

FEDERAL LAW NO. 13.800/2019: CONCEPTUAL ASPECTS FOR USING ENDOWMENTS IN PROTECTED AREAS IN BRAZIL

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ABSTRACT

Protected areas are one of the best strategies for in situ biodiversity conservation. In Brazil, these areas were organized by Federal Law no. 9.985/2000, which provides the creation and management of these natural areas. However, the scarcity of resources of the Public Authority has been causing a series of problems (absence of management plans and land regularization). Due to this issue, the private versus public debate on

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biodiversity management resurfaces. In countries such as the United States and the United Kingdom these areas may benefit from the endowments that are created to receive donations to support specific causes or organizations, an issue that is still little known in Brazil's environmental context. On the national scene, Federal Law no. 13.800/2019 was recently created, which regulates endowments. This research aimed to analyze the applicability of Brazilian legislation on endowments as financial resources for protected areas. The methodology used was bibliography and documental research on endowments through the analysis of their respective legislation. The results demonstrate that the use of endowments for biodiversity conservation requires deep reservations, mainly about the ownership of environmental assets and the public interest in this management.

Keywords: endowments; Federal Act n. 13.800/2019; protected areas.

LEI FEDERAL N. 13.800/2019: ASPECTOS CONCEITUAIS PARA UTILIZAÇÃO DE FUNDOS PATRIMONIAIS EM UNIDADES DE CONSERVAÇÃO NO BRASIL

RESUMO

As unidades de conservação são uma das melhores estratégias para conservação da biodiversidade in situ. No Brasil, essas áreas foram organizadas pelo sistema da Lei Federal n. 9.985/2000 que dispõe sobre a criação e gestão desses espaços naturais. Contudo, a escassez de recursos do Poder Público vem causando uma série de problemas (ausência de planos de manejo e regularização fundiária). Essa questão reacendeu o debate privado versus público na gestão da biodiversidade. Em países como os Estados Unidos e Reino Unido esses espaços podem usufruir dos chamados fundos patrimoniais que são criados para receber doações privadas destinadas a sustentar causas específicas, questão ainda pouco difundida no contexto ambiental do Brasil. No cenário nacional foi criada recentemente a Lei Federal n. 13.800/2019 que regulamenta fundos patrimoniais. Apresente pesquisa teve por objetivo analisar a aplicabilidade da legislação brasileira sobre fundos patrimoniais como fonte de recursos financeiros para as unidades de conservação. A metodologia utilizada foi a pesquisa bibliografia/documental sobre fundos patrimoniais por meio da análise de sua respectiva legislação. Os resultados demonstram que a

utilização dos fundos patrimoniais para conservação da biodiversidade exige grandes ressalvas, principalmente sobre a titularidade dos bens ambientais e o interesse público nessa gestão.

Palavras-chave: *áreas protegidas; fundos patrimoniais; Lei Federal n. 13.800/2019.*

INTRODUCTION

Society needs to act according to its economic assumptions; however, these same assumptions, intended for pleasure and well-being, can cause damage to the environment (DERANI, 2008). In this sense, it is essential to think about ways to reconcile the aspects of protection to the environment with economic activity. It is not for any other reason that initiatives based on the theory of economic incentives have been considered in several environmental policies in various countries (GONÇALVES *et al.*, 2018).

Approaches that aim to integrate environment and economy are not recent, going back to the structural postulates of Adam Smith and Karl Marx, who considered the environment a source of natural resources (DERANI; SCHOLZ, 2017). Nevertheless, other variables deserve to be included in this equation, such as, for example, the social aspect and the intrinsic value of the environment (CAPRA; MATTEI, 2018). Through alternative financial incentives, it is possible to undertake plans that coordinate common interests (private and collective) and prevent the achievement of one being the negation of the other, retaking production as purpose of constituting social wealth and improving life in society (SPALDING, 2016).

Endowments, also known as philanthropic funds or permanent funds, are funds created to receive donations directed to support specific causes or organizations (SPALDING, 2016; SOTTO MAIOR, 2011; SCHÜLER, 2012). In general, the resources received remain in the fund, in financial investments, and only the returns are periodically redeemed to cover all or part of the functioning of social, educational, health, environmental, cultural and other causes of public interest (BRAZIL, 2019a).

For decades, funds have proved to be a mechanism of increasing use for the mobilization of philanthropic resources in the USA, England, and India, among other countries that have legislation on the subject (SOTTO MAIOR, 2011). In France, after the approval of Law no. 2008-776, called “Law of the Modernization of the Economy” on August 4, 2008, more than

200 philanthropic funds were created, among them the Louvre Endowment Fund (SCHÜLER, 2012).

Very widespread abroad, the practice of creating and managing permanent endowments to guarantee the financial sustainability of institutions whose objective is the protection to the environment is still incipient in Brazil, and the “O Boticário de Preservação da Natureza” Foundation is a rare example (GIFE, 2010). Recently, more precisely in January 2019, endowments were regulated through Federal Law no. 13.800/19, known as Endowment Law (BRASIL, 2019a).

Still, in the Brazilian scenario, the protected areas, also called conservation units (UCs), which form a system established by Federal Law no. 9.985/2000, have contributed to protecting natural resources, landscapes, ecosystems, cultures and ways of life, as ensured in the 1988 Federal Constitution and in international agreements, such as the Convention on Biological Diversity – CBD (ICMBIO, 2012). However, the constant lack of implementation of environmental spaces created by the Government ends up inducing the false notion of protection, since, in fact, many of these areas exist only on paper, without any concrete action of preservation/conservation being practiced (GODOY; LEUZINGER, 2015).

This occurs for several reasons: scarcity of financial resources (from budget allocations); unnecessary expenses; lack of personnel; lack of management plans; lack of use of scientific criteria for choosing the category, format and size of the conservation units; existence of traditional populations living in integral protection areas; low acceptance by the surrounding populations; no land regularization, and absence of equitable protection between biomes (FONSECA; KASECHER, 2010; MARTIN; LEUZINGER; SILVA, 2016). As a basis in this scenario, the research problem lies in how to use endowments to finance conservation units.

Managing conservation units finds recurring gridlocks in fundraising and resource management, a fact that puts their own existence at risk (GODOY; LEUZINGER, 2015). In this sense, endowments are an instrument in favor of long-term financial sustainability and represent a way to diversify the financing model of this environmental protection instrument. To this end, the research aims to analyze the use of endowments as an alternative to obtain resources for conservation units in Brazil.

1 METHODOLOGICAL CONSIDERATIONS

The main legal documents that can be used to support the implantation of endowments as a resource for conservation units were analyzed. In this sense, the main sources of consultation were: 1988 Federal Constitution, Federal Law no. 9.985/2000, and Federal Law no. 13.800/2019. In addition to these documents, normative instructions from ICMBIO, IBAMA and the Ministry of the Environment that, in some way, contribute to the discussion of endowments for protected area were consulted.

Besides the aforementioned laws, comments were made on the change in the position of the Federal Court of Accounts (TCU) in Judgment 1791/2019 on the management of compensation fund of conservation units through financial institutions due to Federal Law no. 13.668/18. The article has the challenge of debating the scenario and the current context of endowments, especially those aimed at protecting the environment, focusing on the legal aspects, going through the characterization of practical issues, their management tools, sources of funds, and challenges that have to be overcome for implementation in the country.

With this, the objective is to emphasize, using the legislations presented, the main aspects that enable the implementation of the instrument in the political-legal aspect. It is important to remember that the intention is not an *ad nauseam* analysis on the legislation in all its aspects, but only on what can be used as a basis for funds in the context of conservation units.

The research sought to work not the replacement of the State's role in the management of protected areas, but alternatives/possibilities to think about the economic sustainability of these spaces with help of endowments. Thus, one does not intend to praise an excessive privatism view of the management of environmental goods (GODOY, 2006) but to stimulate the debate about the existing alternative.

2 RESULTS AND DISCUSSION

Federal Law no. 9.985/2000 created the National System of Conservation Units (SNUC), innovating in the organizational framework of the so-called Specially Protected Territorial Spaces (ETEPs) (MILARÉ, 2013), mainly in the characteristics of the process of creation and management of Conservation Units (UCs), as well as in their categorization. However, this law has not solved the most serious structural problems that have always

affected the system and that lead to a low effectiveness of all management categories (GODOY; LEUZINGER, 2015).

Some of these problems are directly linked to the scarcity of resources, such as the low number of civil servants, lack of management plans (less than 30% of federal conservation units have a management plan), and no land regularization (ICMBIO, 2012). Others are related to lack of system planning, such as the establishment of integral conservation units in places where traditional populations live, deficiency in communication with the surrounding populations, and use of political criteria, rather than scientific ones, in the process of creating UCs (MARTIN; LEUZINGER; SILVA, 2016).

The political and financial cost of creating a conservation unit is insignificant compared to the costs of its effective implementation (FONSECA; KASECHER, 2010). It is worth noting that the scarcity of resources for the environment also derives from political factors (MOREA, 2019). This is reflected in the low effectiveness of the system and shows the existence of several “paper units” that exist legally, but not in fact (GODOY; LEUZINGER, 2015). In other words, the main deficiencies of the system are, in general, a direct result of lack of sufficient financial resources for the implementation/management of the SNUC.

Financing that is not enough to cover the protected areas is a reality that has been verified in protected areas in tropical regions of developing countries, such as Brazil and Indonesia (FENDRICH; ROCHA; RANIERI, 2019; MOREA, 2019; ABMAN, 2018).

Morea (2019) found that the characteristics of the problems that hinder the achievement of objectives and the better functioning of protected areas depend on different contextual situations. The difficulties in the management of UCs cannot be generalized. However, some causes are common, mainly in developing countries: the overexploitation of strategic natural resources (mining, oil, gas, water, and wood) and/or the territorial expansion of agricultural establishments for crops directed to the international market.

The scarcity of resources for the maintenance of basic needs creates the idea of the existence of “paper parks,” because, although instituted by law or normative act, protected areas do not have minimum management conditions in order to implement public conservation policies (GODOY; LEUZINGER, 2015). In addition to receiving insufficient resources from these sources, they are subject to severe cuts (MARTIN; LEUZINGER;

SILVA, 2016). This situation tends to increase the financing needs of protected spaces (HUMEL *et al.*, 2019), and it is necessary to discuss alternative resources for these ETEPs (FONSECA; KASECHER, 2010; GODOY; LEUZINGER, 2015).

It is not by chance that new ways of making UCs viable are proposed. Concession of national parks to the private sector has been encouraged by the Federal Government. They are intended for visitation support services as a strategy to leverage investments, increase visitation and population's support to protected areas and, also, reduce maintenance costs (BRASIL, 2018b).

Recently, the concession of Pau Brasil (BA) and Itatiaia (RJ and MG) national parks was granted to the private sector. Besides these parks, one expects concession for the national parks of Lençóis Maranhenses (MA), Serra do Bodoquena (MS), Jericoacoara (CE), Caparaó (MG and ES), Chapada dos Guimarães (MT), Aparados da Serra (RS), Serra Geral (RS), Serra da Canastra (MG) and the National Forest in Canela (RS) (AMARAL, 2019).

The passage of UCs biodiversity from public management to private initiative finds several consistent criticisms in the literature that deserve to be highlighted. Godoy (2006) argued that private management, defended as the best way to ensure sustainable use, consists of the division of natural resources for a few, and that the purpose, to a large extent, is to obtain profit. The decentralization model does not necessarily lead to good management of environmental resources (ABMAN, 2018). Other models could be developed, such as community social arrangements (GODOY, 2006).

Metzger *et al.* (2019) highlighted that efficient management by the Public Authority represents a support for a new social and economic development policy that can create jobs, reduce poverty and socioeconomic inequalities. By giving up this model, the State also neglects the guarantee of permanence of the multiple ways of life and socio-ecological systems that represent the country's cultural and ethnic diversity. Nature-based solutions are crucial for the Brazilian economy, as they guarantee water, energy, food and climate security, contributing to human well-being and the protection to biodiversity (ABMAN, 2018; METZGER *et al.*, 2019).

According to Godoy and Leuzinger (2013), the tension of interests (public versus private) can lead to situations of damage to society. In the concession model, in order to be advantageous to the private entity, the investors can choose to "sell" their products (access to conservation units,

for example) on a sufficient scale to obtain the desired profit. This option can cause visitor overload, compromising the integrity of natural and cultural resources.

In this sense, in the case of parks concession, the coexistence between public and private regimes in the same space imposes the constant challenge in the search for balance between private economic-financial results and those related to the public function of conservation of the area and democratization of access (GODOY; LEUZINGER, 2013). The arguments presented find resonance in this research. It should be noted that an excessive privatism model of environmental goods management will not solve the structural and historical problems of Brazilian society (GODOY, 2006; GODOY; LEUZINGER, 2013; ABMAN, 2018; METZGER *et al.*, 2019).

2.1 State's role in the management of conservation units

One of the striking characteristics of Constitutions that are considered modern is the departure from the traditional list of guarantees provided in the laws of free organization of the economy, the so-called liberal model. Thus, alongside traditional rights to life, freedom and property, for example, new rights resulting from social evolution and new conquests gain a constitutional focus (OLIVEIRA; PIRES; PEREZ FILHO, 2016).

The 1988 Brazilian Constitution is inspired by the Iberian sisters, Portugal and Spain (AGRA, 2015). As a result, it enshrines as public authorities' obligation the preservation and effective guarantee of the fundamental right to an ecologically balanced environment, as a good for the common use of the people, essential to a healthy quality of life (BRASIL, 1988).

CF/88 provides in art. 225 that Specially Protected Territorial Spaces (ETEPs) will be created in all federation units. And conservation units belong to this modality. According to Wandscheer (2016), the Constitution left no flexibilization degree to the administrator that, once the spaces worthy of protection are identified, must establish a conservation unit capable of giving the best possible protection to the environment, taking into account that the environmental value good may be subject to public or private law.

Conservation units are divided into two groups: integral protection and sustainable use. In the first group, also called indirect use UCs, human presence is not allowed in the areas, with some exceptions. According to Federal Law no. 9.985/2000, Ecological Stations; Biological Reserves;

National Parks; Natural Monuments, and Wildlife Refuges (BRASIL, 2000) belong to this category. Sustainable use or direct use UCs allow human presence, including the economic use of the area within environmentally controlled criteria. The following are part of this group: Environmental Protection Areas; Areas of Relevant Ecological Interest; National Forests; Extractive Reserves; Wildlife Reserves; Sustainable Development Reserves; and Private Reserves of Natural Heritage (BRASIL, 2000).

With regard to all the modalities set forth by law, only one is created by the exclusive will of the individual: the Private Reserve of Natural Heritage (RPPN), which emphasizes public will, either through the control of these UCs, or through due legal process, in creation and management (SILVA, 2013). The number of private conservation units exceeds the number of public protected areas (Atlantic Forest, Cerrado and Caatinga) in at least three of the five major Brazilian biomes, although the extent occupied by the RPPNs is still relatively small (SILVA, 2013).

Due to their total extension and their wide spatial distribution, UCs, in their broad sense, are crucial for the provision of ecosystem services for the Brazilian population as a whole (DERANI; JODAS, 2015). They are habitats of many animals that contribute to the dispersion of seeds, facilitating the recovery and ecological restoration of degraded areas in their proximity, thereby increasing the national agricultural potential (METZGER *et al.*, 2019).

According to Silva and Barbosa (2019), the current nature management model points out that the environment policy with almost exclusive protection from the public sector is under constant threat, mainly due to the lack of investment in this sector, and it is an element of fragility for the national environmental program.

Responsible management through partnerships between the public and private sectors can provide an important alternative for the conservation of protected areas (SAPORITI, 2006). Experiences developed have shown that these partnerships can increase services through professional management and marketing, reduce dependence on public subsidies and mobilize capital for investment in park infrastructure and biodiversity conservation (GODOY; LEUZINGER, 2013).

Based on these arguments, Silva (2013) highlights:

The State presents itself as a source of regulatory policies, not always consensual, building normative frameworks and the participation of interested sectors of

society is doubtful; however, amid complex and ineffective legislation, there are environmental state bodies that have their performance under the focus of distrust at the federal, state and municipal levels. A field of conflict is formed between society and these bodies, which are created with the primary purpose of inspecting environmental preservation and executing state policy directed at the environment (SILVA, 2013, p. 81).

Managing these spaces finds difficulties and, according to Wand-scheer (2016), the existence of UCs is actually a major advance in environmental protection insofar, since there are rules and a legal framework to support possible abuses (ABMAN, 2018; GODOY, 2006). The preponderance of the public domain in biodiversity management should be maintained (GODOY, 2006; GODOY; LEUZINGER, 2013; ABMAN, 2018; METZGER *et al.*, 2019). However, this statement does not exclude the possibility of discussions/propositions of other ways of management and it is what has been done both in the Federal Court of Accounts and in federal legislation.

The financial rules of UCs have changed with the recent enactment of Federal Law no. 13.668/18 and with the decision of the Federal Court of Auditors (TCU) in Judgment 1791/2019. With these new paradigms, the resources obtained from environmental compensation⁵ can be managed by a financial institution, allowing greater opening for the participation of other actors in this context.

The previous understanding was the impossibility of indirectly carrying out environmental compensation (consisting of depositing the amount due in book-entry bank accounts managed by a financial institution) that

⁵ Art 36 In the case of environmental licensing of undertakings with significant environmental impact, so considered by the competent environmental agency based on an environmental impact study and respective report – EIA/RIMA, the entrepreneur is obliged to support the implementation and maintenance of a conservation unit belonging to the Integral Protection Group, in accordance with the provisions of this article and the regulation of this Law (Regulation).

§ 1 The amount of resources to be allocated by the entrepreneur for this purpose may not be less than half percent of the total costs foreseen for the implementation of the undertaking, the percentage being fixed by the environmental licensing agency, according to the degree of environmental impact caused by the undertaking (See ADIN n. 3.378-6, of 2008).

§ 2 The environmental licensing agency is responsible for defining the conservation units to be benefited, considering the proposals presented in the EIA/RIMA and having heard the entrepreneur, and the creation of new conservation units may also be contemplated.

§ 3 When the undertaking affects a specific conservation unit or its buffer zone, the licensing referred to in the head provision of this article can only be granted with authorization from the body responsible for its administration, and the affected unit, even if it does not belong to the Integral Protection Group, must be one of the beneficiaries of the compensation defined in this article.

§ 4 The obligation referred to in the head provision of this article may, by virtue of the public interest, be fulfilled in public ownership and domain conservation units of the Sustainable Use Group, especially those located in the Legal Amazon (Included by Law No. 13.668, 2018) (BRASIL, 2000).

was not legally provided. This old position was followed by the TCU, through TC Judgment 014.293/2012-9.

With Federal Law 13.668/18 entering into force, there was an innovation in the management model of these resources, with modification of art. 14 of Federal Law 11.516/2007, known as the legislation that created the Chico Mendes Institute for Biodiversity Conservation (ICMBIO):

Art. 1 Law no. 11.516, of August 28, 2007, becomes effective plus the following arts. 14-A, 14-B and 14-C:

‘Art. 14-A. Chico Mendes Institute is authorized to select an official financial institution, exempted from bidding, to create and manage a private fund to be paid in with funds from the environmental compensation referred to in art. 36 of Law no. 9.985, of July 18, 2000, destined to the conservation units instituted by the Union.

§ 1 The official financial institution referred to in the head provision of this article will be responsible for the direct or indirect execution and for the centralized management of the environmental compensation resources destined to the conservation units instituted by the Union and may, for the indirect execution, enter into a contract with regional official financial institutions.

§ 2 The full deposit of the amount set by the licensing agency relieves the entrepreneur of the obligations related to environmental compensation.

§ 3 The official financial institution referred to in the head provision of this article is authorized to promote the expropriation of private properties indicated by the Chico Mendes Institute that are inserted in the conservation unit that receives the environmental compensation resources.

§ 4 The fund regulations and internal regulations will observe the criteria, policies and guidelines defined in act of the Chico Mendes Institute.

§ 5 The authorization provided for in the head provision of this article extends to the executing agencies of the National System of Conservation Units (BRASIL, 2018a).

With this new possibility, the law authorized direct/indirect execution not only for ICMBIO, but for all SNUC executing agencies, in all spheres, if this is their option. It should also be noted that, in TCU Judgment 1064, Minister Raimundo Carreiro, in his vote, highlighted the legality of the direct/indirect execution of environmental compensation, and the Court, by means of a restrictive interpretation of the law, did not prevent possible mechanisms of management of resources by the competent bodies.

Thus, it was possible, through Judgment 1791/2019, to set a paradigmatic precedent for the matter:

SUMMARY: REQUEST FOR REVIEW. POSSIBLE IRREGULARITIES IN THE APPLICATION OF RESOURCES FROM ENVIRONMENTAL COMPENSATION BY THE GOVERNMENT OF THE STATE OF AMAZONAS. DETERMINATION THAT PETROBRAS AND TRANSPORTADORA ASSOCIADA DE GÁS S.A. DO NOT TRANSFER FINANCIAL RESOURCES TO ENVIRONMENTAL

BODIES OF ANY SPHERE IN THE EVENT OF INDIRECTLY IMPLEMENTING ENVIRONMENTAL COMPENSATION FOR LACK OF LEGAL SUPPORT. **SUPERVENIENCE OF LAW 13.668/2018**. POSSIBILITY OF CREATING A PRIVATE FUND TO BE MANAGED BY AN OFFICIAL FINANCIAL INSTITUTION FOR CENTRALIZED MANAGEMENT OF ENVIRONMENTAL COMPENSATION RESOURCES INTENDED TO CONSERVATION UNITS. COGNIZANCE. PARTIAL PROVISION. ACKNOWLEDGEMENT (Minutes no. 28/2019 – Plenary. Session Date: 7/31/2019 – Ordinary. Electronic code for location on TCU’s website: AC-1791-28 / 19-P) (BRASIL, 2019b, emphasis added).

In this sense, there is express legal authorization for the SNUC executing agencies to choose to directly/indirectly manage the resources from environmental compensation through creation of funds. With that, Judgment 1791/2019 brought the understanding that the management of resources is not harmed by the fact that a conservation unit has private funds destined to environmental compensation.

It should be noted that, with the new legislation, the possibility of indirectly carrying out environmental compensation was regulated, within the Chico Mendes Institute (ICMBIO) scope, upon payment of a fixed amount. Therefore, the inclusion of article 14-A in Federal Law no. 11.516 of 2007 fills the legislative gap on the topic of resource management for UCs by financial institutions and overcome legal obstacles presented by the Federal Court of Accounts. Now, there is an alternative to greater participation of private financing as auxiliary mechanisms in protected areas in Brazil.

2.2 Endowments: conceptual aspects

In this scenario of uncertainties, endowments regulated by Federal Law no. 13.800/2019 appear as a possibility for financing UCs activities. An endowment consists of gathering a patrimony that should serve as a source of predictable and lasting resources for an elected cause (BRASIL, 2019a). It exists to give continuity to the cause, protect certain assets from the usual risks of an operational activity and, in particular, from inefficient or disorganized use of resources (SABO PAES; QUEIROZ FILHO, 2014).

In Common Law countries, such as the USA and the United Kingdom, these structures have existed for decades (HANSMANN, 1990), and there are even some centenary institutions still in operation, such as the example of Carnegie Endowment (1910), which promotes the expansion of libraries in the USA, and the Rockefeller Foundation (1913), with endowments of US\$ 300 million and US\$ 3.5 billion (SPALDING, 2016).

Although its concept is applied for the benefit of various causes/non-profit institutions abroad, endowments have proved to be particularly efficient in the academic environment, where there are examples known for their different management and expressive returns (SOTTO MAIOR, 2011; Hansmann, 1990). The volume of financial resources from academic institutions' endowments often exceeds billions of dollars, allowing such entities to invest in research, build better facilities and seek excellence in their activities (KISIL; FABIANI; ALVAREZ, 2012).

The capital that makes up these funds comes from donations from individuals, legal public or private, national or foreign entities, inheritances and legacies with the objective of perpetuating a cause, leaving a permanent patrimony in society (BRASIL, 2019a; SPALDING, 2016).

Most endowments are born with the obligation to perpetually preserve the donated value so that it generates income as a means of guaranteeing the organization's financial sustainability in the long term or for a pre-defined period (BRASIL, 2019a). The endowment has to be separated from the institution's operating equity in order to facilitate maintenance of its purchasing power and control of its non-use for other purposes, and may even constitute a legal entity separate from the beneficiary organization (SOTTO-MAIOR, 2011).

The returns are used to defray operating expenses, maintain activities, specific projects or another specific purpose of the institution, keeping the initial investment intact in the long term (KISIL; FABIANI; ALVAREZ, 2012). Such funds must contain clear rules for the use and application of resources, aiming at the perpetuity of philanthropic action, requiring an investment management model and adequate governance (SPALDING, 2016).

In short, endowments guarantee the donors (1) the money will be invested in the cause chosen by them; (2) the use of money will be governed by strict and transparent rules, and (3) the money will last the time defined by the investor (SPALDING, 2016). According to Sotto-Maior (2011), it is important to emphasize that endowments are not investment funds, considering that the latter are instruments that investors use in search of financial returns, unlike endowments, whose objective is the longevity of an organization and its viability based on collective interest. However, it is important to mention that the resources of endowments can be invested in investment funds in search of profitability (BRASIL, 2019a; KISIL; FABIANI; ALVAREZ, 2012).

In addition, Sabo Paes and Queiroz Filho (2014) explain that endowments are not reserve funds either, but resources that the organization separates from its operating accounts for eventual contingencies, although they do not generate enough income to be considered an equity fund. Moreover, endowments and social organizations are established due to an emotional factor, such as sympathy for an interest. This leads the donor to make resources available to a specific organization or cause (SPALDING, 2016).

The creation of an endowment provides the donors with the possibility of specifying types of projects and causes to be supported, guaranteeing the destination of the resources of the established fund even after their death (SCHÜLER, 2012). By donating to an established endowment, the donors are more confident that their resources will have perennial sustainability destination and the donated amount will not be spent on momentary needs.

An organization that depends on a donor or a group of donors may lose operational independence to ensure financial support continuity. An endowment promotes independence of action, preventing even donors' interests from overlapping the organization's mission. In addition, they should be managed by management organizations established with the intention of acting exclusively for a fund in the collection and management of donations as well as of the constituted patrimony (BRASIL, 2019a).

2.2.1 New Brazilian legal framework: Federal Law no. 13.800/2019

The unfavorable effects of the current economic and political situation in Brazil – and in the world – on the environmental heritage inside and outside the conservation units lead to need to discuss new ways of financing for the protection to natural assets. In the scenario marked by the scarcity of resources in circulation, the institutions of development and environmental protection have been directly affected. The actors involved in the area discuss the reinvention of methods and the questioning of certainties about the State's, the private sector's and civil society's roles (GODOY; LEUZINGER, 2013).

In this scenario, the enactment of Federal Law no. 13.800/2019 appears as a possibility of raising funds for protected areas management. Art. 1 of the aforementioned law defined that it is possible to set up endowments for the purpose of encouraging and supporting education, science, culture, health, public safety and the environment, among other sectors of relevant social interest (BRASIL, 2019a).

It is not by chance that all areas listed by art. 1 are human rights established in the 1988 Federal Constitution, which are citizens' subjective rights (BENJAMIN, 2011). The environmental issue is social and economic. And there is no economy nor will a developed society be built without natural resources being properly conserved (DERANI, 2008). In this perspective, the environment was expressly foreseen as one of the possibilities for endowments in national legislation, bringing with it other third generation human rights (AGRA, 2015).

The legal definition of the funds is, according to item VI in art. 2 of the law, a complex of assets of a private nature coming from donations from individuals and companies to be managed in order to provide revenues that should be used to promote the activities defined above (BRASIL, 2019a), in a stable and long-term manner, by preserving the principal and applying the resulting income (FABIANI; CRUZ, 2017).

The functioning scheme (Figure 1) involves the participation of (I) a supported institution and (II) a fund management body/organization. The supported institution should be a public or private non-profit institution, and the bodies linked to it should be dedicate to the achievement of purposes of public interest and beneficiaries of programs, projects or activities financed with endowments (BRASIL, 2019a).

It is worth mentioning that the initial allocation for the constitution of the fund is the original amount separated by the institution for payment with the subsequent donations from individuals or companies. In this sense, the endowment is the sum of the initial amount of the fund and the donations that were made after its creation (BRASIL, 2019a).

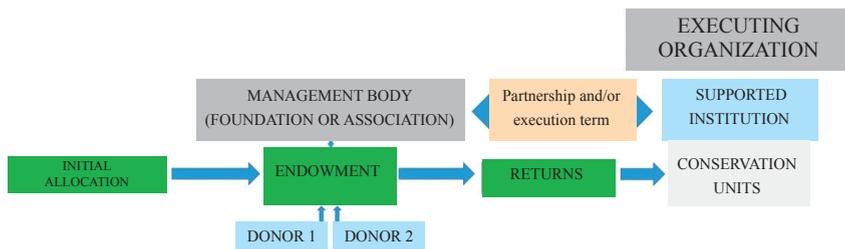


Figure 1 Scheme of endowment functioning.

Source: prepared by the author based on Brazil (2019).

The fund is a source of long-term resources to be invested with the purpose of preserving its value, generating revenue and being a permanent

and regular source of assets. It answers a recurring question among those who are interested in the theme: the amount that is passed on to the supported institution is not the amount originally donated, but the returns (obtained by the fund manager) from this resource.

Brazilian law requires that endowments should be managed by a private non-profit legal entity, instituted as an association or foundation: Management Organization (BRASIL, 2019a). The management organization primarily must: (I) fundraise, and (II) manage donations with the fund resources. The income shown in Figure 1 comes from the function of management of these funds previously obtained from donors.

Within the structure of the Management Organization there must be at least three basic structures: Board of Directors, Investment Committee and Fiscal Council (BRASIL, 2019a). The Management Organization's decision-making body is the Board of Directors, composed of up to seven paid members, and it is established that other participants may join the body without being paid for it.

If there is provision for an exclusivity clause in a partnership instrument (legal mechanism entered into with the supported institution), the supported institution will be able to appoint a member to join the board, with voting rights. If the supported institution is a public institution, donors who represent more than 10% of the composition of the fund will be able to participate in board meetings, without voting right (BRASIL, 2019a). Furthermore, if there is an exclusivity provision in the partnership instrument entered into with public institutions, the board has to be composed of at least two independent members who meet the legal requirements.

In parallel to the Board of Directors, the Investment Committee will exercise the function of advisory body, with regard to investment policy and rules for the resource management. Said committee must be composed of three to five members, duly registered with the Securities and Exchange Commission (CVM), which is an independent body linked to the Ministry of Economy.

The Fiscal Council will exercise the role of supervisory body for the fund management in accordance with the standards established by the Board of Directors, and should be composed of three members elected by the Board of Directors responsible for annually evaluating the Management Organization's accounts. If the Management Organization holds assets in an amount superior to R\$ 5,000,000.00, the members of the Fiscal Council must not have been part of the Board of

Directors in the previous three years (BRASIL, 2019a).

In addition, to ensure that the endowments are fully linked to public rather than private interests, the law prohibits remuneration of public agents that participate in the Board of Directors, Investment Committee and Fiscal Council. The remuneration of the members who integrate the respective bodies must observe the returns from the endowments; in the case there is in the partnership instrument an exclusivity provision with a public supported institution, the remuneration of the members of the Management Organization's bodies will be limited to that of the top manager of the supported institution.

As responsible for fund management, the Management Organization should enter into partnerships to achieve the defined cause; in the example of the present research, it would be the environment, and more specifically the conservation units, represented by ICMBIO at the federal level. In the endowment management, it is lawful to enter into instruments that formalize cooperation with institutions and projects of public interest. Endowment support is dedicated to public or private non-profit institutions ("Supported Institution") by means of partnership instruments entered into between the Management Organization and the Supported Institution.

If the instrument contains an exclusivity clause, it must provide for the specific object that will benefit as well as the rules for the transfer of assets and measures to be adopted in relation to the recommendations issued by the Supported Institution (BRASIL, 2019a). However, if the funding is destined to the execution of programs, projects and purposes of public interest, the Management Organization must enter into an execution term with the Supported Institution which will define how the resources will be spent in the accomplishment of such projects.

It is possible to establish the support for a non-profit institution or recognized international organization, responsible for achieving the project ("Executing Organization"). In this case, the Executing Organization must be part of the execution term. In the environmental field, we can mention Boticário Foundation, World Wide Fund for Nature (WWF), The Nature Conservancy, and Rain Forest Alliance, among others. The Executing Organization's role is to add its expertise to the subject, improving partnership results.

Based on the concepts presented, it would be possible, in the Brazilian case, an endowment directed towards conservation of the Parnaíba

River or the São Francisco River. To this end, a partnership instrument could be established with ICMBIO, the independent body responsible for the implementation of environmental policies related to biodiversity and UCs management (BRASIL, 1981).

In this scenario, resources could be channeled to the Nascentes do Rio Parnaíba National Park, a federal UC classified as fully protected by the National System of Conservation Units (SNUC) (BRASIL, 2000). As a result, the park management would have complementary resources (in addition to those originally planned) for management, which may range from financing studies (research grants, academic awards) at the conservation unit to the purchase of equipment to improve monitoring performance in the areas (vehicles, remote sensing systems, physical infrastructure). It should be noted that the fund management organization can define the activities eligible for financing in advance.

In this sense, in the case of UCs, the management organization will act not in the management of the National Park, but in the way the resources allocated by the fund are used in the management of the conservation unit. The endowment has no power to interfere with the autonomy of the supported institution, and there is only the verification of the points agreed in the partnership instrument (GIFE, 2010). ICMBIO would continue to define all the guidelines and actions of the conservation unit.

It is important to mention that the obligations assumed by the Management Organization do not constitute direct or indirect responsibility of the Supported Institution or the Executing Organization (BRASIL, 2019a). Likewise, the obligations of the Supported Institution and the Management Organization (civil, environmental, labor, social security, etc.) will not be shared responsibility.

For all purposes, the endowment will be separated from its founders', Supported Institution's, Management Organization's and Executing Organization's equity. Brazilian law, when dealing with the use of resources from endowment, meant to fix the use of values from donations (initial allocation + donations), providing that only the results obtained from the investment of the principal are destined to projects (BRASIL, 2019a).

The parties may issue mutual recommendations with a view to resolving deadlocks and providing opportunities for necessary clarifications in the event of non-compliance with the partnership instrument or

the execution term. After hearing the clarifications, the aggrieved party is allowed suspending the contract entered into until the irregularity ceases, or even terminate it (BRASIL, 2019a). This provision provides greater degree of protection for the parties involved in the endowment (KISIL; FABIANI; ALVAREZ, 2012).

In the event of termination of the partnership instrument or the execution term that does not contain an exclusivity clause, the Supported Institution or the Management Organization must fully return the spent and unused resources (BRASIL, 2019a). If the instrument has an exclusivity clause, the Management Organization must transfer the amount contained in the endowment to the new Management Organization that associates with the Supported Institution. In addition, donors who have donated goods with charge will be notified of the termination of the partnership instrument, being entitled to request the return of previously donated values (BRASIL, 2019a; FABIANI; CRUZ, 2017).

In the event of dissolution of the Management Organization, the existing resources of the endowment will be transferred to a new Management Organization that supports a similar public purpose activity. In this process, donations will continue to be received and the transfer of funds should not be interrupted (BRASIL, 2019a).

The structure designed for endowments in the environmental area goes through a fact not foreseen in the legislation and which has a great multiplying effect: the strengthening of public bodies for environmental management. A true culture of donation in Brazil will be possible only with well-defined environmental planning, effectiveness of environmental programs and involvement of society. All these assumptions go through greater appreciation of the environmental area within the Public Power (GODOY, 2006).

CONCLUSION

To become a widespread reality, endowments will mainly need stimuli from the government and a joint effort by various actors in civil society. The legal security given by the enactment of Federal Law no. 13.800/2019 can be denied. The definition of essential characteristics is the main innovation brought by the legislation. The beneficiaries are varied: the donors with the continuity of their cause; the institution supported with the inflow of funds, and the environment with actions related to conservation.

Including art. 14-A in Federal Law no. 11.516/2007, made by Federal Law no. 13.668/2018, fills the legislative gap on the topic of resource management for UCs by financial institutions and overcomes legal obstacles presented by the Federal Court of Accounts in Judgment TC 014.293/2012-9. This new positioning about the matter was achieved through Judgment 1791/2019, which opens a new front for the use of endowments in UCs.

It is worth mentioning that the Constitution determines that the State is responsible for creating UCs and managing them. The role of Federal Law no. 13.800/19 is not to remove this responsibility from the State, but to bring new auxiliary measures to finance these spaces, even because art. 225 of the Federal Constitution establishes that both the public authorities and the community have the obligation to defend and preserve the environment for present and future generations. The success of endowments depends directly on the strengthening of the Public Power in the environmental area.

The great difficulty to be overcome is to what extent private participation can be considered in financing nature. In addition, it is necessary to make it clear that endowments cannot and should not replace Government's responsibilities.

Inability of the legal norm in constructing the purpose that it proposes leads to discredit and consequent emptying in the general legal system. Therefore, the legal provision of endowments is not a guarantee for ending the difficulties in the management of UCs, which go beyond the existence of resources, but just another tool to try to reach the so-called ecologically balanced environment.

The financing of protected areas cannot be restricted in the discussion of whether it should be implemented by the private or public sector. The biodiversity protected by protected areas is invaluable and measures have to be taken to guarantee the conservation of these natural areas. The subject involves several themes and deserves further reflection both in terms of the management model and in terms of effectiveness.

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Article received on: 11/19/2019.

Article accepted on: 6/12/2020.

How to cite this article (ABNT):

REIS NETO, A. F. *et al.* Federal Law no. 13.800/2019: conceptual aspects for using endowments in protected areas in Brazil. *Veredas do Direito*, Belo Horizonte, v. 17, n. 38, p. XXX-XXX, maio./ago. 2020. Available from: <http://www.domhelder.edu.br/revista/index.php/veredas/article/view/1710>. Access on: Month day, year.