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PARKS AND NON-EXPROPRIATED PROPERTIES: A PROPOSAL FOR THE PRACTICE OF TEMPORARY AND LOW IMPACT ACTIVITIES

OS PARQUES E OS IMÓVEIS NÃO DESAPROPRIADOS: UMA PROPOSTA PARA A PRÁTICA DE ATIVIDADES TEMPORÁRIAS E DE BAIXO IMPACTO

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Abstract: This article intends to analyze the situation in which the administration issues a public utility decree for the creation of an integral protection conservation unit, a park, covering private properties. The issue of the mentioned decree entails a series of limitations on the property rights of its holders. It happens that the effective implantation of the park does not happen and the decree of public utility has expired. In spite of this, the owners of the affected properties are required to respect the environmental protection standards relating to the park, which are extremely restrictive. It is discussed in the text whether, in these cases, authorization by the public authority for the exercise of temporary and low-impact activities in the park would be possible, until the property is effectively expropriated and the compensation paid. The STJ's jurisprudence on indirect expropriation, the applicable legal provisions are analyzed and interests are weighed in the hypothesis, having as a guiding principle the principle of proportionality.

Keywords: Park, Public utility, Integral protection conservation unit, Expropriation, Exercise of temporary activities.

Resumo: O presente artigo pretende analisar a situação na qual a administração edita decreto de utilidade pública para a criação de uma unidade de conservação de proteção integral, um parque, abrangendo imóveis privados. A edição do referido decreto acarreta uma série de limitações ao direito de propriedade de seus titulares. Ocorre que a efetiva implantação do parque não acontece e tem-se a caducidade do decreto de utilidade pública. Apesar disso, exige-se que os proprietários dos imóveis atingidos respeitem as normas de proteção ambiental relativas ao parque, que são extremamente restritivas. Discute-se no texto se, nesses casos, seria possível a autorização pelo poder público para o exercício de atividades temporárias e de baixo impacto no parque, até que seja o imóvel efetivamente desapropriado e a indenização paga. Analisa-se a jurisprudência do STJ sobre desapropriação indireta, os dispositivos legais aplicáveis e procede-se a uma ponderação de interesses na hipótese, tendo como fio condutor o princípio da proporcionalidade.

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Palavras-chave: Parque, Utilidade pública, Unidade de conservação de proteção integral, Desapropriação, Exercício de atividades temporárias.

1. INTRODUCTION

With some frequency, the following situation occurs. The Administration issues a public utility decree for the creation of an integral protection conservation unit, usually a park, covering private properties. The issue of the aforementioned decree entails a series of limitations on the property rights of its holders. It happens that the effective implantation of the park does not happen and the decree of public utility has expired. Despite this, the owners of the affected properties are required to respect the environmental protection standards relating to the park, which are extremely restrictive.

To make matters worse, the jurisprudence has not recognized the occurrence of indirect expropriation of the properties affected by the decree of public utility, without the effective administrative possession of the property. The situation causes perplexity due to the emptying of the economic content of the property, without the payment of the just and previous indemnity.

The present work intends to analyze if, in these cases, it would be possible the authorization by the Public Power to exercise temporary and low impact activities in the park, until the property is effectively expropriated and the compensation paid. We analyzed the STJ's jurisprudence on indirect expropriation, the applicable legal provisions and weighed the hypotheses, based on the principle of proportionality.

2) TENSIONS BETWEEN THE ENVIRONMENT AND PRIVATE PROPERTY: SOME NOTES

For the development of this work, it is necessary, first, to establish some important premises about the eventual conflict between the protection of the environment and the right of property. This is done through three basic premises.

The first. Contemporary property law is not strictly aimed at protecting the interests of the owner. In fact, in obedience to the command of the Constitution of the Federative Republic of Brazil ('CRFB'), the interests of the owner must coexist with the socio-environmental functionalization[2][3] of his private property[4]. Thus, as long as the essential core of

[2] According to Gustavo Tepedino and Anderson Schreiber, "*the functionalization of the property is the introduction of a criterion for the valuation of the ownership itself, which starts to demand positive actions from its owner, in order to adapt to the task expected of him in society*" (TEPEDINO, Gustavo; SCHREIBER, Anderson. Função social da propriedade e legalidade constitucional: anotações à decisão proferida pelo Tribunal de Justiça do Rio Grande do Sul (AI 598.360.402 – São Luiz Gonzaga). *Revista Direito, Estado e Sociedade*, v. 9, n. 17, p. 41-57, ago./dez. 2000, p. 48.).

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property rights is not violated, there would be no question of an illegal act when the Administration intervenes in private property, with a view to fulfilling its social function.

The second. There is no a priori supremacy of the environment over property rights[5]. Thus, eventual conflicts must be resolved according to the peculiarities of the specific case, through the weighing of interests[6] and the adoption of the principle of proportionality[7] as the guiding thread of the balancing operation. The logic here is that even the most noble public interests cannot serve as a safe-conduct for unreasonable state actions and that simply disregard the legitimate interests of the administered.

The third. Considering the constitutionalization process of administrative law[8], the Public Administration's action is not limited to pure observance of the law[9], but rather has the CRFB[10] as its norm, with a special emphasis on the fundamental rights system[11]. To this end, the Administration can, based directly on the Constitution and by means of a robust justification, legitimize itself in acting beyond the law (*praeter legem*), when faced with collisions between fundamental rights[12].

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[3] In a broader view of the idea of functionalization, Ingo Sarlet and Tiago Fensterseifer argue that it would not be reduced to a social dimension, but would also be designed for an environmental protection matrix, embodying a true Social and Environmental State of Law: SARLET, Ingo Wolfgang; FEMSTERSEIFER, Tiago. *Direito Constitucional Ambiental. Constituição, Direitos Fundamentais e Proteção do Ambiente*. São Paulo, Editora Revista dos Tribunais, 2011, pp. 96/101.

[4] In Mauricio Motta's understanding, such a socioenvironmental function would consist of the following: "the owner of the socioenvironmental asset, that is, that asset essential for the maintenance of the life of the species, is obliged to an active behavior, which involves defending, repairing and preserving the environment environment. The owner cannot exercise his right contrary to the interests of the present and future generations, causing damage to the quality of life and consequently to the very fundamental right to life. " (MOTTA, Mauricio. Função socioambiental da propriedade: a compensação ambiental decorrente do princípio do usuário pagador na nova interpretação do Supremo Tribunal Federal. In: MOTTA, Mauricio (Coord.). *Função social do Direito Ambiental*. Rio de Janeiro, Elsevier, 2009, p. 22.).

[5] Given the absence of a normative hierarchy between these rights and the characteristics of each specific case, Daniel Sarmento and Claudio Pereira de Souza Neto affirm that "*it is much more in line with the reverence that each right or constitutional norm deserves, the solution that it seeks, in each conflict situation, optimize, as far as possible, each of the legal assets in dispute* ". *(*SARMENTO, Daniel; NETO, Claudio Pereira de Souza. *Direito constitucional: teoria, história e métodos de trabalho*. Belo Horizonte, Fórum, 2012, p. 505*).*

[6] Ibid., p. 511-514.

[7] Cf. ALEXY, Robert. *Teoria dos Direitos Fundamentais.* Tradução de Virgílio Afonso da Silva. 2ª ed.. São Paulo, Malheiros, 2012.

[8] "*The values, the public purposes and the behaviors contemplated in the principles and rules of the Constitution start to condition the validity and the meaning of all the norms of the infraconstitutional law*." (BARROSO, Luís Roberto. *Curso de Direito Constitucional contemporâneo: os conceitos fundamentais e a construção de um novo modelo*. 4. ed.. São Paulo, Saraiva, 2013, p. 379.).

[9] BINENBOJM, Gustavo. *Poder de polícia, ordenação, regulação: transformações político-jurídicas, econômicas e institucionais do direito administrativo ordenador*. Belo Horizonte, Fórum, 2016, p. 45.

[10] OTERO, Paulo. *Legalidade e Administração Pública: o sentido da vinculação administrativa à juridicidade*. Lisboa, Almedina, 2003, p. 741.

[11] Ibidem, p. 740.

[12] BARROSO, Luís Roberto. *Curso de Direito Constitucional contemporâneo: os conceitos fundamentais e a construção de um novo modelo*. 4. ed.. São Paulo, Saraiva, 2013, p. 402. For Gustavo Binenbojm, the

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3) PARKS AND DOMINICAL CONSEQUENCES OF THEIR CREATION

In accordance with the provisions of paragraph 1 and items of art. 225 of the CRFB[13], one of the most important instruments for the realization of the constitutional right to a healthy and balanced environment is the establishment of territorial spaces specially protected by the Public Power. Thus, public or private geographical areas with unique environmental attributes are considered, which are subject, by means of a normative act, to a legal regime of public law that establishes restrictions and sustainable use, with a view to preserving their ecological balance[14].

Among the specially protected territorial spaces, the so-called Conservation Units stand out[15]. Such units are currently regulated by Law No. 9,985 / 00 (SNUC Law) and defined in art. 2 of the Law as a "*territorial space and its environmental resources, including jurisdictional waters, with relevant natural characteristics, legally instituted by the Public Power, with conservation objectives and defined limits, under special administration regime, to which adequate guarantees apply of protection*"[16].

According to the SNUC Law (art. 7), there are two groups of conservation units: (i) sustainable use units, whose basic objective is to make nature conservation compatible with the sustainable use of part of its natural resources in order to guarantee its perpetuity (§1 °) -

idea of legality, defined exactly with this scope, entails, among other issues, that: "the administrative activity continues to take place, as a rule, (i) according to the law, when it is constitutional (activity secundum legem), (ii) but can find a direct foundation in the Constitution, independently or beyond the law (praeter legem activity), or, eventually, (iii) legitimize before the law, even if against the law, but with a fulcrum a weighing of legality with other constitutional principles (activity against legem, but based on an optimized application of the Constitution). " (BINENBOJM, Gustavo. A Constitucionalização Do Direito Administrativo no Brasil: um inventário de avanços e retrocessos. *Revista Brasileira de Direito Público – RBDP*. Ano 4, n. 14, jul./set. 2006. Belo Horizonte: Fórum, 2005.).

[13] CF / 88. "Art. 225. § 1 To ensure the effectiveness of this right, it is incumbent upon the Public Power: (...)
III - define, in all Federation units, territorial spaces and their components to be specially protected, alteration and suppression being permitted only through law, any use that compromises the integrity of the attributes that justify their protection being prohibited; (.. .) "

[14] SILVA, José Afonso da. *Direito Ambiental Constitucional*. 5ª Edição. São Paulo, Malheiros, 2004, p. 230. For Paulo de Bessa Antunes, such spaces are "*constitutional exceptions to the principle of the use of private or public property, which in the condition of environmental and economic resources, even if the full use regime is applicable, this must be done in compliance with the applicable rules and , in particular, protection of the environment*". (ANTUNES, Paulo de Bessa. *Áreas Protegidas e Propriedade Constitucional*. São Paulo, Atlas, 2011, p. 49.).

[15] DIAS, Edna Cardozo. *Direito ambiental no Estado Democrático de Direito*. Belo Horizonte, Fórum, 2013, p. 125.

[16] According to Frederico Amado, "this concept encompasses the conservation units of all political entities, making it possible to include the subsoil and airspace conservation unit in the area, whenever they influence the stability of the ecosystem". (AMADO, Frederico. *Direito Ambiental*. 10ª ed. ver. atual. e ampl.. Salvador, Juspodvim, 2019, p. 299).

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conservation idea; and (ii) integral protection units, whose function is to preserve nature, with only the indirect use of its natural resources being allowed (§ 2°) - idea of preservation.

One of the species of integral protection units[17] is the national park (state, district or municipal), which aims to preserve natural ecosystems of great ecological relevance and scenic beauty, making it possible to carry out scientific research and develop educational activities and environmental interpretation, recreation in contact with nature and ecological tourism (art. 8°, item III and art. 11 of the SNUC Law).

Specifically with regard to the dominant regime of this type of conservation unit, § 1 of art. 11 expressly states that "*the National Park is in public possession and domain, and the private areas included in its limits will be expropriated, according to the law*"[1819].

In summary, for better protection of the environment, the SNUC Law determines, in the case of the creation of national / state / municipal parks, the transfer of private land to the public domain, so that the entity that institutes the conservation unit must indemnify those affected by expropriation. Thus, the rule is the expropriation of properties located inside parks, provided they are pre-existing to the creation of the conservation unit and once the requirements for doing so are present.

4) THE DECLARATION OF PUBLIC UTILITY: ITS EFFECTS AND THEIR LOSS IN CONSERVATION UNITS

All Western states, at least since the Romans[20], have had some form of state intervention in private property. Among the intervention modalities, the expropriation institute undoubtedly configures its most severe aspect, as it results from its effective supply[21].

[17] Law 9,985 / 00. "Art. 8th The Integral Protection Units group is composed of the following categories of conservation unit: I - Ecological Station; II - Biological Reserve; III - National Park; IV - Natural Monument; V - Wildlife Refuge. ".

[18] It should be noted that this public dominance in the Parks is not exactly a novelty of the SNUC, but a systematic followed at least since Decree 84.017 of 1979, which conveyed the regulation of the Brazilian National Parks, qualifying them as Union goods intended for the common use of the people. See, in this sense: DINNO, Flavio. Desapropriação em matéria ambiental. In: MACHADO, Paulo Affonso; MILARÉ, Édis. *Direito Ambiental: conservação e degradação do meio ambiente* (Coleção Doutrinas Essenciais; vol.2). São Paulo, Editora Revista dos Tribunais, 2011, p. 387.

[19] Regarding the reasons for this option for the public domain, Hebert Coelho and Elcio Rezende point out that "*the permanence of the property, where the conservation unit was created, as being privately owned, tends to make its effectiveness unfeasible for the purpose for which was created, undermines its proper management and compromises its management objectives* ". COELHO, Hebert Alves; REZENDE, Elcio Nacur. A efetiva implantação das unidades de conversação ambiental por meio da desapropriação. *Revista do Direito Público*, Londrina, v. 11, n. 2, p.165-195, ago. 2016, p. 184.

[20] FRANCO SOBRINHO, Manoel de Oliveira. A desapropriação no direito comparado. *Revista de Direito Administrativo*, Rio de Janeiro, v. 112, p. 1-26, out. 1973. Available on: <http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/37908>. Acessed in: 14 fev. 2018.

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According to the concept of José Cretella Júnior, expropriation is "*the unilateral operation of Public Law whereby the competent authority obliges the owner to assign his property to him for reasons of public need, public utility or social interest, through prior and fair compensation in money*"[22]. It is, therefore, an institute that conveys a competence, the power of the State to expropriate, and an asset guarantee, the right of the administered to be compensated[23].

The CRFB regulates the matter in its art. 5°, XXIV, except for prior, fair and cash compensation for expropriation only to the cases expressly provided for in its text by the constituent power (original and derivative)[24].

At the infraconstitutional level, Decree-Law 3,365 / 41, despite its seniority, remains the center of discipline in the expropriation procedure, applicable even to cases not classified as of public utility. By the way, Di Pietro[25] notes that, with the repeal of the Civil Code of 1916, which he had in his art. 590, §1º, cases of public need, there is no longer any reference in the legislation as to what this assumption for expropriation is, which is why the hypothesis would in practice have been merged with those of public utility regulated by Decree-Law 3,365 / 41.

Decree-Law 3,365 / 41 determines a two-phase procedure for expropriation, with initially (i) an expropriation declaration and, after, (ii) its factual effect by the expropriator or another entity with delegated powers to do so. In other words, at first, based on art. 6 of Decree-Law 3,365 / 41, the public authority, by means of a decree, declares the public utility of the property, so that, only then, in a second moment, it can carry out the transfer of property, either through the administrative consensual or judicial litigation[26].

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[21] CARVALHO FILHO, José dos Santos. *Manual de Direito Administrativo*. 28. ed. rev., ampl. e atual.. São Paulo, Atlas, 2015, pp. 851-852.

[22] JÚNIOR, José Cretella. *Do Poder de Polícia*. Rio de Janeiro, Forense, 1999, p. 177.

[23] ENTERRÍA, Eduardo Garcia; FERNÁNDEZ, Tomás-Ramón. *Curso de Direito Administrativo*, V. 2. Revisor técnico Carlos Ary Sundfeld. Tradutor José Alberto Froes Cal. São Paulo, Revista dos Tribunais, 2014, p. 235. Intending to differentiate the expropriation from other similar institutes, Marcello Caetano clearly registered his distinctive attributes in Portuguese law (which are perfectly applicable to Brazil). Cf: CAETANO, Marcello. *Manual de Direito Administrativo – Vol. II*. 10. ed. rev. e atual. por Diogo Freitas do Amaral. Coimbra, Almedina, 1999, p. 1024.

[24] Taking into account these constitutional exceptions, Kiyoshi Harada presents his concept of expropriation as: "a public law institute consisting in the removal of private property by the Public Power or its delegate, for public need or utility, or social interest, upon prior payment fair indemnity in cash (art. 5, XXIV, of the CF), for social interest for agrarian reform purposes (art. 184 of the CF), contrary to the city's Master Plan (art. 182, § 4, III, of the CF), upon prior payment of the fair price in public debt securities, with a clause for the preservation of their real value, and for harmful use of the property, in which case there will be no indemnity of any kind (art. 243 of the Federal Constitution). " HARADA, Kiyoshi. *Desapropriação: doutrina e prática*. 11. ed.. São Paulo, Atlas, 2015, p. 16.

[25] DI PIETRO, Maria Sylvia Zanella. *Direito Administrativo.* 28ª ed.. São Paulo, Atlas, 2015, p. 200.

[26] Regarding this operationalization, Alexandre Aragão points out that: "It is one thing to declare a specific asset or public utility, which is a prerequisite for filing an expropriation action. Another thing is the procedural capacity to promote and materialize it, either through a lawsuit, or through an agreement

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In this vein, the jurisprudence of the Supreme Federal Court is quite tranquil in the orientation that the loss of property occurs only at the end of the expropriation process, whether consensual or litigious, without the need to talk about transfer of ownership even with the exercise of possession by provisional immission[27]. In a case that dealt with the implementation of conservation units, Minister Cezar Peluzo insisted on pointing out:

> **The fact that the implantation of the Mapiguari National Park - as well as that of the entire unit of integral protection - is not consummated with the simple decree of creation, let alone expropriation, with the only declaration of public utility of the private areas contained in the perimeter**. It does not hurt, in fact, to warn that the creation of these units can only mean administrative limitations that do not imply transfer of domain, in cases in which there is no emptying of the economic content of the property right. And, as this may be the case, there is no mention of a budget forecast for expropriation that has not yet taken place.[28]

It happens that, far from being a merely initial and formalistic step in the expropriation procedure, from the declaration of public utility, there are relevant legal consequences for the individual, such as the right of the administrative authorities to penetrate the expropriated property, the framework for the payment of useful improvements (if done with the authorization of the expropriator) and the fixation of the physical state of the thing, on which its value will be calculated and the compensation will be arbitrated[29].

Additionally, among the consequences of the act of declaration of public utility is the initial term of the term of 5 (five) years set in art. 10 of Decree-Law 3,365 / 1941[30] for the declaration to expire. According to Celso Antônio Bandeira de Mello, "*the expiry of the declaration of public utility is the loss of its validity over the course of time without the Public Power promoting the concrete acts destined to carry it out*"[31]. It is important to note that this is a period that does not include interruption or suspension[32].

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precedent to this, even bearing the amount of the indemnity. ". (ARAGÃO, Alexandre Santos de. *Curso de Direito Administrativo*. Rio de Janeiro, Forense, 2012, p. 251.). In the same sense, José Carlos de Salles emphasizes the need not to confuse the declaration of public interest with the factual expropriation of the property. Cf: SALLES, José Carlos de. A *desapropriação à luz da doutrina e da jurisprudência*. 6. ed. red. atual. ampl.. São Paulo, Editora Revista dos Tribunais, 2009, p. 123.

[27] STF, MS 25.534, Rel. Min. Eros Grau, j. 13/9/2006, *DJ* de 10/11/2006; STF, MS 24.163, Rel. Min. Marco Aurélio, *DJ* de 19/9/2003; STF, MS 24.484, Rel. Min. Eros Grau, *DJ* de 2/6/2006.

[28] STF, MC no MS 2763/DF, Rel. Min. Cezar Peluzo, j. 31/10/2008, DJe de 05/11/2008 – emphasis.

[29] Ibidem.

[30] Decree-Law 3,365 / 41. "Art. 10. Expropriation must be effected by agreement or be brought to court within five years, counted from the date of issuance of the respective decree and after which it will lapse."

[31] MELLO, Celso Antônio Bandeira. *Curso de Direito Administrativo*. 32. ed. rev. e atual. até a Emenda Constitucional 84, de 2.12.2014. São Paulo, Malheiros, 2015, p. 906.

[32] HARADA, Kiyoshi. *Desapropriação: doutrina e prática*. 11. ed.. São Paulo, Atlas, 2015, p. 84.

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In effect, it can be said that forfeiture implies true retroactive nullity of the law, removing from the legal act (of the declaration of utility) the validity and, by corollary, the capacity to produce effects, due to legal reasons after its edition. In the view of José Ailton Garcia, "*the sub-examine rule determines that the initial term of the term for filing the expropriation action is the date of dispatch of the respective declaration of public utility. (...) The forfeiture, in this case, results from the inertia of the expropriating Public Power in not exercising the right within the established legal term*"[33].

As a rule, the expiry forecast has been applied interchangeably to all cases of prolonged inertia by the Public Power in the executive phase of expropriation. However, it is known that there is some controversy about the occurrence or not of forfeiture in cases of expropriation for public utility in environmental matters, notably those related to the institution of protected areas. For the ICMBio Specialized Attorney and for the 4th Coordination and Review Chamber of the Federal Public Ministry:

> *(1) the restrictions on the enjoyment of property emanate not from the declaration of public utility, but from environmental legislation, lasting over time regardless of its expiry;*
> *(2) the expiry of the expropriation decree, in the case of properties inserted in conservation units, appears to the private individual not as a guarantee, as occurs in expropriations in general, but as a penalty;*
> *(3) the expropriations of private areas inserted in certain classes of protected areas are based not on an administrative act of convenience and opportunity, but on a legal imposition;*
> *(4) Article 225, paragraph 1, item III, of the Federal Constitution established the principle of the reserve of law for the alteration or suppression of a conservation unit;*
> *(5) there is no legal support for the tacit extinction of a conservation unit;*
> *(6) the declaration of public utility is independent and accessory to the scope of the act of creation of the conservation unit.*[34]

However, the majority jurisprudence understands by the full applicability of the rules of Decree-Law 3,365 / 1941 to cases of expropriation for the purpose of institution of conservation unit, including with regard to the lapse rule by the Executive inertia of the Public Power[35]. It only emphasized that the eventual expiry of the act would not have the immediate

[33] GARCIA, José Ailton. *Desapropriação: comentários ao Decreto-Lei n° 3.365/41 e à Lei n° 4.132/62*. São Paulo, Atlas, 2015, p. 104.
[34] MINISTÉRIO PÚBLICO FEDERAL. Nota Técnica 4ª CCR Nº 1/2017.
[35] In this line, representative precedents are: TRF5, Apelação/Reexame Necessário 2008.80.00.004964-9, Rel. Des. Ivan Lira de Carvalho, 2ª Turma, Julgamento em 02/06/2015, DJe 16/06/2015; TRF5, Apelação 0800001-69.2013.4.05.8002, Rel. Des. Ivan Lira de Carvalho, 4ª Turma, Julgamento em 07/10/2014; TRF5, Agravo de Instrumento 0800522-95.2012.4.05.0000, Rel. Des. Paulo Machado Cordeiro, 2ª

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consequence of the extinction of the unit or of the inherent administrative limitations to the right to build. In this sense, mention is made of the following judgment representing the TRF of the 4th Region:

> ENVIRONMENTAL LAW. CREATION OF CONSERVATION UNIT. ILHA GRANDE NATIONAL PARK. DESAPROPRIATION OF PRIVATE AREAS. OMMISSION OF PUBLIC POWER. EFFECTS OF ARTICLE 10 OF DECREE-LAW 3.365 / 41.
> 1 - The Ilha Grande National Park was created by executive decree, complying with article 225 of the Constitution, with article 5 of Law 4,771 / 65 (in force at the time) and with article 22 of Law 9,985 / 00 (supervening legislation).
> 2 - As the conservation unit was created by executive decree and the creation act is valid according to the legislation in force at the time, we have a consolidated legal act. Only by specific law can its destination be changed or the conservation unit terminated, according to article 225-§ 1-III of the Constitution and article 22-§ 7 of Law 9,985 / 00.
> **3 - Neither the expiry of the declaration of public utility provided for in Article 10 of Decree-Law 3,365 / 41 nor the delay by the Public Power in expropriating all areas that make up the conservation unit imply the extinction of the conservation unit. Otherwise, we would have a paradoxical situation: the Executive Branch could not act and issue a decree to revoke the implantation of that national park (a to-do), but it could achieve this objective through simple omission (a non-to-do).**
> 4 - In the creation of a conservation unit, we have environmental acts and we have administrative facts, governed by different rules and with different intentions, which are not confused, but complement each other.
> **5 - From the perspective of environmental law, we must consider the creation of the conservation unit itself, from the perspective of protecting nature and the environment, which happens from the act of the Public Power that meets the specific requirements (decree or law, now regulated by article 22 of Law 9,985 / 00 and at the time regulated by article 5 of Law 4,771 / 65). In this perspective, the creation of a national park depends only on the edition of the respective specific normative act, which can be a decree or law, provided that it satisfies the relevant formal requirements (technical study and public consultation, according to article 22-§§ 2 and 5 of the Law 9,985 / 00). This act of creating the conservation unit is not to be confused or necessarily depends on the act of expropriation that removes particular areas from the respective owners and definitively affects them to the specific environmental purpose of the nature protection unit.**
> 6 - From the perspective of administrative law, we need to perform administrative acts related to the effective implementation of the conservation unit and its consolidation as an administrative

Turma, Julgamento em 24/09/2013; TRF4, Apelação/Reexame Necessário n. 5000362-07.2011.404.7202/SC, Rel. Juiz Federal João Pedro Gebran Neto, 4ª Turma, julgado em 04/12/2012, publicado em 05/12/2012; TRF5, Agravo de Instrumento n° 0800522-95.2012.4.05.0000, Desembargador Federal Paulo Machado Cordeiro, 2ª Turma, julgado em 07/10/2014.

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> management body and organization of the respective public service. These are the administrative measures necessary for the conservation unit to effectively leave the "role" and materialize in reality, which happens from the performance of the administration in the sense of, for example: (a) linking public areas to the conservation unit included and necessary to fulfill its ecological or environmental function; (b) preparing and approving a management plan for the unit area and its surroundings; (c) **expropriate and indemnify individuals and traditional populations affected by the implementation of the conservation unit. These acts do not depend only on Law 9,985 / 00 and environmental law, but are subject to the rules of administrative law, especially regarding the forced expropriation for public utility provided for in DL 3,365 / 41, including the expiry period provided for in Article 10.** (...)[36]

In summary, if the period of 5 (five) years has elapsed without the Public Power having initiated the executive phase of expropriation, the expropriation declaration must expire, even in the case of protected areas, although the recognition of this lapse does not necessarily imply the extinction of the conservation unit or the removal of the protective particularities of these spaces.

5) INDIRECT EXPROPRIATION: LEGAL NATURE AND CONDITIONS FOR ITS OCCURRENCE

As everyday practice far exceeds the legislator's capacity for normative anticipation, doctrine and jurisprudence sometimes allow the creation of new institutes, aiming at a better resolution of conflicts between Administration and administrators. In the case of the so-called "*indirect expropriation*", Aragão defines it as "*an institute in many respects hybrid between three other institutes of Administrative Law: administrative limitations on property, expropriation and civil liability of the State*"[37].

In the view of Diogo de Figueiredo Moreira Neto, indirect expropriation does not "*characterize [as] a distinct type of expropriation, but rather points to the consequences of an unlawful act by the Administration, by taking possession of a good without fulfilling both. essential constitutional requirements for expropriation: declaration and fair compensation*"[38].

As a rule, the most common type of indirect expropriation occurs with the administrative seizure of a private property: a fact of the Administration in the irregular and

[36] TRF 4, EINF50060836120114047000, Rel. Des. Candido Alfredo Silva Leal Junior, 2ª Seção, D.E. 15/04/2014 – emphasis.
In the same way: TRF 5, AC 0007193-36.2012.4.01.3701 / MA, Rel. Des. Carlos d'Ávila Teixeira (conv.), 4ª Turma, e-DJF1 de 29/08/2016.
[37] ARAGÃO, op.cit., p. 263.
[38] MOREIRA NETO, Diogo de Figueiredo. *Curso de Direito Administrativo: parte introdutória, parte geral e parte especial*. 16 ed. rev. e atual.. Rio de Janeiro, Forense, p. 520.

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lasting appropriation of a private property by the Public Power[39]. Once the depletion by possession is configured, but formal expropriation is absent, we will be facing an indirect expropriation and, therefore, a duty to indemnify the individual by the virtual annihilation of the possibilities of exercising his dominion over the thing[40]. In fact, such a restriction must be temporally relevant, with the ability to pass the good on to the public domain due to the prolonged affectation, so that one cannot speak of indirect expropriation in the punctual and temporary sketch.

Another possible modality of indirect expropriation pointed out commonly by the doctrine would be that of a regulatory nature, when the imposition of an administrative limitation would remove the economic content of the asset, but not necessarily the fullness of the faculties inherent to the domain. As is known, administrative limitations, due to their conditioning - but not extinction - nature of property rights, are not indemnifiable, even if they imply some economic loss for the individual[41]. However, taking into account the principle of proportionality as a criterion for the interpretation and integration of the legal order, certain limitations, when specific and abnormal, are indemnifiable[42] [43].

Within the scope of jurisprudence, the treatment of the matter has fluctuated over the years. At first, when judging cases related to the Serra do Mar State Park in São Paulo, the STJ understood that the prohibition of suppression and exploitation of vegetation in private properties, in the face of the total economic emptying of the area, would be equivalent to a possessory plot, even if the government did not actually seize it[44]. According to this line of reasoning, the configuration of an expropriation-regulation would dispense with the inherent appropriation of expropriation-depletion, being enough the perception that the economic

[39] ARAGÃO, op.cit., p. 264.
[40] As a legal foundation for the institute, art. 35 of Decree-Law 3,365 / 41: "Expropriated assets, once incorporated into the Public Treasury, cannot be the object of a claim, even if founded on nullity of the expropriation process. Any action, considered valid, will be resolved in losses and damages. ".
[41] OLIVEIRA, Fernando Andrade de. Restrições ou limitações ao direito de propriedade. *Revista de Direito Administrativo*, Rio de Janeiro, v. 141, p. 15, jan. 1980. Available on: <http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/43212>. Acessed in: 20 Fev. 2019.
[42] ARAGÃO, op.cit., p. 265-266.
[43] According to Cyrino, these limitations consist of: "regulatory measures permeated by apparent legitimacy and edited within the parameters of jurisdiction established by law, which, however, prove to be demonstrations of excessive state power. Regulations whose form of legitimate rules limiting economic activity conceals an act of unconstitutional emptying of private property, understood in its broad sense, as a guarantee of protection of assets and rights against confiscation. " (CYRINO, André Rodrigues. Regulações expropriatórias: apontamentos para uma teoria. *Revista de Direito Administrativo*, Rio de Janeiro, v. 267, p. 203, set. 2014. Available on: <http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/46463>. Acessed in: 21 Fev. 2019.).
[44] Cf. no STJ:: REsp 94.297/SP, Rel. Min. Francisco Falcão, 1ª Turma, DJe: 2.12.2002; REsp 95.395/SP, Rel. Min. Ari Pargendler, 2ª Turma, DJ 15.12.1997; REsp 209.297/SP, Rel. Min. Paulo Medina, 2ª Turma, DJe 10.3.2003.

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potential was disproportionately restricted by the Public Power to the detriment of the private, including by the practice of lawful acts, such as those related to the protection of the environment.

However, it is important to note that more than a decade ago, the current STJ started to consider that even severe administrative restrictions to the right to property do not necessarily imply debris, which, for its configuration, would depend on effective acts of possession by the government. Public Power[45]. According to Cyrino, the perception is that, regardless of the modality to be discussed, the most relevant criterion currently used by the STJ to characterize the indirect expropriation is the presence or not of a possessory sketch by the Public Power[46]. In this sense, the menu of the following STJ judgment is representative and clarifying, which follows the same line as other precedents of the Court[47]:

> ADMINISTRATIVE. PROTECTION AREA CREATING ENVIRONMENTAL. (Decree STATE 37536/93). INDIRECT DISAPROPRIATION. ASSUMPTIONS: seizure, affectation USE PUBLIC, IRREVERSIBILITY. NON-CHARACTERIZATION.
> 1. The so-called "indirect expropriation" is a praetorian construction created to settle concrete conflicts between the right to property and the principle of the social function of properties, in the cases in which the Administration occupies private property, without observing the previous expropriation process, to implement public work or service.
> **2. In order to have a situation characterized by imposing the particular replacement of the specific provision (restore vindicated thing) for alternative provision (indemnify it in cash), with the consequent compulsory transfer of the domain to the state, it is necessary to check cumulatively, the following circumstances: (a) the seizure of the property by the State, without observance of due process of expropriation; (B) the allocation of the well, i.e. its destination public use; and (c) the material impossibility of granting specific tutelage to the owner, that is, the irreversibility of the factual situation resulting from undue possession and affectation.**
> 3. In the specific case, any of the requirements mentioned above is not satisfied, because (a) the mere edition of Decree 37.536 / 93 does not constitute taking possession, which necessarily presupposes the practice

[45] Cf. REsp 1.171.557/SC, Rel. Min. Castro Meira, 2ª Turma, DJe 24.2.2010; REsp 752.232/PR, Rel. Min. Castro Meira, 2ª Turma, DJe 19.6.2012; REsp 1.172.862/SC, Rel. Min. Eliana Calmon, 2ª Turma, DJe 26.3.2010.

[46] CYRINO, André Rodrigues, ob. cit., p. 222.

[47] Check in the same direction in the STJ: EREsp 628.588/SP, Rel. Min. Eliana Calmon, 1ª Seção, Julgado em 10.12.2008, DJe 09.02.2009; REsp 1784226/RJ, Rel. Min. Herman Benjamin, 2ª Turma, julgado em 12.02.2019, DJe 12.03.2019; AgRg no REsp 1511917/SC, Rel. Min. Assusete Magalhães, 2ª Turma, julgado em 03/08/2017, DJe 16/08/2017.

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> of material acts; (b) the full reversibility of the factual situation allows authors to use, if appropriate, possessory interdicts, with an undoubted possibility of obtaining specific tutelage.
> 4. It is not possible, except in the event of an accomplished and irreversible fact, to compel the State to effect the expropriation, if it does not want it, as it is an act informed by the principles of convenience and opportunity.
> 5. Special appeal dismissed[48].

In addition, the STJ's prevailing jurisprudence also perceives the additional requirement that any indemnified losses to the individual must have resulted from new restrictions, not achieved by preexisting norms or normative acts, such as the Forest Code. In this step, Minister Luiz Fux noted, in REsp 649.809 / SP, that no indemnity would be applicable for the creation of Parque Florestal "*unless proven by the owner, through the filing of own action against the State of São Paulo, which the aforementioned decree entailed administrative limitation more extensive than those already existing at the time of its edition. "*, in this case, those engendered by the Forest Code that was in force or by the Urban Land Installment Law and that already prohibited the indiscriminate use of the property.

In short, it is possible to recognize indirect expropriation due to environmental restrictions that are disproportionate to property rights. However, for this purpose, the conditions considered by the STJ on the subject must be taken into account: (i) the effective administrative possession of the property; (ii) absence of a similar restriction on the use of the asset by the past legislation.

6) WEIGHTING OF INTERESTS: POSSIBILITY OF EXERCISING TEMPORARY AND LOW IMPACT ACTIVITIES BY PROPERTY OWNERS INSERTED IN PARKS AND WITH DECLARED PUBLIC UTILITY STATEMENTS

It is relatively common in jurisprudence and doctrine to use the expression *"paper parks"*[49] to designate cases of conservation units created by the Government, but without a structural implementation, notably in what concerns the management plan and the expropriation of private land[50] (in the case of those units that demand the public domain).

[48] STJ, REsp 628.588/SP, Rel. Min. Luiz Fux, Rel. p/acordão Min. Teori Zavaski, 1ª Turma, julgado em 13.09.2005, DJe 01.08.2005 – emphasis.

[49] Cf. PIMENTEL, Douglas de Souza. *Os "parques de papel" e o papel social dos parques.* 2008. Tese (Doutorado em Recursos Florestais) - Escola Superior de Agricultura Luiz de Queiroz, Universidade de São Paulo, Piracicaba, 2008. Acessed in: 2019-05-16.

[50] FIGUEIREDO, Guilherme José Purvin de; LEUZINGER, Márcia Dieguez. Desapropriações Ambientais na Lei n° 9.985/2000. In: BENJAMIN, Antônio Herman (Coord). *Direito Ambiental das*

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Such "*paper parks*" give rise to customary discussions in the Judiciary Branch about the excesses practiced by the Public Branch in the creation of conservation units[51].

Taking the national / state / municipal parks as a paradigm, it is known that the location of the land within these spaces makes the exercise of many of the rights inherent in the domain of the owner highly unfeasible. This is because the presumption of the law is that, with the structuring of the unit, these lands would be future and necessarily expropriated by the Public Power. In this way, the legal-environmental regime of public law immediately applicable to the institution of the conservation unit prohibits some of the most elementary rights, such as, for example, to build.

However, as the jurisprudence understands that the Public Power cannot be simply forced to expropriate[52], the Administration's inertia in this field, causing the decree to lapse, creates a real impasse for the owner. In view of the unpredictability of the eventual edition of a new declaration of public utility (which, in fact, results in an expropriation, with the payment of indemnity), as well as the absence of the requirements required for the configuration of the indirect expropriation (based on jurisprudence of the STJ), the conduct of the Public Power ends up imposing obstacles that are difficult to overcome in the search for the private individual because he is justly compensated for the damage suffered to his right to private property[53].

It could possibly be said that the rights of the owners were not totally frustrated by the Administration, as it was previously mentioned that Law 9,985 / 2000 provides that the full protection conservation units, such as parks, admit an indirect use of their natural resources (art. 7, § 1). Under the terms of the Law, this indirect use would include "*that which does not involve consumption, collection, damage or destruction of natural resources*" (art. 2, IX). Examples of activities mentioned routinely for the indirect use of natural resources would be

áreas protegidas: O Regime Jurídico das Unidades de Conservação. Rio de Janeiro, Forense Universitária, 2001, p. 465.1

[51] V. CALIL, Ana Luiza; CAPECCHI, Daniel. Limitação administrativa e desapropriação indireta: a linha tênue dos institutos na criação de espaços de proteção ambiental. *Revista de Direito da Administração Pública*, a. 2, v. 1, n. 2, p. 163-183, jan/jun 2017, p. 172.
On the issue, Paulo de Bessa Antunes notes that: "It deserves to be reaffirmed that, unfortunately, it has been a very common practice for public bodies to decree the" creation "of parks - in the three spheres of power and fail to implement the necessary measures for the real constitution of the conservation unit, even though they carry out administrative activities as if, in fact, the areas had been expropriated and the private domain had been transferred to the public. Thus, prohibitions are established for private activities that exceed the limits established by article 22-A of the SNUC Law (...) ". (ANTUNES, Paulo de Bessa. ob. cit., p. 60.).

[52] STJ, REsp 628.588/SP, Rel. Ministro Luiz Fux, Rel. p/acordão Ministro Teori Zavaski, 1ª Turma, julgado em 13.09.2005, DJe 01.08.2005.

[53] STJ, EREsp 191.656/SP, Rel. Ministro Hamilton Carvalhido, 1ª Seção, julgado em 23/06/2010, DJe 02/08/2010.

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recreation in contact with nature, ecological tourism, scientific research, education and environmental interpretation and others that do not imply changes in the protected environment.

Therefore, at first, it would be perfectly possible for individuals to develop activities within the conservation unit, as long as they are classified as indirect use. Even such activities, in addition to not significantly impacting the environment, could be carried out by private individuals until after the transfer of ownership to the institution[54].

It happens that, considering only the activities of indirect use, it does not seem to us that these are able, by themselves, to ensure the rights of the owners in these cases, in view of the severity of the restriction on the right to build of the individual, which may not be interested in exploring ecological tourism or other similar activity in your property. In fact, it should be noted that such indirect use would not even differentiate the condition of the non-expropriated owner from that of the other administrators, given that the indirect use is, according to the SNUC Law, abstractly permitted for everyone[55].

Therefore, situations of this type, in practice, contain an example of emptying the economic content of the property without the payment of the corresponding indemnity. In these cases, there is a paradoxical and absurd situation regarding the rights of property owners located inside parks: a park is created that covers several private properties; private properties are not expropriated; the Administration does not promote the possession of the asset; the public utility decree expires after 5 (five) years, making it impossible to pay compensation for expropriation; after five years the owner has not been properly compensated, but still can do practically nothing on his private property. We think that the national legal system does not tolerate this type of situation.

Therefore, it is necessary to balance interests between the rights of owners (property rights, etc.) and the right to a balanced environment, in order to allow, at least, some kind of

[54] As a note, there is an interesting text prepared by various environmental experts in the Regional, Urban and Environmental Bulletin of IPEA, the record of the various benefits provided by tourism in the interior of UC: "The multiplier effect triggered by activities related to visitation and the tourism linked to the existence of UCs is an important element to strengthen the local and regional economy. At the same time, these activities strengthen the environmental awareness of the population and increase the financial resources for maintaining these areas. The Iguaçu National Park, for example, receives about 1 million people annually and various support services for visitation are made possible by concession contracts with private companies that generate resources for the park. Its collection, consisting of ticket collection, filming fees and concessions, was around R $ 12 million in 2008 (LICHTNOW, 2009) (GURGEl et al. Unidades de conservação e o falso dilema entre conservação e desenvolvimento. *Boletim Regional, Urbano e Ambiental IPEA*, n. 3, p. 109-119, 2009, p.114. Available on: <http://agencia.ipea.gov.br/images/stories/PDFs/100406_boletimregio3.pdf>. Acessed in: 17. abril. 2018.).

[55] Obviously, to exercise economic ecotourism activity inside parks, it would be necessary, at least, authorization from the environmental agency and, when applicable, bidding.

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useful use to the owner until the effective expropriation, with the consequent payment of fair compensation. This is because the situation in which the property of the individual is inserted in the area of a park, becoming a non-edifying area and without there being a just and prior indemnity, even after several years, violates the private property right.

To one, because, among the possible alternatives, the situation narrated disproportionately limits the right to property (subprinciple of necessity), insofar as, in theory, there would be other appropriate measures that would limit this right less. Two, because, weighing the costs and benefits involved in the measure, it is clear that the sacrifice specifically demanded from the individual is somewhat excessive in view of the environmental gain. To illustrate the reasoning, a quote from the Rio Grande do Sul Court of Justice is cited:

> (...) **When the Public Power has more than one alternative at its disposal, it must choose in favor of the one that limits the interests and freedoms at stake as little as possible. Proportionality in the strict sense requires questioning the relationship between the benefit and the loss, in order to ascertain whether the burdens to reach the end are not excessive. Application in the case of proportionality guidelines, as the expert evidence, considering the context in which the embargoed work is located, considered it to have a low environmental impact, whose impact on the environment is insignificant, considering other existing industrial, commercial and residential buildings , in addition to providing for the possibility of countervailing measures**. Precedents of this Court. PRELIMINARY INCOMPETENCE REJECTED. PROVISION PROVIDED. IMPROCED JUDGED ACTION.[56]

Along these lines, the idea that seems reasonable to us would be to allow low-impact buildings in the park (construction of a single-family residence, small inn, for example), provided that they are compatible with the preservationist objectives outlined in the management plan of the conservation unit (in the environmentally sensitive areas any type of construction would not be allowed), as a reasonable, provisional solution and until there is an effective expropriation of the property.

In addition, we understand that the constructions that may be admitted - after the act of creating the unit - should not be included in the calculation of the value of future expropriation. It is even recommended that a decree or regulation be issued by the competent environmental agency, regulating this provisional use of private property in parks.

[56] TJRS, Apelação Cível nº 70071079206, 3ª Câmara Cível, Relator: Desembargador Leonel Pires Ohlweiler, Julgado em 15/12/2016, publicado em 23/01/2017 – emphasis.

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Indeed, it seems compatible with the objectives pursued by public environmental policy the possibility - exceptional and duly controlled - of individuals, with expired declarations of public utility, to be able to carry out low impact activities on their properties until there is a future expropriation, such as, for example, the enjoyment of a single-family unit for leisure.

In fact, although the permanence of individuals in certain conservation units is not the line favored by the legislator, it is known that Law 9.985 / 00, when dealing with traditional populations[57], provides for the viability of their permanence in conjunction with environmental protection of spaces. In this sense, art. 42, paragraph 2, of the aforementioned law, determines that, pending the resettlement of traditional populations, the Administration must establish specific rules and actions aimed at making the presence of traditional resident populations compatible with the unit's objectives[58]. In other words, the legislator himself, aware of the difficulties involved in regularizing land tenure in the conservation unit, foresees the possibility of creating temporary rules for the use of properties by traditional populations.

Although they do not boast the qualification of traditional populations, the perception is that an integrative analog use of the rule of art. 42, §2 °, to protect the interests of the owners with expired declarations of public utility, reinforces the consensual and collaborative dimension of the Administration[59], as well as allows a better promotion of the public interest. In this tuning fork, it is clear that the notion itself of a public interest as always opposed to the interest of the individual has been questioned by the doctrine[60]. For Humberto Ávila, "*the private interest and the public interest are so established by the Brazilian Constitution that they*

[57] V. art. 5, X, and 23, of Law 9.985 / 00. The concept of traditional populations is provided for in art. 3 of Decree No. 6,040 / 2007: "For the purposes of this Decree and its Annex it is understood by: I - Traditional Peoples and Communities: culturally differentiated groups that recognize themselves as such, who have their own forms of social organization, which they occupy and use territories and natural resources as a condition for their cultural, social, religious, ancestral and economic reproduction, using knowledge, innovations and practices generated and transmitted by tradition. ".

[58] Art. 42, Paragraph 2, of Law 9,985 / 00: "Until it is possible to carry out the resettlement referred to in this article, specific rules and actions will be established to make the presence of traditional resident populations compatible with the unit's objectives, without prejudice to the ways of life, sources of subsistence and places of residence of these populations, ensuring their participation in the elaboration of the referred norms and actions. "

[59] For an analysis from another angle of consensual relations between Administration and administrators, check out: DAUDT D'OLIVEIRA, Rafael Lima. *A simplificação no direito administrativo e ambiental (de acordo com a lei nº 13.874/2019 - "Lei da Liberdade Econômica")*. Rio de Janeiro, Lumen Juris, 2020, pp. 75-79, 102-108, 152-158 e 172-178.

[60] Cf. SARMENTO, Daniel (org.). *Interesses públicos versus interesses privados: desconstruindo o princípio da supremacia do interesse público*. Rio de Janeiro, Lumen Juris, 2005.

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cannot be separately described in the analysis of state activity and its purposes. Private elements are included in the State's own purposes (eg preamble and fundamental rights)"[61].

Therefore, the emergence of the principle of legality provides the Director with a creative space to explore legal instruments and alternatives in resolving constitutional tensions in specific cases. Thus, what is now sustained is not to go against the law (*contra legem*), but rather - with a direct foundation in the Constitution[62] - to go beyond it (*praeter legem*), allowing the Administration some institutional imagination to be able to resolve practical conflicts with those administered.

It is a proposal to fill a singular legal vacuum caused by the administrative omission in effecting the expropriation. Evidently, the intention is not to grant a new ray of permanent rights to the administered, with virtual departure from the SUNC Law; on the contrary, the idea is simply to establish a provisional regulation while the expropriation is pending by the Public Power, given the expiry of the declaration of public utility. The extent of the release of buildings and activities must be properly assessed in each specific case, by the detailed technical assessment of compatibility with the objectives of the protected area, defining the appropriate measures to temporarily reconcile the protection of the protected area and the rights of the protected area. particular.

As a result, it is recommended that the possible projects to be installed must be subject to administrative authorization of a temporary nature.

It should also be noted that any improvement carried out by the administrator, at least under the transitional regime proposed here, must always be at his own risk and risk, and will not be indemnified when the effective expropriation of the asset finally occurs. In fact, future constructions should be seen only as a temporary form of compensation for the losses of the administrator due to the delay in carrying out the expropriation, under penalty of encouraging

[61] ÁVILA, Humberto. Repensando o "Princípio Da Supremacia do Interesse Público sobre o Particular". *Revista Eletrônica sobre a Reforma do Estado (RERE)*, Salvador, Instituto Brasileiro de Direito Público, n° 11, setembro/outubro/novembro, 2007. Available on: <http://www.direitodoestado.com.br/artigo/humberto-avila/repensando-o-principio-da-supremacia-do-interesse-publico-sobre-o-particular>. Acessed in: 18. Jul. 2019.

[62] The possibility of direct application of the principles of the Constitution by the Public Administration, without prior intermediation from the legislator, has been welcomed in different opportunities by the jurisprudence. As an example, mention is made of the understanding that the prohibition of nepotism by CNJ Resolution 7/2005 would not require the publication of a formal law, as the prohibition would result directly from the principles contained in art.37, caput, of the Federal Constitution (STF, RE 579,951, Rel. Min. Ricardo Lewandowski, j. On 8/20/2008, DJe of 10/24/2008), as well as the possibility of Public Administration, in direct application of the principle of morality, even if not provided by law , disregarding the legal personality of a company incorporated with abuse of form and fraud to the Bidding Law Law No. 8.666 / 93 (STJ, RMS 15166, Rel. Min. Castro Meira, 2nd Class, Judged on 07/07/2003, Dje 08.09. 2003).

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strategies to build and explore activities in order to be compensated in the future (observed also the exclusions of article 45, III, of the SNUC Law[63]).

7) CONCLUSION

From the above, it is concluded that the Administration can, based directly on the CRFB and by means of a robust justification, legitimize itself in acting beyond the law (*praeter legem*), with the objective of weighing up fundamental rights and carrying out the public interest in the best possible way.

Therefore, proceeding to a balance of interests between the right of property and the right to a balanced environment (with the principle of proportionality as the guiding thread), as well as based on the integrative analogy of the rule of art. 42, paragraph 2, of Law 9,985 / 2000, **individuals in good faith are allowed to exercise the right to build and carry out activities in parks, of a provisional nature and until the appropriate compensation for expropriation is paid, provided that that fulfilled the requirements**:

(i) The area of the property has been inserted into the boundaries of a park (subject to a regime of public ownership);
(ii) Any indemnified losses to the individual must have resulted from new restrictions, by the creation of the park, and not from the legal regime imposed by pre-existing normative acts (Forest Code, for example);
(iii) The Public Utility Decree for the purpose of expropriation has expired (after 5 years);
(iv) There has been no administrative possession of the asset;
(v) There has been no expropriation or the payment of fair compensation to the owner.
(vi) That the activity to be carried out by the owner is of low impact, to be defined by the technical area (we suggest the edition of regulations by the competent environmental agency);
(vii) That the activity is compatible with the zoning established by the management plan of the conservation unit;
(viii) That the activity be authorized by the competent environmental agency;
(ix) There is no payment of indemnity for expropriation for those improvements that are built after the creation of the park (nor any resulting damages, nor loss of profits).

[63] Law No. 9,985 / 00. "Art. 45. The following are excluded from the indemnities referring to the land tenure regularization of the conservation units, whether or not derived from expropriation: (...) IV - expectations of gains and loss of profit (...) ".

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We believe that this solution is the one that best promotes the public interest, reconciling the rights of affected owners and the right to an ecologically balanced environment[64].

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[64] This was the solution adopted in Opinion RD No. 21/2019 INEA / PGE, of our own, approved by the Attorney General of the State in the records of administrative process No. E-07 / 002.104242 / 2018.

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