tried the appeal. Also, the following item in the syllabus of the tried cases was considered: (6) if the decision mentions articles of the Federal Constitution to justify the verdict.

In addition to these primary analytical categories, we created a secondary category: "length of the case". For so, we calculated how long the claims lasted from the year of the initial action filing (item "3") until the year of the appeal trial (item "4").

For the quali-quantitative analysis of the syllabus of the tried cases, we used the following categories<sup>7</sup>: (1) plaintiff in the original claim; (2) defendant in the original claim; (3) claim scope – whether of individual or collective nature; (4) location where the event under discussion in Court took place – whether it was within the favela or outside; (5) the type of action of the original claim<sup>8</sup>; (6) the legal subject-matter – that is, the good legally protected in the claim; (7) the material subject-matter<sup>9</sup> – the real world interests at stake in the claim, beyond the legally protected interests; (8) the kind of argument used by the TJRJ to substantiate the verdict – whether exclusively legal or political and social as well; and (9) the presence or not of judicial activism in the decision.

In the law case search, from 1980 to 2009, we found 171 records of judicial decisions by the TJRJ containing in their syllabus the word "*favela*". From that sample, we filtered only judicial decisions effectively addressing the social phenomenon of favelas in Rio de Janeiro or representing claims from favela dwellers. From 171 syllabuses of decisions, we eliminated 18 tried cases. In the remaining 153 syllabuses, three tried cases were found to appear twice and were then excluded. Based on that screening, the sample shifted from 171 to 150 records of judicial decisions<sup>10</sup>.

The 150 tried cases were divided in three groups, "the 1980s" (from 1980 to 1989); "the 1990s" (from 1990 to 1999) and "the 2000s" (from 2000 to 2009). It took into consideration the filing year of the initial claim that gave rise to the appeal tried by the TJRJ.

In a supplementary way, we used qualitative research tools, such as interviews and observation forms. The interviews were carried out from semi-structured questionnaires applied to lawyers and other independent professionals members of RENAP (*Rede de Advogados Populares/Grassroots Lawyers Network*) in face-to-face conversations. Altogether, three grassroot lawyers and a historian who have acted in RENAP were interviewed. The observations *in loco* took place in the Complexo da Maré (favela) and Rocinha (favela) along the year 2010.

### **2.2.2. Differences in favela access to court in the different urban city spaces.**

This analysis considers differences in access to the TJRJ in favelas in different areas of the city of Rio de Janeiro. For so, we analyzed the three largest favelas (in area), the three most populated favelas, and the three oldest favelas in the city in each of the five municipal areas of planning - AP1: Downtown; AP2: South Zone; AP3:

<sup>6</sup> "The first one acts in reality levels, in which the data are presented to the senses (...). The second one works with values, beliefs, representations, habits, actions, and opinions. The first one (...) aims to shed light to data, indicators, and noticeable trends (...). The second one, (...) to deepen the complexity of phenomena, facts and particular specific group processes (...)." (Minayo & Sanches, 1993, pg.05)

<sup>7</sup> It is worth highlighting that the pieces of information collected in this analysis, rather than being objective and uncontroversial as those listed in the quantitative analysis of the headings of the tried cases, result from the researchers' interpretation of the syllabuses of the judicial decisions.

<sup>8</sup> It was not possible to access the name of the action on the lower court for each of the appeals analyzed in our sampling. The information was estimated from the interpretation of the syllabuses of the cases under analysis tried by the TJRJ, rather than from information provided by the TJRJ.

<sup>9</sup> A judicial action having as its legal subject-matter a contractual relationship, in the real world, may aim to deliver essential public service, such as electricity and water. To identify the interest of real world demands, we created an analytical category "material subject-matter".

<sup>10</sup> Our sampling is composed of tried cases that were collected through research at the TJRJ website in the year 2010. This sampling may, therefore, undergo changes in the short or long run at the rate that the appeals lodged before the TJRJ over the last three decades are tried after the survey's date.

North Zone; AP4: Southwest Zone; AP5: West Zone<sup>11</sup>. From them, we selected the three largest favelas in area, as it was the most updated available measurement<sup>12</sup>. Besides, the three largest favelas in area, in 2008, correspond to those which, according to the latest census by IBGE, were also the most populated. Finally, most of the selected favelas comprise the older settlements in their respective areas of planning (APs).

Upon the name of each of those communities<sup>13</sup>, we researched again for precedents in the TJRJ website. The criteria used in this search were the same as those used in item “2.1”<sup>14</sup>. The main results obtained from this research are presented and discussed here.

### 3. Some results about the context of the study: Rio de Janeiro’s favelas

The historical analysis of the favelas in Rio de Janeiro suggests a complex reality: fluid and pervaded by ambiguities and shocks of perceptions. Among the most catching facets of this history, we highlight the following: (1) favela dwellers’ resilience; (2) consolidation of favelas as a social fact (1980s); (3) a decade when favelas become trendy (1990s); (4) belated governmental concern with data collection (1940s and 1950s); (5) “misinforming” media; (6) construction of a dichotomous view on the favelas and the city.

The favelas survived all attempts of extermination undertaken against them throughout the century. In the 1980s, the idea that they were a social disease to be eradicated no longer fitted the political speeches. Favelas were not just another urbanistic episode, but a consolidated social fact – made of masonry – in the city of Rio de Janeiro (Cavalcanti, 2009). Their incorporation to the formal city has been, ever since, a challenge to all governments. Rio de Janeiro’s favelas, which are over a century old, have been in full expansion in certain areas of the city (Cezar, 2002).

Shortly after their consolidation, in the 1990s, favelas become trendy. However, such popularity does not feature as result of a 100-year history struggling for survival, but the degeneration of values and violence arising from crime. Either nationwide – via TV and newspapers – or worldwide – via movie screens –, the violence and unlawfulness in the favelas have gained vast publicity bearing fetishism (Baumann, 2009). Most likely due to a (mis)informing media combined with lack of data about favelas and their dimensions in the city. The first favela was already 50 years old when the decision of running a specific census was finally made by the municipality (Valladares, 2005, pg. 62). The first censuses in 1940s and 1950s bore conflicting and inaccurate data to be corrected over the following decades, upon new research, still in process, to diagnose the evolution of favelas in Rio de Janeiro. The delay and insufficiency of data production along with massive, alarming speculations by the media, are the perfect combination to build fanciful, unrealistic perspectives of these peripheries: the perception of Rio de Janeiro as a “split city” – a city divided in two (Ventura, 1994).

Should we address the social urban framework of Rio de Janeiro’s favelas in such dichotomous terms? Different favelas in different areas of the city have diversified realities that cannot be generalized. Rio de Janeiro’s favelas are not a uniform reality over the city (Cavalcanti, 2009). Firstly, by observing the social development index (SDI) map of Rio de Janeiro city (Cavallieri & Lopes, 2008), we note that the lowest rates of social development are in planning areas AP4 and AP5 (Southwest and West Zones), whereas the best scores are concentrated in the South Zone (AP2). In red circles, two areas are highlighted for comparison: the major circle singles out a large region of the West Zone (AP5); and the smaller circle portrays a small region corresponding to the area of two big favelas in the South Zone (AP2), i.e., Rocinha and Vidigal. It is possible to notice that, in extreme cases as this one, there are better SDI rates in favelas in the South Zone (AP2) than in the formally constituted city in the West Zone (AP5). Such reality is explicit in housing rent rates. In 2010, living in the formal city in Santa Cruz, in the West Zone (AP5), was cheaper (BRL 200,00) than living in Rocinha favela (BRL 700,00), located in the highest SDI Zone of the city (South Zone - AP2).

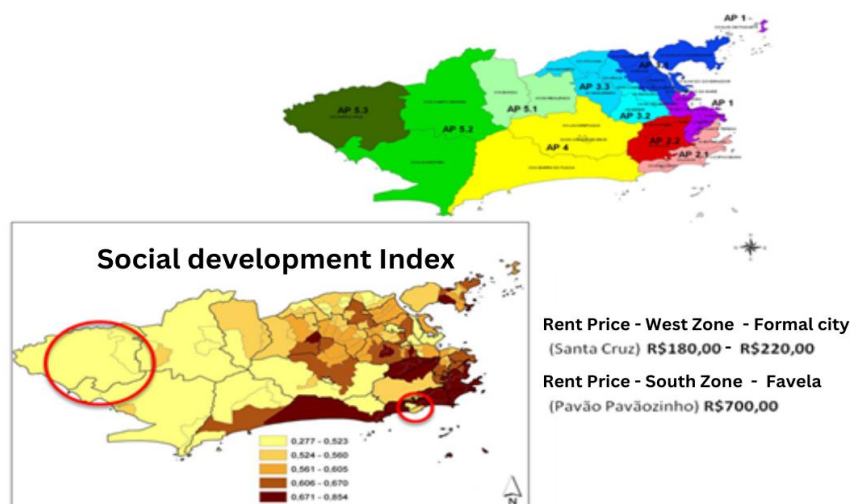
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<sup>11</sup> The research was carried out from information provided by the database “Registration of Low Income Urban Settlements”, named “SABREN” [*Sistema de Assentamentos de Baixa Renda*, in English, System of Low Income Settlements], a highly complex and updated system about the Rio de Janeiro’s favelas.

<sup>12</sup> The information about the favela vegetative growth was last updated in 2000, year of the last census published to date. The favela area and their expansion were updated in the SABREN system based on satellite photography up to 2008, latest available datum.

<sup>13</sup> As written in the SABREN system.

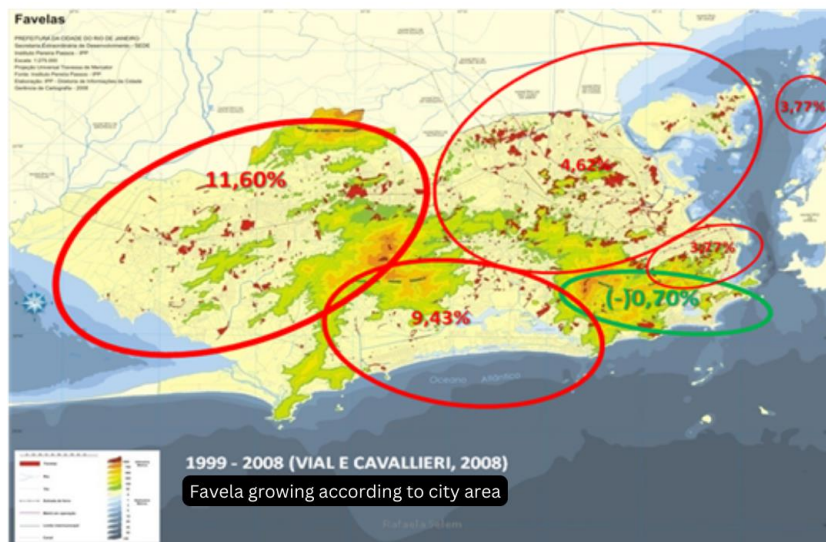
<sup>14</sup> The only difference in this search was the keyword used to find the tried cases. Here we used the name of each favela selected for the study (table 1; table 2; table 3; table 4; table 5). The tried cases were also filtered. See more details at Moreira (2011).



**Image 1 – Comparative analysis of two maps of the city of Rio de Janeiro as it was published by the Institute Pereira Passos: above, on the right, the map of the distribution of the city in 5 municipal areas of planning AP1: Downtown; AP2: South Zone; AP3: North Zone; AP4: Southwest Zone; AP5: West Zone; below, on the left, the map of social development indexes of the city: our emphasis on the second map to enhance and analyze the different areas of the city.**

Favela growth is also affected by such variation of city zone and corresponding Social Development rate. Overall, in 2000, favela growth compared to the formally constituted city growth was of 6 new individuals in the favela for each 1 new individual in the formal city (Moreira, 2007). During the same period, while the population in the South Zone favelas (AP2) and those in Downtown (AP1) decreased, the population in the North Zone favelas (AP3) grew modestly, and the population in the West Zone favelas (AP4 and AP5) grew at full speed (Moreira, 2011). The latest data about favela expansion in area, obtained through airborne photography, shows that there has been a change over the last decade: while the South Zone favelas (AP2) decrease, the favelas in Downtown (AP1) and North Zone (AP3) grow, and those in the West Zone (AP4 and AP5) experience a boom.

The data above suggests correlation of growth and the SDI rates: in areas with lower SDI rates, favela



**Figure 2 – Map of the favelas in the city of Rio de Janeiro in 2008, as it was released by the Institute Pereira Passos, with highlights in red and green with numbers indicating the rates of favela growth in the city in square meters, in the five areas of municipal planning according to research by VIAL & CAVALLIERRI (2008). AP1 (Downtown) = 3.77%; AP2 (South Zone) = -10.70%; AP3 (North Zone) = 4.62%; AP4 (Southwest Zone) = 9.43%; AP5 (West Zone) = 11.60%;**

growth is higher. Besides, as to public investments, attention from the media and non-governmental organizations (NGOs), in the city of Rio de Janeiro, the focus is the South Zone (AP2): the city's postcard to Brazil and the world (Moreira, 2011). Knowing and understanding such dynamic reality may be the first step to effectively meet society's claims, sew the disharmony in the social tissue, and distribute rights with equity.

In spite of all flaws, throughout the history of the city, never has the State been so undeniably present in the favelas as nowadays. *Favela-Bairro*, *PAC*, *UPPs* and *UPP Social* are some of the ongoing governmental programs aiming to incorporate the favelas to formal city and its public services. Whether the incorporation to the formal city materializes the democratization of access to rights is our core question; and it is questionable, considering the SDI of the formal city in the West Zone (AP5).

The growing of favelas represents the growing of social conflicts. Next, we proceed with our investigation toward the Judiciary Branch through the analysis of the TJRJ's performance upon the claims involving Rio de Janeiro's favela dwellers.

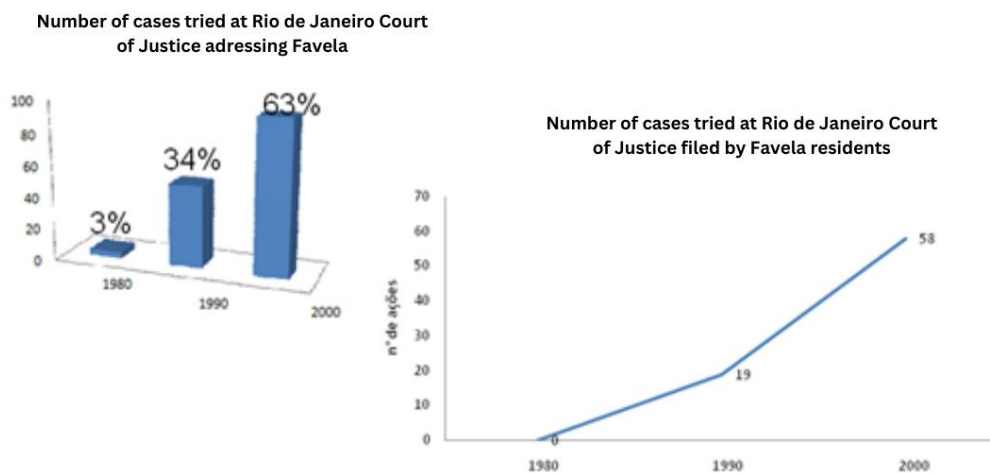
#### 4. Some findings from favela law cases in the TJRJ

##### 4.1. Individual claims by favela dwellers

The incidence of claims discussing the favelas or filed by favela dwellers has been increasing significantly over the last years.

What strikes about this group of tried cases from actions filed in the 1980s (3%) is that none of them were filed by favela dwellers. The plaintiffs in those claims are property owners in the formal city who feared for devaluation of their assets due to the irregular settlements. Those owners were standing against the State and claiming in court for not only compensations for their losses, but also measures to remove those favelas. Therefore, in the 1980s, all the claims were filed against the State.

In the course of time, the profile of those actions' plaintiffs begins to change. In the 1990s, there were an



**Figure 3 – This illustration is composed of two graphics from research done by Moreira (2011). The graphic on the left, in columns, shows the number of tried cases from the law cases archives of the TJRJ, between 1980 and 2009, which address favelas and/or were filed by favela dwellers (1980 = actions filed between 1980-1989; 1990 = actions filed between 1990-1999; 2000 = actions filed between 2000-2009). The line graphic on the right extracts from the graphic on the left only the claims filed by favela dwellers and rereads the data, portraying the number of claims found for the same periods.**

increasing number of plaintiffs who were favela dwellers<sup>15</sup>. This number becomes even more significant over the 2000's.

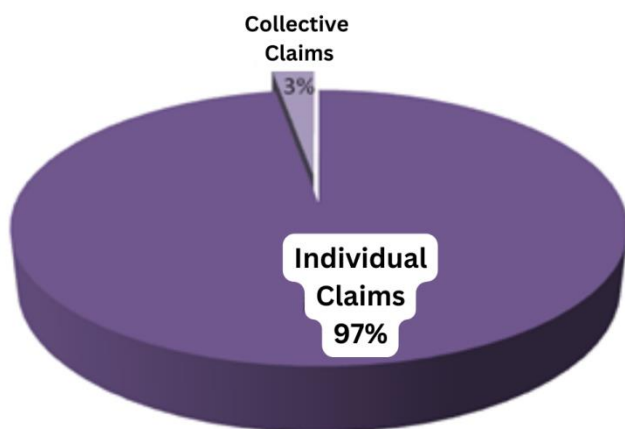
##### 4.2. Judicial collective claims related to Rio de Janeiro's favelas: really?

Collective claims are Public-Interest Civil Action and Class Actions filed by the parties set forth by law<sup>16</sup> with the purpose also defined in law<sup>17</sup> to protect

<sup>15</sup> The first action found filed by a favela dweller dates from 1993. It is a claim filed by a favela dweller versus another favela dweller, an ex-husband and an ex-wife who, in the middle of their divorce, were arguing about the value of an estate built by both in the favela where they used to live. As most of the estates built in a favela, this one was an irregular construction and according to the "proper law" did not have commercial value. The judge who tried the claim in the lower court, out of respect for the positive law and "public order", did not mention the division of the estate considering it economically worthless and, therefore, legally inexistent in the formal world. The claims surprisingly reaches the Court of Appeals which stands to face the provocation: it understands that the estate in the favela does have economic value and determines that the judge in the lower court proceed to the division of the good. In spite of the innovation brought by the case to the legal world, it is relevant to ponder that different understandings were manifested by other Appellate Judges of the TJRJ in similar cases over the 3 decades analyzed. An example of this is the decision rendered in 2008 by the Seventh Civil Chamber, in which Appellate Judge Maria Henriqueta Lobo adheres to the understanding that the estate in the favela does not have commercial value. It was the decision rendered on June 04, 2008, in Interlocutory Appeal, Case No. 0015054-26.2008.8.19.0000 (2008.002.06554), with the following syllabus: "Interlocutory Appeal. Enforcement of judicial instrument. Levy of the real estate. Request of replacement of the levied good. Dismissal. No creditor's consent. Estate property offered by the judgment debtor to replace the one ingrown in a favela, deprived of value in the real estate market. It is lawful for the creditor to refuse goods offered to be levied that prove to be difficult to sell, as the enforcement is in their interests, rather than in the debtor's interests. Absence, also, of evidence in the records of the competent real estate register of the real estate offered by the judgment debtor. Dismissal of appeal." (emphasis added).

<sup>16</sup> Article 5 of Law 11.448/07.

<sup>17</sup> Article 1 of Law 7.347/85

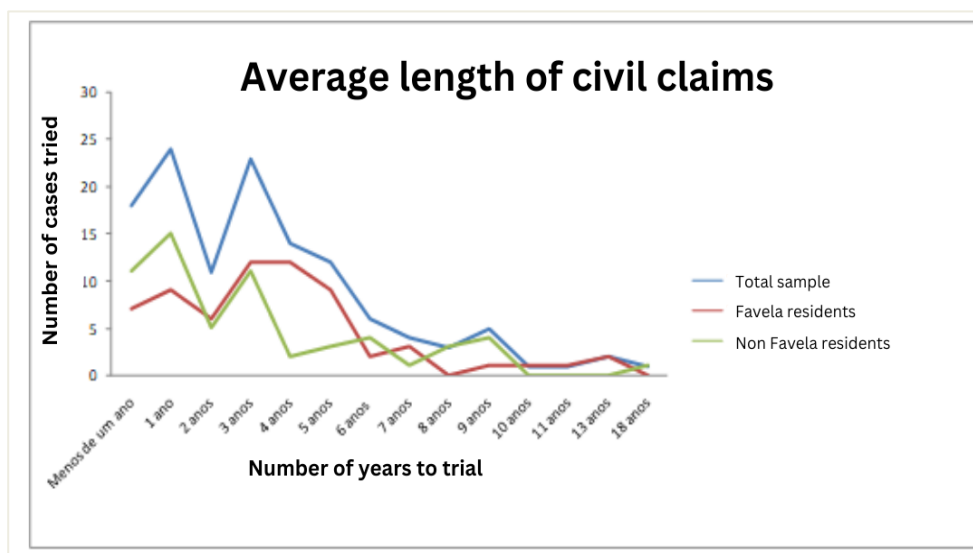


**Figure 2 - Percentage of individual and collective claims found in the civil case law archive in the TJRJ in research carried out using keyword “favela” comprehending the period of 1980 to 2009.**

social groups are not leading actors in judicial actions of a collective nature. In most cases, such groups feature as defendants and seek the help of grassroots lawyers for their defense. On the other hand, all the accounts reported that many claims of a collective nature are suspended in the lower court due to – in the interviewees’ words – “judges’ shyness to render decisions of the kind”, that is, decisions of an administrative nature which may generate public policies, especially when addressing land issues and other polemic property rights disputes. Such pieces of information, which are not new and were also recorded by other specialists (Falcão, 1989; Junqueira, 1996, Holston, 2008), possibly point to the real reasons for the last decade not providing any records of Class Actions related to favelas in Rio de Janeiro.

#### 4.3. Length of time of litigations

To investigate the length in our sample, we discarded all interlocutory appeals: Interlocutory Appeals and Motions to Stay Execution. All the remaining appeals submitted to the TJRJ – Appeals and Motions for Rehearing –, as well as actions under the original jurisdiction of the TJRJ – Writ of Mandamus and Habeas Corpus – and their respective trial year were considered in forming this sampling, conceived exclusively to calculate the average length of these judicial claims before the TJRJ. Based on these criteria, we found the following scenario:



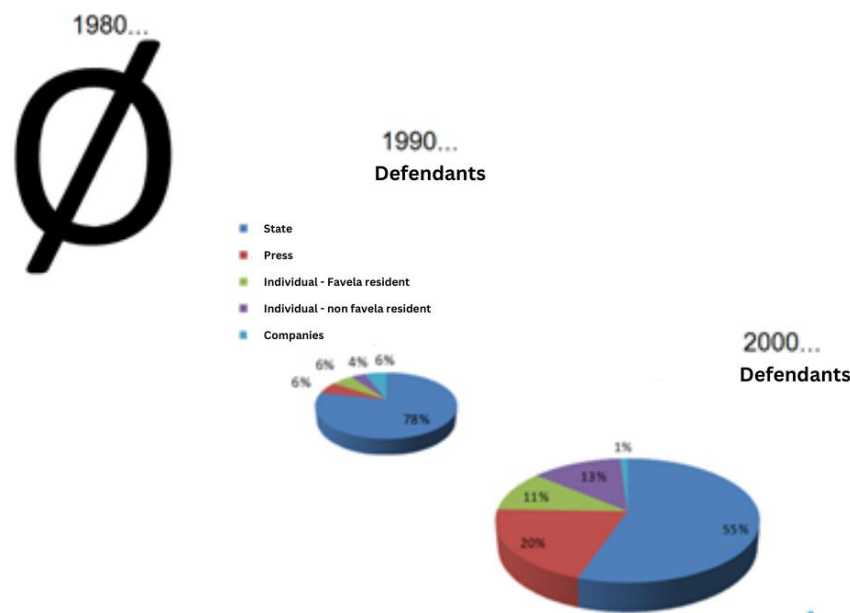
**Figure 5 – Length of civil claims filtered in the precedents archive of the TJRJ upon the keyword “favela” from 1980 to 2009. The chart shows a comparative analysis framework in three lines: one representing the overview of claims; the other, the claims by favela dwellers; and, lastly, a third line representing the claims by the formally constituted city dwellers.**

<sup>18</sup> This net is formed by institutions specialized in collective claims involving rural land conflicts, having had their practice enhanced over the last years to comprehend urban scenarios with a collective bias. In the city of Rio de Janeiro, “Mariana Criola” Center, linked to RENAP, was founded in 2007.

We found that, in the overview (blue line), the claims related to Rio de Janeiro's favelas depict, in the period taken for study, two clearly defined peaks: first, claims lasting from one to two years; second, claims lasting from three to four years. This phenomenon may be better clarified when we analyze it separating claims filed by favela dwellers and claims filed by non-favela dwellers. As shown, for people who do not live in favelas (green line), most of the filed claims have an average length of one year, directly influencing the peak of one year observed in the general trend line (blue line). In turn, the length of the claims filed by favela dwellers (red line) is different, with the highest peak corresponding to claims lasting from three to four years, thus directly influencing the second peak also in the blue line. In other words, while the claims filed by favela dwellers tend to take longer, from three to four years, the claims by dwellers in the formal city, property owners, last on average one year. Such phenomenon may be related to the fact that favela dwellers, in general, cannot afford to hire a private attorney. Most times, favela dwellers are assisted by pro-bono attorneys who volunteer in community projects, or by public defenders. The lack of proportion between the number of the available defenders and the number of people they assist<sup>19</sup> may be a possible reason for the difference between the length of time of claims filed by favela dwellers and the length of time of claims filed by property owners out of favelas.

#### 4.4. The profile of claims over the years: what do favela dwellers expect of the courts?

Over the years, there was not only an increase in the quantitative number of claims filed by favela dwellers (Figure 3), but also a qualitative leap in the content of those claims.



**Figure 6 – This figure, extracted from a study by Moreira (2011), shows in a comparative way for 10-year periods (1980 = 1980 until 1989; 1990 = 1990 until 1999; 2000 = 2000 until 2009) those who feature as defendants in claims filed by favela dwellers in the TJRJ from 1980 to 2009. The 1980s do not show any claims by favela dwellers, shown on the left by the null sign.**

As illustrated in Figure 6, in the 1980s (from 1980 to 1989), there was no claim filed by favela dwellers in the case law archive of the TJRJ. In the 1990s (from 1990 to 1999), these claims begin to appear primarily versus the State, on account of threats to their lives and physical integrity resulting either from public urbanization projects or stray bullets in clashes between the police and drug dealers. In the 2000s (from 2000 to 2009), there was an increase in claims filed by favela dwellers, as well as in the scope of those sued by favela dwellers. Favela dwellers now, besides seeking the judiciary to protect their lives and physical integrity, appear as discontented consumers in regard to service delivery, namely, utility company services for electricity, telephone, cable TV, gas, among others. In recent years, there are few claims by favela dwellers versus other favela dwellers. Such disputes would not be conceivable some time ago, as issues between favela dwellers have been traditionally resolved within the very community (Strozenberg, 2001; Santos, 1988; Santos 1989a; Moreira, 2006; Moreira, 2007).

<sup>19</sup> According to data from Brazilian Justice Council (CNJ), in 2006, the Brazilian population had 1.48 public defenders for each 100,000 inhabitants (ANADEP, 2008). In the city of Rio de Janeiro, in 2008, for 6,161,047 inhabitants, there were 634 public defenders (ANADEP, 2008), one public defender for each 9,717.73 inhabitants.



#### **4.5. As for the judges, what have been their stance regarding these claims?**

Over the 1980s, claims related to favelas were scarce in the TJRJ and the few existing claims had been filed by non-favela dwellers. These property owners were suffering losses due to the devaluation caused by favelas in the surroundings. Some of these claims requested pecuniary compensation; others, however, requested the removal of favelas. At that time, in the 1980s, the appellate judges of the TJRJ avoided making decisions. The court knew that decisions of such level would directly interfere with municipal management. A court order to the government to remove favelas would substantiate a political and administrative decision, which pertained to the Executive Branch. In the 1980s, therefore, the appellate judges of the court would rather not interfere.

In the 1990s, the scenario in the favelas changed again – unfortunately, for worse: the lack of resources and the violence powered by the increasingly armed drug trafficking, community organizations and local leaders become frail and fragmented. Many conflicts, which used to be resolved within community organizations (Santos, 1988; Moreira, 2006), begin to rely less and less on public community spaces legitimated for so. Leaderships in charge of forwarding the conflicts within favelas became increasingly scarce, expelled, killed or corrupted in the war against (and for) the drug trafficking. At that time, in the mid-1990s, favela dwellers started filing claims before the TJRJ, as observed. These first claims were related to accidents involving urbanization projects and stray bullets in the war between police officers and drug dealers.

The number of claims related to Rio de Janeiro's favelas throughout the 1990s increases and the judges change their stance. They start to take a position as to favela social issues and policies. Over the 1990s, then, the TJRJ begins to render decisions in polemic cases demanding a political stance in respect to governmental measures. As “little strokes fell great oaks”, the court finally begins to issue political understandings about favelas. In the 1990s, the judges exposed their political opinions and also performed social analyses in favela-related claims. Some creative decisions were found, in which the judges actively innovated as to the current legal order, extrapolating the legal provision on behalf of a social or politically effective or social just decision. Accordingly, the judicial activism<sup>20</sup> found in some judicial decisions throughout the 1990s expresses a pro-active posture of judges so as to expansively construe the Constitution, beyond the limitations of the infra-constitutional legislation, enhancing the meaning and range of constitutional rules. (Barroso, 2008).

Before we draw a conclusion of any kind about the judges' social engagement, it is necessary to know such political stance and investigate its coherence with the social reality it concerns. In a small portion of the decisions analyzed over the 1990s (6%), the understanding was that the government was negligent and did not fulfil its duties to avoid irregular settlements. Hence, judges took the political stance that favelas should be removed. So that judicial decisions are efficient and politically feasible, their content must be grounded on the social reality. Otherwise, the conflict between judicial decisions and unfeasible enforcement results in ineffectiveness and disbelief in judicial institutions. In this sense, in the 1990s, decisions that determined the removal of consolidated favelas were clearly against the history. Favelas were already a consolidated social fact at that time and all public policies undertaken were on behalf of the urbanization of those areas and enhancement of their dignity. Despite that kind of decision, still in the 1990s, in many other decisions, the court fared well. There were cases in which the judges went up the favelas to inspect the site of conflicts between neighbors and many others in which the judges considered local, social, cultural values to beacon their decisions in claims filed by favela dwellers (Moreira 2011). In the 2000s, claims filed by favela dwellers multiplied. Similar claims to those filed in the two earlier decades – with favela removal requests – mingled in court with a much greater number of claims which brought for the judges the perspective of those communities' dweller. It seemed that the court had then adjusted its lenses and sharpened its understanding with the temporality of favelas in the city's reality. Coherence between judicial decisions and social reality becomes more visible. At the rate that actions related objectively or subjectively to favelas multiply, the judges seem to become more familiar with that social reality and its conflicts<sup>21</sup>. While, in the 1980s, the TJRJ's position was one of avoiding decisions likely to interfere with governmental management and, in the 1990s, such position is replaced by an active stance, though initially disconnected from the historical social context, in the 2000s, the TJRJ seems to seek more pertinent decisions, more attuned with reality, heading to a middle way between stagnation and activism. This may be observed especially through the analysis of legal, social, and political arguments which the judges used to substantiate their decisions over these three decades (Moreira, 2011).

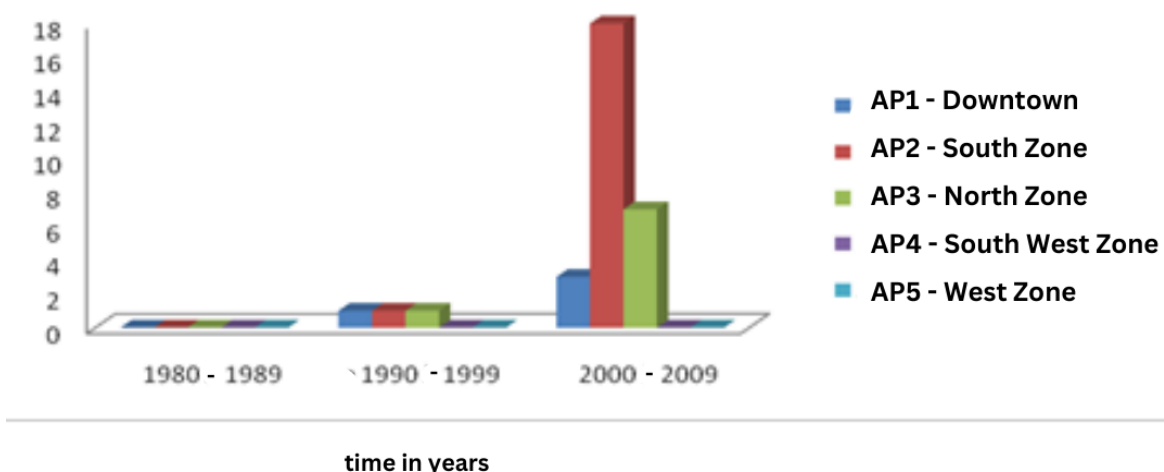
#### **4.6. Favela access to the judiciary in different urban spaces: a matter of social development?**

The quantity and quality of favela claims before the TJRJ varied over 30 years, not only in relation to time, but also to different municipalities in the city.

<sup>20</sup> The term judicial activism is understood here differently from “judicialization” in politics (Barroso, 2008). The discussion about judicial activism and political judicialization is vast. To find out more about this discussion, see Vianna, 1999; Barroso, 2008; Cittadino, 2004.

<sup>21</sup> Judicial decisions, from the mid-1990s to the end of the last decade, reveal the greater knowledge of Rio de Janeiro's favelas by judges. For further comments on the evolution of TJRJ decisions in this regard, see Moreira, 2011.

## Number of legal claims comparing City Areas



**Figure 7 – Comparative analysis of the incidence of civil claims in the TJRJ over time – from 1980 to 2009 – related to the three major communities (in square meters) in 2008, according to the SABREN system, using the name of those favelas as keywords in the law cases archive of the TJRJ.**

The graphic above (Figure 7) shows that, in the 1980s, there was no claim filed by those communities in the TJRJ, as previously mentioned (Figures 3 and 4). In the 1990s, however, some claims are found in areas of planning AP1 (City Center), AP2 (South Zone) and AP3 (North Zone). These claims do not occur uniformly in all the municipal zones. For the favelas in Southwest Zone (AP4), as well as those in the remaining areas in the West Zone (AP5), there is no record of claim filed during the 1990s in our sampling. In the 2000s, such context changes. Claims filed by favelas in the city’s South Zone (AP2) rise at a considerably greater rate than those filed by favelas in the other regions. The North Zone (AP3) appears in second in the rank of favela-filed claims, followed by Downtown Zone (AP1), whose growth is observed to be more restrained<sup>22</sup>. There is, therefore, an asymmetric growth in favela dwellers seeking the judiciary among the different areas of Rio de Janeiro. How can such asymmetry be explained? Besides thinking of the different social development indexes presented in Figure 01, another possible reasoning would be the decentralization of the court toward the South Zone (AP2), which could facilitate the access by favela dwellers in that region to a local office of TJRJ court. Aiming efficiency in providing justice and facilitating the



**Figure 8 – Map of the city of Rio de Janeiro indicating the areas of planning (APs) as published by the IPP (Pereira Passos Institute) in 2010, with the symbol of Justice marking the neighborhoods where the TJRJ’s regional courthouses are located.**

<sup>22</sup> It is noted that the evolving number of claims observed over the last ten years in the different urban spaces seems to be coherent with the general framework of claims related to Rio de Janeiro’s favelas throughout time, with emphasis on their recent boom.

access to the judiciary, the TJRJ, based in Downtown (AP1), decentralized its activities, spreading over the city via regional courthouses<sup>23</sup>.

The purpose of the regional courthouses<sup>24</sup> is to bring the judiciary closer to citizens in different areas of the city, even if quite away from the AP1 Downtown, where the central courthouse is located, thus facilitating the access to justice through the state judiciary. (ORGANIZAÇÃO, [200-?]).

However, as shown in Figure 08, the TJRJ does not provide regional courthouses in the South Zone, which is assisted by the central courthouse. How could we explain the fact that favelas in the South Zone still have shown, according to data in this research, easier access to the judiciary?

We may think, at first, that these regional courthouses are an innovation in the city, compared to the central courthouse, and would still be in the process of being assimilated by the population, who quite often sees the central courthouse as a reference for the local office of the judiciary. This may help us explain the fact that, although there are many regional courthouses in Rio de Janeiro's West Zone, claims filed by favelas in that region are not found in the TJRJ.

This reality seems to point to the fact that variables, such as social development, public investment in infrastructure and basic services, existence of non-governmental organizations and public policies of favelas, may influence the dynamics of rights claiming in a more direct way than the geographical decentralization of the court.

### 5. Final considerations about this study

The variables affecting favela access to social justice via rights claiming in courts were here analyzed considering time, geographic urban zone, individual and collective relevance, as well as the position of the TJRJ's judges in their decisions. On one hand, the favela access to the judiciary in time and space; on the other, the response of the judges. Among the abundant data and analyses brought to surface by this study, some aspects deserve special attention: (1) relation between the volume of individual claims and the social development indexes; (2) frequency of collective claims, from high expectations to hollow court decisions; (3) initial lack of coherence between social reality and the stances taken by the judges and its adjustments over time.

Since the 1980s and, more clearly, over the 2000s, it is noticeable that the governments are getting closer to favelas and peripheries, in a nonuniform way, benefiting – specially favelas with higher visibility and located in higher social development city zones – from projects and public investments. Ever since, the Judiciary Branch has been increasingly called to make the State comply with its obligations, by means of an efficient public administration capable of distributing rights concerning people's lives and physical integrity, as well as basic services delivering. All this is unprecedented and reveals real transformations in our urban scenario towards democratization of society. Nonetheless the difficulties, favela dwellers have been seeking more and more the judiciary to resolve their conflicts, more recently even those related to neighbors and relatives. Given this context, the judiciary holds major responsibility as a branch of the State and public sphere capable of mediating expectations between the citizens and the public administration. We consider access to the judiciary one of the permanent routes for enhancing citizenship and justice. Accordingly, the efficiency of judicial decisions is a core contribution to democratization in our society. More and more the judiciary has been playing its role in the political scenario. However, as noted, such movement must be well aligned with social, political, economic, and cultural transformations that take place outside the courts. Maybe training programs for judges can be better explored to this end.

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<sup>23</sup> We did not include in this analysis the Small-Claim Courts, since the tried cases studied herein are part of the civil case law archive of the TJRJ and do not derive from actions processed before the Small-Claim Courts.

<sup>24</sup> The Judiciary Branch of the State of Rio de Janeiro is governed, as to its management and functioning by the Code of Judiciary Organization and Division of the State of Rio de Janeiro (CODJERJ). In the city of Rio de Janeiro, there is the Judicial District of the Capital City, composed of the central courthouse and ten regional courthouses spread over the city according to the graphic in Figure 8.

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