

BRAZILIAN FOREST CODE APPLICABILITY TO THE ATLANTIC FOREST BIOME

Eduardo Fortunato Bim¹

Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis (IBAMA)

ABSTRACT

This article deals with the divergence in the extension of the application of the Forest Code (FC) to the Atlantic Forest biome, especially in consolidated, urban and rural areas, which had fluctuating understandings in the Attorney General Office (AGU) and within the Ministry of the Environment (MMA), generating judicialization, including in the Supreme Federal Court (STF). Several issues were analyzed for this, such as the *raison d'être* of Chapter XIII of the FC, possible insufficient protection or environmental setback in this application, the prediction of the Atlantic Forest as a national heritage, the practical consequences of the non-application thesis, the false antinomy between Chapter XIII of the FC (consolidated use area) and the Atlantic Forest Law (AFL), how legislators and administrators interpreted the issue, the contradictory argumentative behavior of some actors and the complementarity of the FC to the AFL, there is no need to talk about specialty. The methodology used was bibliographic, documentary and jurisprudential research and the results show that the application of the FC is compatible with the Atlantic Forest Law, with no unconstitutionality, illegality or any problem in terms of the general theory of law.

Keywords: application; Atlantic forest; consolidated areas; Forest Code.

¹ PhD in State Law from the Universidade de São Paulo (USP). Master in Law from the Universidade Metodista de Piracicaba (UNIMEP). Specialist in Environmental Law from UNIMEP. Specialist in Tax Law from the Pontifícia Universidade Católica de São Paulo (PUC-SP). Federal Attorney. President of IBAMA. ORCID: <http://orcid.org/0000-0002-6946-5311>/e-mail: eduardofbim@yahoo.com.br

A APLICAÇÃO DO CÓDIGO FLORESTAL AO BIOMA MATA ATLÂNTICA

RESUMO

O presente artigo trata da divergência na extensão da aplicação do Código Florestal (CFlo) ao bioma Mata Atlântica, especialmente das áreas consolidadas, urbanas e rurais, que teve entendimentos oscilantes na Advocacia-Geral da União (AGU) e no âmbito do Ministério do Meio Ambiente (MMA), gerando judicialização, inclusive no STF. Analisou-se diversas questões para tanto, como a razão de ser do Capítulo XIII do CFlo, eventual proteção insuficiente ou retrocesso ambiental nessa aplicação, a previsão da Mata Atlântica como patrimônio nacional, as consequências práticas da tese da não aplicação, a falsa antinomia entre o Capítulo XIII do CFlo (área de uso consolidado) e a Lei da Mata Atlântica (LMA), como os legisladores e administradores interpretaram a questão, o comportamento argumentativo contraditório de alguns atores e a complementariedade do CFlo à LMA, não havendo que se falar em especialidade. A metodologia utilizada foi a pesquisa bibliográfica, documental e jurisprudencial e os resultados demonstram que a aplicação do CFlo é compatível com a Lei da Mata Atlântica, não havendo inconstitucionalidade, ilegalidade ou qualquer problema em termos de teoria geral do direito.

Palavras-chave: aplicação; áreas consolidadas; Código Florestal; Mata Atlântica.

INTRODUCTION

The application of the Forest Code (FC) to the Atlantic Forest biome has been a subject of debate even after the Supreme Federal Court rejected most of the allegations of unconstitutionality of Law 12.651/12.

Although the Atlantic Forest Law (Law 11.428/06), in its article 1, requires, in the conservation, protection, regeneration and use of the Atlantic Forest Biome, the application of the “current environmental legislation, in particular Law nº 4.771, of 15 September 1965” (the revoked FC, whose updated wording would translate into the current FC) there is controversy over the application of certain provisions of Law 12.651/12 to the Atlantic Forest biome, that is, over the scope of the FC. The provisions of controversial application and subjected to judicialization are articles 61-A and 61-B of the FC; however, the issue is broader, covering Chapter XIII in its entirety.

At the federal level, shortly after the edition of the FC, opinions from the Attorney General Office (AGU) and orders from the Minister of State for the Environment oscillated on the scope of the application of the Forest Code to the Atlantic Forest biome when discussing the issue narrowly, including only articles 61-A and 61-B. Recently, the matter was judicialized in several forums and in the Supreme Federal Court (STF), through Direct Action of Unconstitutionality (ADI).

This paper seeks, by presenting the controversy in its entirety, to outline the scope of the FC (Chapter XIII) to the Atlantic Forest biome, using the hypothetical-deductive method, with bibliographic, documentary and jurisprudential research.

1 THE SCOPE OF THE CONTROVERSY OVER THE APPLICATION OF ARTICLES 61-A AND 61-B OF THE FOREST CODE (FC) TO THE ATLANTIC FOREST BIOME

It is essential to understand the scope of the thesis of the inapplicability of articles 61-A and 61-B of the FC to the Atlantic Forest biome, in fact, an application map of the Atlantic Forest of the Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis (IBAMA – *Brazilian Institute of Environment and Renewable Natural Resources*). Without considering the dimension of the thesis, one incurs in the mistake of mutilating the analysis of the criticisms that are addressed to the FC applicability to the Atlantic Forest biome.

Both articles are in section II (“Of the Consolidated Areas in Areas of Permanent Preservation”) of Chapter XIII (transitional provisions – arts. 59-68), but the thesis of inapplicability goes beyond not only these articles and section II, it reaches Chapter XIII in its entirety. The law itself clarifies that the objective of this section is to regulate the consolidated areas in areas of permanent preservation (APP), whose cases go beyond articles 61-A (continuation of agroforestry, ecotourism and rural tourism activities) and 61-B (recomposition of the consolidated areas of APP for agroforestry activities in properties with up to 10 tax modules), since the consolidated areas exist in the Agrarian Reform Program not yet titled by Incra (art. 61-C), in the reservoirs (art. 62), in the consolidated rural areas in certain cases (art. 63) and in the Urban Land Regularization – Reurb-S (arts. 64) and Reurb-E (art. 65).

Section III of that same Chapter deals with “Consolidated Areas in Areas of Legal Reserve” (LR), with specific rules for the recovery of LR in consolidated areas. It should be noted that section I (General Provisions) of Chapter XIII of the FC contains the rules of the Environmental Regularization Programs (ERPs).

The non-application of certain provisions referring to the consolidated use in APPs (arts. 61-A and 61-B) to the Atlantic Forest biome, under the argument of incompatibility with articles 5 and 17 of Law 11.428/06 (AFL), translates into the refusal of incidence of the entire regime of Chapter XIII of the FC, including the one that deals with LR, section III. The argument is based on the fact that the AFL does not foresee the possibility of a consolidated area or transition regimes in relation to APP and LR, as well as that predicted in relation to ERP. However, the AFL does not provide for a specific regime on APP and LR; it imports such regimes from the FC, expressly admitting them, making it impossible to talk about incompatibility with the solutions of Chapter XIII of the FC.

In essence, the position for the non-incidence of articles 61-A and 61-B is the inapplicability of consolidated use area to the Atlantic Forest biome. Therefore, it is not about the application of articles 61-A and 61-B only, but the entire Chapter XIII of the FC (arts. 59-68), with the practical consequence of denying its application to one of the biomes that contains 72% of the Brazilian population, is present in 17 states of the federation and concentrates 70% of the GDP.² In short, this controversy directly impacts the daily lives of millions of Brazilian citizens.

² Data from the SOS Mata Atlântica Foundation (<https://www.sosma.org.br/conheca/mata-atlantica/>).

It should be noted that such a thesis is not restricted to rural areas only, but also reaches the urban area by repealing the Urban Land Regularization (art. 64-65) provided for in Chapter XIII of the FC.

The general theory of law distinguishes the text (linguistic expressions of the law) from the norm (what is understood from these linguistic expressions). Canotilho and Vital Moreira (1991, p. 47) teach that there must be “a strict distinction between *precept* (‘provision’, ‘formulation’, ‘text’, ‘linguistic form’) and the *norm* (rule or legal rules contained therein). A simple statement of a normative text or document will be called ‘provision’ or ‘precept’; and the legal-normative meaning of the linguistic statement will be called ‘norm’. The linguistic provision, precept or statement is subject to interpretation; the norm is the product of interpretation. By means of a semiotic vision, Mario Jori and Anna Pintore (1995, p 240) find in every norm, including the legal one, two aspects: “a meaning content and a linguistic formulation.” The authors also assert that “the distinction between normative statement and its meaning is made by jurists, with terminology currently widespread, with the expressions *provision* and *norm*.”

The meaning that comes from reading the text and the context of the law is the norm. However, context is also important, as there is no text without context; the latter conditions the intelligence of the former, and may influence the construction of the norm more than the text itself.

Because text and rule are not confused, the STF declares the unconstitutionality of a norm without text reduction, which also makes it possible to file an ADI in the face of normative provisions to exclude exegesis that contradicts the Constitution from its meaning. The STF has employed the technique of declaring partial unconstitutionality without reducing the text, aiming at excluding unconstitutional interpretations of norms whose text does not carry unconstitutionality, since the early 1990s (e.g., ADI 491 MC, ADI 5.100, ARE 665,134 QO).

In terms of the Federal Executive, the understanding of the application of Chapter XIII of the FC is present in orders of several Ministers of the Environment, based on fluctuating legal opinions of the AGU,³ but under a narrower perspective: only the application of Articles 61-A and 61-B of the FC to the Atlantic Forest biome was analyzed.

The crystallization of the applicability of articles 61-A and 61-B of the Forest Code (FC) to the Atlantic Forest biome by Order 4.410/2020/MMA

³ For the relationship between public advocacy advice and Public Administration, cf. BIM, Eduardo Fortunato. A eficácia dos pareceres da consultoria jurídica no órgão de advocacia de Estado e na Administração Pública, *Revista de Informação Legislativa*, v. 57, n. 227, p. 43-80, jul./set. 2020.

(DOU 06/04/2020) – from Opinion 115/2019/DECOR/CGU/AGU, signed by the Attorney General of the Union – does not appear to be a novelty in terms of FC application. Prior to this, the Order 1050/2015/CONJUR/MMA/CGU/AGU/jmloa decided for its applicability and was approved by the interim Minister of State for the Environment, on 12/08/2015, binding Ibama and ICMBio by force of Complementary Law 73/93 (art. 42). Later, there was a change of understanding by Order 64773/2017-MMA (11/06/2017), recorded by the Minister of the Environment supported in Note 52/2017/CONJUR-MMA/CGU/AGU, deciding for the inapplicability of FC Articles 61-A and 61-B provisions to the Atlantic Forest biome.

Although during the 2015 ministerial order, for the applicability of FC articles 61-A and 61-B to the Atlantic Forest biome, it did not undergo judicial or extrajudicial challenge, with the advent of this understanding by Order 4.410/2020/MMA, several recommendations issued by the (federal and state) Public Prosecutor's Office were addressed to federal (Ibama) and state (OEMAs) environmental enforcement bodies, with several lawsuits filed for not applying Articles 61-A and 61-B of the FC to the Atlantic forest biome. The arguments for the denial of the application of these articles to the Atlantic Forest biome lie in articles 5 and 17 of the AFL, as well as the claim of environmental setback or insufficient protection.

Order 19,258/2020-MMA (DOU 6/4/2020), by revoking Order 4,410/2020/MMA, left the executive bodies of the National Environment System – Sisnama, linked to MMA (Ibama and ICMBio), free to adopt any understanding on the subject, as it no longer requires the application of articles 61-A and 61 –B to the Atlantic Forest biome, but it also does not prohibit it. Sectional (state) and local (municipal) bodies are not reached by the ministerial order, and are also free to adopt any understanding.

In this context, ADI 6446 was filed, in which the applicability of articles 61-A and 61-B to the Atlantic Forest biome is discussed, as well as the provisions of articles 2, sole paragraph, 5 and 17 of the AFL, for, in short, excluding any interpretation that moves the Atlantic Forest biome away from the regime of consolidated areas related to APPs contained in the FC, although the thesis is broader, as seen, and reaches the LRs and, *ipso facto*, the ERPs.

The non-occurrence of the consolidated areas regime, and transitional provisions, of the FC to the Atlantic Forest biome is nothing more than an attempt to circumvent the authority of STF's decisions and subtract the application of the FC, at a neuralgic point, to the Atlantic Forest biome.

2 THE RAISON D'ÊTRE OF CHAPTER XIII (TRANSITIONAL PROVISIONS) OF THE FC

Considering the circumstances that base and justify the creation (*raison d'être*) of Chapter XIII of the FC helps to clarify its applicability to the Atlantic Forest biome. Interpretation must attend to “the underlying social reality and the value that gives meaning to that fact, regulating the action to achieve an end”, as well as to the social ends to which it is directed and the demands of the common good (Lindb, art. 5), verifying “the practical results that the application of the norm would produce in a given concrete case, because only if these results agree with the purposes and values that inspire the norm, on which it is based, should it be applied” (DINIZ, 2014, p. 71-72).

The legislative process was carried out considering the rural and urban areas of the Atlantic Forest as one of the main reasons for the need for the new FC, since this biome houses $\frac{2}{3}$ (two thirds) of the Brazilian population and concentrates the largest number of rural properties, as shown in the record from the Cadastro Ambiental Rural (CAR – *Rural Environmental Registry*): 2,491,722 rural properties until the beginning of this year. Maria Luiza Machado Granziera (2014, p. 482) is categorical, based on the debates about the project that culminated in the FC, in stating that “the intention of the legislator, when developing the concept of consolidated rural area, was to remove from lawlessness a huge number of rural landowners and holders, who were illegal under previous legislation.” Part of the examples used to justify the need for a differentiated APP and LR regime was anchored in cultures found in the Atlantic Forest biome: apple in Santa Catarina; grape in Rio Grande do Sul; coffee in Minas Gerais or Espírito Santo; fruits and vegetables in São Paulo.

For this reason, the Chamber of Deputies, in Official Letter 688/SGM/P/2020 added to ADI 6.446, clarified that, during all the work of the special committee that analyzed the 2012 FC bill, “until the approval of the final wording in Plenary, the understanding underlying the deliberations around the matter was that the provisions relating to the consolidated areas would be applicable and all biomes, without exception, and without the need to change Law No. 11,428/2006 or any other rules.” Its body contained the basis for such a conclusion:

During all discussions, within the scope of the Special Committee, the legislators' understanding was that the changes promoted, including those related to the

maintenance of agroforestry activities in consolidated areas, within areas of permanent preservation and legal reserve, would be applicable to all biomes, with the Atlantic Forest being cited in several public hearings, notably those held in the states covered by Law No. 11,428/2006 (DOCUMENT 1). [...] The opinion of the rapporteur Aldo Rebelo was, therefore, in the sense that the consolidated areas provided for in the new law would be applicable to all biomes, particularly to the oldest occupation, the Atlantic Forest, without the need to change Law 11.428/06. So much so that the revocation clause refers only to Laws 4,771/65 (former Forest Code) and 7,754/1989 (protection of springs). In the text of Law 11.428/2006, only the adaptation of art. 35 was proposed to correct a remission, considering the replacement of the old quota of forest reserve with the current quota of environmental reserve. [...] It is also interesting to note that art. 61-A was the object of a prominent vote in the Plenary of the Chamber of Deputies at the time, exactly in view of the controversy that the matter raised. On that occasion, Deputy Alberto Lupion, parliamentarian of the State of Paraná, which has more than 90% of its territory within the Atlantic Forest biome, proposed an amendment aimed at removing the obligation of any type of restoration of the marginal strips to water courses, which was rejected by the Plenary. Everything indicates that such prominence and amendment would not even have been proposed, had it been the understanding of parliamentarians that the Forest Code would not have national coverage.

After all, as Paulo Nader (2015, p. 277) duly noted, “the work of interpretation cannot neglect any subsidy that clarifies the reasons for the enactment of the law”, that is, “no law, written or not, can be understood without full knowledge of the facts that gave rise to it or to which it will be applied”.

It is not just about *mens legislatoris*, as one might think at first glance, but to bring out the very purpose of the norm (*ratio legis* or *juris*), the reasons that determined its creation, with its historical circumstances (*oportio legis*). The rules of Chapter XIII were to adapt, from the environmental point of view, in a viable way and with consideration among competing constitutional values, the countless human activities (agricultural and urban) on properties located in the Atlantic Forest biome – although not exclusively – out of step with the parameters of the previous Forest Code.

As highlighted by Marcelo Abelha Rodrigues (2017, p. 283), “the legislator had the right to create a differentiated legal regime to meet (and resolve) the situation of hundreds of thousands of rural properties that illegally exercised activities such as agriculture and livestock in APPs, Legal Reserve and restricted use areas”. When dealing with Chapter XIII of the FC, Leonardo Papp (2012, p. 224) is emphatic in recognizing its foundation in the need to give differentiated treatment to consolidated areas,

“even though the actual or potential realization of productive activities in such places is in conflict with the literalness of the provisions contained in the environmental legislation previously in force.”

The teleological element of adapting non-parameterized properties to the FC is shown not only by the manifestation of the Chamber of Deputies, but also in the explanatory statement of the Provisional Measure (MP 571), which gave rise to the FC and whose main objective was to amend articles 61-A and 61-B. When referring to them, the explanatory statement demonstrates that these rules were intended to affect the entire national territory, without excluding any region and, consequently, biome;⁴ this exegesis was expressly taken over by the Chamber of Deputies in defending the Executive Branch’s understanding of the incidence of provisions relating to consolidated areas to the lands covered by the Atlantic Forest Application Area Map.⁵

The FC’s objective of pacifying conflicting situations involving APP and LR is undeniable, not only in the countryside, but also in the city, as revealed by the Urban Land Regularization (Reurb) of articles 64–65. This balance between the constitutional interests at stake does not reduce their reach to any biomes or portions of the national territory, but they are certainly more necessary where there are more people and rural properties, as is the case of the Atlantic Forest biome.

3 THE FALLACY OF THE ARGUMENT OF INSUFFICIENT PROTECTION OR SETBACK

The argument that the application of Chapter XIII of the FC would be insufficient protection or even a setback to the Atlantic Forest biome is

4 “32. [...] the proposed recovery obligations observe reasonableness and proportionality criteria appropriate to the environment of *agro-silvopastoral production* and to the *diversity of the Brazilian land structure*. 33. There is, therefore, different treatment for the different socioeconomic situations of *rural landowners and squatters*, adapting the degree of recovery requirement to the respective economic capacity. About 90% of *rural properties* have an area of up to four fiscal modules, occupy 24% of the territory destined for production and account for 70% of the supply of food for domestic consumption, according to the Agricultural Census. Obviously, 76% of the country’s rural area is concentrated in 10% of the properties. Thus, it is in the public interest that the production of 90% of the properties in 24% of the area is guaranteed without, however, failing to demand compensation from this segment as well, while respecting the equity criterion, to ensure environmental sustainability in the rural environment” (Exposição de motivos da Medida Provisória 571. Available from: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2012/Mpv/571.htm#art1.)

5 “It can be seen that all the arguments in the Explanatory Memorandum emphasize the national land characteristics, based on the IBGE Agricultural Census, without distinguishing between biomes or regions. The Explanatory Memorandum apparently demonstrates that the Executive Branch understood that these provisions (related to consolidated areas) would apply to the lands covered by the Map of the Area of Application of Law No. 11,428, of the IBGE, in spite of art. 5 of Law No. 11,428/2006” (Ofício 688/SGM/P/2020).

untrue, since the Supreme Court rejected such allegations, categorically, in relation to the transition regime established for the consolidated rural areas.

The STF validated Chapter XIII of the FC (ADC 42, ADIs 4,901, 4,902, 4,903 and 4,937) with an express rejection of allegations of insufficient protection or environmental setback, as expressly highlighted in the direct actions.⁶

Thus, wanting to create an insufficient setback or protection using the Atlantic Forest biome as an element of discrimination does not make sense. If it did, the STF itself would have given the proper interpretation to exclude the Atlantic Forest from the scope of application of the rules of Chapter XIII of the FC, since this biome is listed as a national heritage in the Federal Constitution (art. 225, § 4). The Supreme Court, besides not having carried out this interpretation duly, understood, as can be seen from the vote of the rapporteur, that there was a “reasonable transition between the legislative systems, revealing a technique for stabilizing and regularizing the legal situations already used in other areas of the Brazilian law that also involve the protection of legal assets that are also

6 “[...] 11. On the other hand, public environmental policies must be reconciled with other values democratically elected by legislators such as the labor market, social development, meeting the basic consumption needs of citizens, etc. Thus, *it is not appropriate to disqualify a certain legal rule as contrary to the constitutional command to defend the environment (art. 225, caput, CRFB), or even under the generic and subjective label of environmental setback*, ignoring the various nuances that permeate the legislator’s decision-making process, democratically invested with the function of appeasing conflicting interests by means of general and objective rules. [...] That is to say, economic development and environmental preservation are not intrinsically antagonistic policies. 14. *The compatibility analysis between nature and human work is intrinsic to the idea of sustainable development*, an expression popularized by the Brundtland report, prepared in 1987 by the World Commission on Environment and Development. The same efficient organization of available resources that leads to economic progress, through the application of accumulated capital in the most productive way possible, is also that capable of guaranteeing the rational management of environmental wealth in the face of population growth. *Therefore, environmental protection, in the context of sustainable development, does not equate to a static view of natural goods, which strives for the prohibition of any and all changes or interference in ecological or related processes*. Human and natural history is made of changes and adaptations, not of static or equilibrium conditions. 15. The preservation of natural resources for future generations cannot mean the complete absence of human impact on nature, considering the material needs of the current generation and also the need to generate sufficient economic development to ensure a comfortable journey for our descendants. 16. *Environment and Economic Development involve an apparent normative conflict between different nuances, especially intergenerational justice, demanding tragic choices to be made by democratic bodies, and not by the conviction of judges*, however well-intentioned they may be. (REVESZ, Richard L.; STAVINS, Robert N. Environmental Law. In: Handbook of Law and Economics. A. Mitchell Polinsky; Steven Shavell (ed.). V. 1. Boston: Elsevier, 2007. p. 507 [...] 19. *The Principle of prohibition of retrogression does not override the democratic principle in the desire to transfer to the Judiciary functions inherent to the Legislative and Executive Powers, nor does it justify the removal of more efficient legal arrangements* for the sustainable development of the country as a whole. [...] 21. *The Forest Code boasts institutional and democratic legitimacy*, and it is certain that the public hearing held in the present actions found that the discussions for the approval of the questioned Law extended for more than ten years in the National Congress” (our emphasis).

unavailable.” The explanatory memorandum of MP 571, converted into FC by Law 12.651/12, reveals this intention to bring balance between the values honored by our constitutional order as well as to prohibit a solution that could appear to be an amnesty, especially in relation to the transitional provisions:

3. Carefully, vetoes sought to avoid legal uncertainty in matters so important to the country, such as the guarantee of productive activities and the preservation of the environment. They also aimed to establish a balance between the constitutional principles involved, such as valorization of human work, free enterprise, reduction of social inequalities and environmental defense. Therefore, it was vetoed to avoid the imbalance between these values, not allowing a wide amnesty to those who failed to comply with environmental laws, preventing the imposing of a greater burden on small rural owners and, thus, guaranteeing an equal treatment in terms of responsibilities for recovery of deforested areas.⁷

The STF asserted that the idea of sustainable development is inherent to the analysis of compatibility between nature and human activity,⁸ and that equity or intergenerational justice has been wisely left to the legislator. Both issues, as well as other values that the direct actions judgments refer to, are expressly present in the AFL, corroborating the compatibility between the values taken over by the FC and AFL.

The AFL has the “general objective of sustainable development” (art. 6, *caput*), with no prohibition for the FC, whose clauses also aim at this objective, to apply to the Atlantic Forest biome, especially considering its express application to forests and other forms of native vegetation “existing in the national territory” (art. 2, *caput*), not excluding any portion of that territory. In addition, Law 11.428/2006 itself expressly highlights that the protection and use of the Atlantic Forest Biome will take place “under conditions that ensure the discipline of rural and urban occupation, in order to harmonize economic growth with the maintenance of ecological balance” (art. 7, IV), harmonization that was recognized by the STF when validating the FC, and which is nothing more, as Paulo Affonso Leme Machado (2017, p. 965) puts it, than an unfolding of the general objective of sustainable development.

⁷ Explanatory memorandum to Provisional Measure 571. Available from: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2012/Mpv/571.htm#art1.

⁸ The compatibility between nature and human activity was also affirmed by Antônio Souza Prudente, when corroborating the lessons of Celso Fiorillo and defending the ecologically balanced environment as an objective to be pursued, reconciling environmental protection and economic development, “without the economic order preventing an ecologically balanced environment and without the latter hindering economic development” (A missão constitucional do poder judiciário republicano na defesa do meio ambiente e do desenvolvimento sustentável, *Revista de Direito Ambiental*, v. 17, n. 66, p. 77-112, abr./jun., 2012, p. 86).

The STF (ADC 42) also decided, in the wake of the legislator, as explained in the explanatory memorandum of MP 571, that the transitional regime set out in articles 61-A and 61-B of the Forest Code does not represent any setback to environmental preservation, but on the contrary, it also guarantees the validity of such other constitutional values as free enterprise, full employment, eradication of poverty and marginalization, and sustainable economic development.⁹ At that time, the regime of consolidated rural areas was subjected to careful scrutiny by this Court. The leading vote of Minister Luiz Fux on articles 61-A, 61-B, 61-C, 63 and 67 masterfully summarizes the situation (ADC 42, p. 149):

In the present case, I have to contend that the contested rules, despite relativizing some environmental obligations, promote a reasonable transition between legislative systems, revealing a technique for stabilizing and regularizing legal situations already used in other areas of Brazilian law that also involve the protection of legal assets equally unavailable.

It should be stressed that not only constitutional values, but prestigious values in the AFL itself, such as tourism values, of social stability, intergenerational equity, respect for the right to property and the promotion of public and private activities compatible with the maintenance of ecological balance (Chapter II of the AFL, arts. 6-7), were taken over in the judgment of direct actions in view of the FC, making no sense for the FC to honor them only when it is not about the Atlantic Forest biome.

The application of articles 61-A and 61-B of the Forest Code (FC) *does not mean amnesty and much less exemption from recovering the environment*, since the STF expressly dismissed the thesis of amnesty and stressed that environmental recovery is guaranteed by FC. The STF itself mentions the application of the consolidated rural areas brought by the FC to the Atlantic Forest biome under the sentence of Minister Dias Toffoli (ADC 42, p. 344), who adduced:

⁹ “[...] (u) Arts. 61-A, 61-B, 61-C, 63 and 67 (Regime of consolidated rural areas until 07/22/2008): The Legislative Power has constitutional legitimacy for the legal creation of transition regimes between regulatory frameworks, due to security imperatives legal (art. 5, *caput*, of the CRFB) and legislative policy (articles 21, XVII, and 48, VIII, of the CRFB). Articles 61-A, 61-B, 61-C, 63 and 67 of Law no. 12,651/2012 establish criteria for the restoration of Permanent Preservation Areas, according to the size of the property. *The size of the property is a legitimate criterion for defining the extent of the restoration of the Areas of Permanent Preservation, thanks to the legitimacy of the legislator to establish the guiding elements of public environmental protection policy, especially in light of the need to minimally ensure the economic content of the property*, in compliance with articles 5, XXII, and 170, II, of the Constitution, *by adapting the area to be recomposed according to the size of the rural property*. In addition, the law itself provides mechanisms for the competent environmental bodies to adjust the criteria for restoration to the reality of each ecological niche; Conclusion: Declaration of the constitutionality of articles 61-A, 61-B, 61-C, 63 and 67 of the Forest Code” (our emphasis).

And I say again: environmental damage is not to be forgiven, quite the contrary. What the Forest Code tried to do was exactly to call these people, owners, possessors, to recover the damage. And whoever goes to the interior realizes that this is happening. Indeed, there was a report on GloboNews recently, talking exactly about the recovery of the Atlantic Forest in the states of Rio de Janeiro, São Paulo and Paraná, which is mainly the result of these areas of small landowners.

Furthermore, not applying the rules of Chapter XIII of the FC to the Atlantic Forest biome would be an excessive, disproportionate measure, contrary to the reasonableness sought by the FC. The exegesis that preserves the constitutional values to a greater extent must be honored, avoiding excess. In this case, one would have to consider the equality between biomes and the legislator's proportional solution, whose objective, supported by the STF, with the consolidated rural areas is not amnesty, but creating recovery obligations that respect criteria of reasonableness and proportionality appropriate to the environment of agro-silvopastoral production and to the diversity of the Brazilian land structure:

32. [...] Thus, the possibility of general amnesty to whoever has incurred deforestation in APPs is ruled out. However, the proposed recovery obligations observe reasonableness and proportionality criteria appropriate to the environment of agro-silvopastoral production and to the diversity of the Brazilian land structure.¹⁰

To deny the reasonable and proportional solution brought by the FC (Chapter XIII) to the Atlantic Forest biome ignores all constitutional values honored by the legislator and recognized by the STF.

4 THE ARGUMENT OF NATIONAL HERITAGE (FC, ART. 225, § 4) AND THE LACK OF HIERARCHY BETWEEN BIOMES

As it is a national heritage (CF, art. 225, § 4), it is argued that the Atlantic Forest could not be affected by the FC, which implicitly presupposes the supposed superiority of this biome in relation to the others. In addition to the fact that several state and non-state actors have always considered it possible to apply the FC (Chapter XIII – transitional provisions) to the Atlantic Forest biome, this argument is flawed for several reasons.

The Atlantic Forest, the Brazilian Amazon Forest (supposedly smaller than the Amazon biome) and the Pantanal Mato-Grossense (Pantanal biome) are guaranteed to be used in accordance with the law and under

¹⁰ Explanatory memorandum to Provisional Measure 571. Available from: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2012/Mpv/571.htm#art1

conditions that ensure environmental preservation, including regarding the use of natural resources, as highlighted by the STF (RE 134.297) and expressly prescribed by the Federal Constitution in its article 225, § 4.¹¹ Having its use in the form of the law, nothing prevents the legislator from dealing with the matter, either in Law 11.428/06 or in Law 12.651/12 (FC). Legal treatment, required by the Constitution, does not create immunity from the specific law for the remnants of the Atlantic Forest (AFL) in relation to subsequent legislation (FC), whose aim was to bring peace to the countryside and the city.

The requirement that the use take place “under conditions that ensure environmental preservation, including the use of natural resources” also does not prevent the application of the FC because it was validated by the STF as adequate from the constitutional point of view, guaranteeing an ecologically balanced environment, remaining constitutional when applied to the Atlantic Forest, Amazon Forest or Pantanal Mato-Grossense.

There is no reason not to apply the FC to the Atlantic Forest biome under penalty of extending the argument to the Amazon Forest, Pantanal, Serra do Mar and the Coastal Zone, which highlights the absurdity of the argument. If the reasoning were valid in relation to the coastal zone, since it is classified as a national heritage by the Federal Constitution, as much as the Atlantic Forest, the FC would have its application blocked not only in the Atlantic Forest, but in part of the Amazon, Cerrado, Caatinga and Pampa.

The fact that there is a law on the Atlantic Forest does not make this biome superior to the others, classified (Amazon Forest or Pantanal Mato-Grossense) or not (Pampa, Cerrado or Caatinga) as national heritage, because such classification does not generate hierarchy between biomes and much less immunity to the terms of the law, since the Constitution expressly said that the law could deal with national heritage.

It should be clarified that there is no hierarchy between the biomes in the Brazilian system, and one cannot be considered more important than the other, both from the legal point of view and from the ecosystem (natural) point of view.

The ecologically balanced environment provided for in the Federal Constitution (art. 225) presupposes equality in the protection of biomes, guaranteeing the respective specificities. All biomes must be protected for

¹¹ “[...] its use will be, according to the law, under conditions that ensure environmental preservation, including regarding the use of natural resources.”

the effectiveness of such constitutional clause. There is no hierarchical relationship in the elements that make up natural subsystems because of one word: balance. There is an intimate connection between the components of the environment, which interact dynamically internally and externally. When commenting on the constitutional clause of the ecologically balanced environment, José Afonso da Silva (1997, p. 60) highlights the “harmony of the relationships and interactions of the elements of the habitat”. Making an element of the environment, such as the biome, more relevant than another taints the ecological balance, and the interpreter cannot shelter exegeses that violate such a constitutional clause.

Researchers adduce that conservation should not focus only on forest ecosystems, but should extend to ecosystems considered non-forest, predominant in the *pampa*, *cerrado*, *caatinga* and *pantanal* biomes (OVERBECK, GE *et al*). This overexposure of predominantly forest biomes (Amazon and Atlantic Forest), with the underestimation of the majority of non-forest biomes, is as well known as criticized. In the magazine *Página 22*, in a volume dedicated to the importance of biomes other than the Amazon, there is the following statement by a professor: “it must not be a fetish, *there should be no hierarchy of biomes in which the amount of biodiversity determines whether it is important or not*” (PARDINI, 2008, p. 20). The daily dissemination of reports about the need to preserve the Amazon and the Atlantic Forest in the press is criticized, “while the other biomes, which deserve equal attention, are not mentioned – or if so, they are much less emphasized. This may generate a false impression that other biomes are not as important as those most present in the media” (COSTA, 2010, p. 328-329).

Gisele Teixeira Parra Pedroso (2008, p. 87) was emphatic about this aspect: “there is no biome more important than the other, since they all have their peculiar and fundamental characteristics for the good functioning of the ecosystem.” In support of the Constitutional Amendment Proposal (PEC), a work was prepared on the importance of all biomes (AATR-BA, 2018, p. 4), refuting their hierarchy by defending that it is “an *absolute nonsense to establish higher or lower relevance hierarchies among them*, considering all aspects related to the predominant ecological function of each one.”¹²

In our legal system there is no ranking between biomes, and the fact that some are national heritage does not serve for such purpose, especially

12 Journalist Míriam Leitão also reinforces the essentiality of all biomes by asking: “do we have to preserve everything, are all biomes important? Yes. [...] All biomes are essential.” (*História do Futuro: o horizonte do Brasil no Século XX*. Rio de Janeiro: Intrínseca, 2015, p. 64).

because the very Constitution allows their use as long as the preservation of the environment is ensured (art. 225, § 4). All Brazilian biomes have biodiversity, are threatened by human action and vulnerable to climate change. With the degradation of ecosystems, a valuable element is lost for biomes and human beings, that is, ecosystem services, such as food, water, flood and disease control, recreational and cultural benefits, in addition to nutrient cycling, which maintain living conditions on Earth. It is noteworthy that the lack of attention and efforts to preserve Brazilian biomes, without exception, produces a series of socioeconomic problems for the populations, as they depend on the particularities of each biome, essential to their survival. Regions where there is an intrinsic relationship between man and nature, such as the *Caatinga* and the *Pampa*, which are often ignored, are examples of these socioeconomic problems present in the preservation of biomes.

One cannot and should not prioritize the conservation of one ecosystem over another, as there would be damage to all biomes. However, this is what occurs when considering the Atlantic Forest biome, which is predominantly of forests, immune to the provisions of Chapter XIII of the FC. Its importance to support characteristics inherent to all biomes is described, its uniqueness (“own biological diversity”¹³), aiming to exclude certain FC rules applicable to all biomes, creating an outrageous treatment of the isonomy between biomes and the clause that guarantees the ecologically balanced environment.

5 THE DEBATE AROUND ECOLOGICAL IDENTITY IN THE ENVIRONMENTAL RESERVE QUOTAS (CRA): ADMISSION OF SPECIAL TREATMENT TO THE ATLANTIC FOREST BIOME

When judging the constitutionality of the Cotas de Reserva Ambiental (CRAs – *Environmental Reserve Quotas*) provided for in the FC, the STF

¹³ The very definition of biome, by the Brazilian Institute of Geography and Statistics –IBGE, highlights this singularity in relation to other biomes when talking about a biological diversity of its own. The *Mapa de biomas do Brasil: primeira aproximação* (2004) conceptualizes the biome as: a set of (plant and animal) life constituted by the grouping of contiguous and identifiable vegetation types on a regional scale, with similar geoclimatic conditions and a shared history of changes, resulting in a specific biological diversity (*Biomas e sistema costeiro-marinho do Brasil: compatível com a escala 1:250 000*. Rio de Janeiro: IBGE, 2019, p. 11). On its website there is a slightly different definition, but it also highlights the uniqueness (own flora and fauna): “Biome is a set of plant and animal life, constituted by the grouping of types of vegetation that are close and that can be identified on a regional level, with similar geological and climatic conditions that, historically, have undergone the same processes of landscape formation, resulting in a diversity of flora and fauna of its own.” (In: <https://cnae.ibge.gov.br/en/component/content/article.html?catid=0&id=1465>. Access on Oct. 14, 2020).

debated on the scope of article 48, § 2,¹⁴ and overturned the core of the thesis of inapplicability of Chapter XIII of the FC, which is the need to recover or restore the suppression of vegetation in the Atlantic Forest biome.

Minister Marco Aurélio raised doubts as to the interpretation to be given to the referred provision when considering the wide extent of some biomes in the country, adducing that “the criterion of the biome’s identity is insufficient to ensure that the compensation between the areas is in harmony with environmental protection. The biome is a space with accentuated territorial amplitude, so that, within this area, countless different ecosystems coexist, whose biodiversity must be preserved.” There would be very different flora and fauna in the same biome. As a solution to the problem pointed out, he suggested the use of the criterion of “ecological identity” between areas for the purpose of environmental compensation of legal reserves via Environmental Reserve Quotas, restricting the scope of the literality provided for in Article 48, § 2, of the FC.

In agreement, Minister Dias Toffoli reminded peers about the technical manifestation presented during the public hearings held by the Court, when exhibitors Jean Paul Metzger (Universidade de São Paulo – USB) and Nurit Bensusan (Universidade de Brasília – UnB) *used examples of hypothetical environmental compensation for the use of CRAs in the Atlantic Forest biome*.¹⁵ Based upon these technical considerations, Minister Dias Toffoli concluded that the literal meaning of Article 48, § 2, would generate a problem of unconstitutionality, because there would be use of the CRA for different characteristics in terms of species and ecosystems, concluding that its use “to compensate the legal reserve will only be compatible with the 1988 Constitution if the area referred to in the title has an ecological identity in relation to the compensated legal reserve area.”

For these reasons, the STF granted interpretation according to the Constitution to restrict the scope of environmental compensation through Environmental Reserve Quotas to areas within the same biome and with the same ecological identity.

At no time did the Supreme Court exclude areas of the Atlantic Forest

14 “CRA can only be used to offset the Legal Reserve of rural property located in the same biome as the area to which the title is linked.”

15 “Let’s take the example of São Paulo. The owner who is in the interior of São Paulo, who has the Atlantic Forest liability, will not compensate in São Paulo, he will compensate in the Northeast, because the price of land in the Northeast is much lower. What’s the problem with that? The first problem with this is that this compensation is not made with equivalent areas, because the Atlantic Forest biome, like all other biomes, they are heterogeneous, they have zones of endemism, they have biogeographic regions.”

biome from the debates and considerations on the regime for compensating legal reserve areas through CRA. On the contrary, the hypotheses of environmental compensation through CRAs involving areas within the Atlantic Forest biome were part of the very reason for deciding on the matter, provided that it has the same ecological identity. Indeed, admitting the exclusion of areas of the Atlantic Forest biome from the scope of the Forest Code would mean restricting legitimate public policy based on law and preventing the use of modern regulatory mechanisms based on market rules (known as *cap-and-trade*), a healthy alternative to the traditional command-and-control rules, and which have relevant potential to promote economic incentive to the environmental compensation regimes of legal reserve areas in Brazil.

The importance of this consideration made by professors from USP and UnB of the Atlantic Forest biome, received by the STF, lies in the fact that the CRA is expressly mentioned in article 66, § 5, I, of the FC, which allows the regularization of the legal reserve, regardless of adherence to the Programa de Regularização Ambiental (PRA – *Environmental Regularization Program*), through its compensation via “acquisition of Environmental Reserve Quota – CRA” (art. 66, III); the recovery or restoration of the LR *in loco* is not required, that is, it admits the consolidation with a differentiated regime of environmental restoration. The STF admitted the use of CRA, that is, an instrument of the FC exclusive to the legal reserve, in the Atlantic Forest biome, overturning the basis of the argument that there would be no room for legal solutions in this biome that were not the solution recommended in the Atlantic Forest Law.

6 ARGUMENTS ABOUT THE PRACTICAL CONSEQUENCES OF ADOPTING THE INAPPLICABILITY THESIS OF CHAPTER XIII OF THE FC TO THE ATLANTIC FOREST BIOME

The Law of Introduction to the rules of Brazilian Law (Lindb) adduces that “it will not be decided based on abstract legal values without considering the practical consequences of the decision” (art. 20). In this line, it is important to highlight the practical consequences of the thesis of not applying Articles 61-A and B (*rectius*: Chap. XIII) of the FC to the Atlantic Forest biome.

Not applying articles 61-A and B to the Atlantic Forest biome is no

different from applying other articles in Chapter XIII of the FC, as is the case with articles 66 and following (section III), which deal with the legal reserve, or article 62, which has the APP as a reservoir for hydroelectric plants, or even articles 64-65 on urban land regularization (Reurb). It is illogical not to recognize the incidence of any article in Section II (APP) of Chapter XIII and, at the same time, to apply all articles in Section III (LR), since they are transitional provisions and there is no element that authorizes differential treatment. The transitional provisions must be applied to all native vegetation, whose protection is contained not only in the name of the FC (Law of protection of native vegetation) but also in its content, as it is applicable to all forms of vegetation, including forests, in the national territory (Art. 2, *caput*). In short, not applying articles 61-A and B of the FC excludes the application of the transitional provisions, with enormous damage and corruption of Law 12.651/12. As Carlos Maximiliano (2011, p. 136) warns, the law must “*be interpreted intelligently*”.

The very execution of the forest recovery and water production programs related to the rupture of the Fundão dam, in Mariana/MG, would be impaired. The Technical Chamber of Forest Restoration and Water Production (CT-FLOR), created within the scope of the Interfederative Committee (CIF), responsible for managing the repair of the Mariana disaster, highlighted the non-application of articles 61-A and 61-B of the FC “as being the main obstacle that directly impacts the execution of the programs.”

Thus, a fundamental part of the FC would not be applicable to the biome that shelters $\frac{2}{3}$ of the Brazilian population, which is even against its wording, since it expressly adduces its application to forests and other forms of native vegetation “existing in the national territory” (Art. 2, *caput*), not excluding any part of this territory, mainly a part with such an expressive population, distributed across 17 states and responsible for approximately 70% of the GDP.

Although the thesis denies the application to such an expressive part of the population, its impacts are not only rural, but also urban.

The Regularização Fundiária Urbana (Reurb – *Urban Land Regularization*) provided for in articles 64-65 of the FC (Chapter XIII, section II) would also be substantially reduced, since it would not be applicable to the biome in which Brazilians live. Reurb is the procedure by which the right to housing is guaranteed for those who reside in informal settlements located in urban areas. Land tenure regularization can be of

social interest (Reurb-S) or of specific interest (Reurb-E) (Law 13.465/2017, art. 13), with Law 11.977/2009 (art. 47) its inspiring prediction of the original wording of Articles 64-65 of the FC. It should be noted that FC, in its original wording or in its current version, promoted by Law 13.465/17, did not limit the application of Reurb to consolidated areas, although it is in Chapter XIII. Even before the wording change, it would not make sense to relegate the application of this important urban planning tool (Reurb) to areas other than the Atlantic Forest biome because its applicability would be poor, since the majority of the Brazilian population lives in it.

7 THE FALSE ANTINOMY BETWEEN CHAPTER XIII OF THE FC (CONSOLIDATED USE AREA) AND THE ATLANTIC FOREST LAW

As Carlos Maximiliano (2011, p. 110) teaches, one should not assume antinomies or incompatibilities: “if someone claims the existence of irreconcilable determinations, they must demonstrate it until evidence”, and the hermeneut should try to harmonize the texts. In Zeno Veloso’s scholium (2005, p. 38), in the absence of express repeal “and since successive laws can coexist harmoniously, *both* laws will be applied, with the interpreter *reconciling* their provisions.”

The suppression of the Atlantic Forest biome under certain requirements (Decree 750/93 and Law 11.428/06), a situation also present in the FC, is not incompatible with the regime of consolidated areas of APP or LR contained in the FC. Unauthorized suppression of vegetation does not mean incompatibility with the consolidated area regime, on the contrary, it appears as its assumption. It is only possible to consolidate the use of the area if this was not allowed, expressly or implicitly, until then by the legal system. There is perfect compatibility between both laws.

When the FC excluded any situation from its application, it was express. This is the case of the Conservation Units (CUs) of the integral protection group, and even so, with limits: the creation of the CU by an act of public power until the date of publication of the FC (art. 61-A, § 16). In the general definition of a consolidated rural area, for example, there was no exclusion of biome or region, since it is considered as such any area “with human occupation since before July 22, 2008, with buildings, improvements or agroforestry activities, the adoption of the fallow regime admitted in the latter case” (art. 3, IV).

Article 5 of the AFL,¹⁶ which provides for the maintenance of the classification of primary or secondary vegetation even if it has unauthorized intervention (*e.g.*, fire or deforestation), is general of the system, so much so that such a rule is contained in the regulation of the Ministry of the Environment (MMA) on “the procedures for the integration, execution and compatibility of the Rural Environmental Registry System-SICAR” and “the general procedures of the Rural Environmental Registry-CAR”. In effect, Normative Instruction MMA 2/2014 provides that the “remnants of native vegetation, existing after July 22, 2008, will not lose this classification in cases of fire, deforestation or any other type of unauthorized or unlicensed intervention” (art. 3).

In other words, unauthorized interventions are no longer allowed to change the *status* of previously existing vegetation. This is a healthy rule that prevents illegal suppression from being considered valid without a law recognizing that validity, removing effects based on the mere passage of time.

Interventions not authorized by the AFL do not change the stage of the Atlantic Forest that existed before this illegal act, but this does not prevent the legislator from being able, in certain cases, to admit some interventions retroactively and casually, as the FC in its Chapter XIII did. The Constitution does not establish the non-retroactivity of laws, except in criminal matters and, limitedly, in tax matters, with a limit only in what concerns the non-violation of a perfect legal act, *res judicata* or acquired right (RAMOS, 2003, p. 156-157); there is no impediment for FC to deal with consolidated use.

Contrary to what has been maintained, the application of Chapter XIII of the FC is not prohibited by Article 5 of the AFL because it prohibits the change of classification in unauthorized interventions. In the case of the regime of transitional provisions, it is foreseen that certain types of interventions, in certain circumstances, generate solutions that are different from those of restoration, that is, they are authorized by law regardless of the biome, as the FC applies to all forms of vegetation, including forests, in the national territory (art. 2). As will be detailed, the STF, the PGR and the 4th Chamber of the MPF validated, in the Atlantic Forest biome, another form of area consolidation in APP, that provided for in article 62 of the FC, in the Atlantic Forest biome.

¹⁶ “Art. 5. Primary vegetation or secondary vegetation at any stage of regeneration of the Atlantic Forest Biome will not lose this classification in cases of fire, deforestation or any other type of unauthorized or unlicensed intervention.”

There is perfect harmony between the AFL (prohibits illegal interventions) and the transitional provisions of the FC (retroactively authorizes certain activities in certain circumstances, imposing specific solutions), and absolute contradictions should not be assumed: “the implicit incompatibility between two expressions of law is *not presumed*; when in doubt, one norm will be considered reconcilable with the other” (MAXIMILIANO, 2011, p. 291).

It is also alleged that Article 17, § 2, of the AFL requires compensation in an equivalent area with the same ecological characteristics, in the same hydrographic basin, in cases of suppression, which would be incompatible with Chapter XIII of the FC, which, in turn, does not bring such a solution as a rule. It happens that nothing prevents specific situations from being treated differently from AFL, also because if the treatment is the same, it becomes unnecessary. As seen, the need for ecological identity for the Environmental Reserve Quota (CRA) demonstrates that the STF recognized the application of specific FC rules to the Atlantic Forest biome, overturning the argument that another solution would not be possible. Furthermore, the FC solution (Chapter XIII) only repeals Article 17, § 2, of the AFL within the exact limits of its applicability, that is, it still remains in the legal system in the same way as Article 5 of that law.

8 THE “AUTHENTIC” INTERPRETATION OF THE FC BY INSTITUTIONAL ACTORS (STATE LEGISLATORS AND FEDERAL AND STATE EXECUTIVES)

The purely interpretative law is accepted by our jurisprudence (STF, ADI-MC 605), and it is not considered as such that which alters the existing normative discipline (innovative) (RE-RG 566.621). Although authentic interpretation is carried out, via interpretative law, by the very body that issued the interpreted law, this does not prevent, atypically, talking about interpretative normative acts by those whose mission is to regulate the law, as occurs with promoted regulations by the Federal Government and – due to its territorial, climatic, historical, cultural, economic and social peculiarities – by the States (FC, art. 59, § 1). As Ricardo Freire teaches, the interpretation “can be performed by a plurality of legal interpreters”, such as “legislators, administrators” (SOARES, 2017, p. 196), which is why it is important to assess what (state) legislators and (federal and state) administrators understand in terms of the scope of Chapter XIII of the FC.

All the institutional actors, including the state ones, when legislating on the implementation of CAR and PRA, did so aiming as well at the consolidated rural areas throughout the national territory, not excluding any biome, being also applicable to properties located in the Atlantic Forest biome.

At the federal level, Decree 7,830/2012, when dealing with the CAR, made it very clear that it includes consolidated areas (art. 5) and applies to all rural properties and possessions (art. 6). In turn, in relation to the PRA, it is categorical in prescribing its objective of complying with the provisions of FC Chapter XIII (art. 9), regularizing the use of consolidated rural areas as defined in the PRA (art. 13, sole paragraph). In turn, Decree 8,325/2014 “establishes general rules complementary to the Environmental Regularization Programs of the States and the Federal District” and, emphasizing that they are restricted “to the regularization of the Areas of Permanent Preservation, Legal Reserve and restricted use”, it does not make any restriction to the biome. Normative Instruction MMA 2/2014, which provides for the National Rural Environmental Registry System (Sicar) and the CAR in no way excludes any biome from its scope.

The content of these federal normative acts on the CAR and PRA leaves no doubt about the impact of FC Chapter XIII on all rural properties in the country, not excluding any region and, consequently, biome.

In the states covered by the IBGE Atlantic Forest Application Map, it appears that the ERP (FC, art. 59) and CAR, approved by local laws or that followed federal regulations, do not exclude the Atlantic Forest biome from its scope, exactly because they consider the FC (Chapter XIII) applicable to this biome. The states of Rio de Janeiro and Espírito Santo, which have 100% of their territory covered by the Atlantic Forest, have not failed to regulate the ERP, which implies its application to the Atlantic Forest biome, as well as Santa Catarina, which has practically 100% of its territory in the same biome and also regulated the ERP without any reservations.

Illustrating this understanding of the full applicability of the ERP and, consequently, of Chapter XIII of the FC to the Atlantic Forest biome, the following regulations made by the member states:

- (i) in Rio de Janeiro, with 100% within the Atlantic Forest biome, State Decree 44.512/2013 was published, which provides for CAR, ERP, Legal Reserve and its regularization instruments;
- (ii) in Santa Catarina, where almost 100% of the territory is covered by the Atlantic Forest biome, Law 16.342/2014 was enacted, introducing into the state legislation

the institutes of consolidated rural area (*e.g.*, art. 28, III), of the CAR (*e.g.*, art. 117-A) and the ERP (*e.g.*, art. 114-A);

(iii) in Paraná, in which 98% of the territory is covered by the Atlantic Forest biome, Law 18.295/2014 was enacted, dealing with ERP, which, in its article 1, clarifies its objective of promoting environmental regularization under the terms of Chapter XIII of FC, which is also reinforced in its regulatory decree (State Decree 11.515/18);

(iv) in São Paulo, where 69% of the territory is covered by the Atlantic Forest biome, Law 15.684/2015 was enacted, which provides for the ERP of rural properties and real estates, introducing the institutes of consolidated rural area (*e.g.*, art. 7), CAR (*e.g.*, art. 2) and ERP (*e.g.*, art. 4). Decree 64.842, of March 5, 2020, even mentions the possibility of recomposing APP and LR of rural properties that are part of the ERP within the scope of the Nascentes Program (art. 8, sole paragraph), a program known as important for the Atlantic Forest in the State of São Paulo, with Article 61-A of the FC expressly mentioned.

(v) in Rio Grande do Sul, where 52% of the territory is covered by the Atlantic Forest biome, Law 15.434/2020 introduced into the state legislation the institutes of consolidated rural area (*e.g.*, art. 2, III and IV) and CAR (*e.g.* art. 14, VII); (vi) in Minas Gerais, where 47% of the territory is covered by the Atlantic Forest biome, Law 20.922/2013 was enacted, which introduced the institutes of consolidated rural area (*e.g.*, art. 2, I), CAR (*e.g.*, 15) and ERP (*e.g.*, art. 16, § 11).

All of these state normative diplomas presuppose the application of the specific legal regime of Chapter XIII of the FC, which is why, despite having a significant amount of the Atlantic Forest biome in their territories, there was no exclusion.

In other words, since 2012, all federal and state legislation designed to implement the CAR and PRA was implemented to focus on consolidated rural areas throughout the national territory, and the thesis that there would be no application of the transient provisions of the FC to the Atlantic Forest biome is baseless.

9 CONTRADICTORY PROCEDURAL AND EXTRA-PROCEDURAL BEHAVIOR (LEGAL ARGUMENTS)

The procedural behavior of the actors involved in the judgment of the Forest Code clearly demonstrates the misconception of the thesis of the inapplicability of FC Chapter XIII to the Atlantic Forest biome from the perspective of its own defenders.

Robert Alexy (2010, p. 188) lists the following basic rules of rational practical discourse: (i) no speaker can contradict himself; (ii) every speaker can say only what he believes; (iii) any speaker who applies an F predicate to an object must be prepared to apply F to any other object that is similar

to *a* in all relevant respects; (iv) different speakers cannot use the same expression with different meanings. In their *Tratado da Argumentação Jurídica*, Perelman and Olbrechts-Tyteca (2014, p. 221) adduce: “The assertion, within the same system, of a proposition and its negation, by making manifest a contradiction that it contains, makes the system incoherent and, therefore, unusable.”

If the argumentative discourse is in contradiction, there is destruction of the legal language, generating a non-law.

Several actors involved in FC’s direct actions admitted the application of articles 61-A and 61-B to the Atlantic Forest biome when they cited examples of this biome to support its unconstitutionality, which demonstrates an offense to the legal discursive rules by exposing the inherent contradiction of its performance.

The Attorney General’s Office (PGR), in its initial applications of ADIs against FC, cited examples from the Atlantic Forest biome to support the unconstitutionality of Chapter XIII of the Forest Code, now adjudicates several public civil actions denying this fact.

In the initial application of ADI 4,903 (item 109), when article 62 of the FC was accused of unconstitutionality due to the fact of reducing or extinguishing the APP of hydroelectric reservoirs, hydroelectric plants (HPP Porto Primavera and Jaguari) present in the Atlantic Forest biome were mentioned, which was reinforced by the Rede de Organizações Não Governamentais da Mata Atlântica (RMA – *Network of Non-Governmental Organizations of the Atlantic Forest*) in its *amicus curiae* application (item 477). In Opinion 242.277/2016-AsJConst/SAJ/PGR, attached to ADC 42, the PGR, challenging the validity of articles 61-A, 61-B, 61-C and 63 of Law 12.651/2012, mentioned the Atlantic Forest area that would not be recomposed (p. 72).

The RMA, which is associated with the Fundação SOS Mata Atlântica, and whose Internal Regulation (art. 3), revised on May 29, 2015, is categorical in stating that its purpose is to preserve the Atlantic Forest, joined as *amicus curiae* in the actions that judged the FC’s constitutionality and did not exclude from its assistance FC articles 61-A and B, on the contrary, it was express in adducing its unconstitutionality of FC by citing examples from the Atlantic Forest biome.

In the *amicus curiae* petition, in the ADIs against the Forest Code, RMA and others, there was a challenge to the constitutionality of articles 61-A, B, C and 63 citing their application to support their claim of

unconstitutionality in several places that are in the Atlantic Forest biome, such as the Cantareira System (item 324), Serra do RJ and SC (item 326), Morro do Baú region (item 327), all properties in the country (item 330), which obviously includes those in the Atlantic Forest biome. As if that were not enough, when it claimed the unconstitutionality of article 67 (legal reserve), when dealing with the alleged liabilities arising from the application of the article, it cited the Caatinga and the Atlantic Forest (item 355).

In addition, in the dozens of public hearings held to discuss the FC, there were speakers umbilically linked to entities that defend the Atlantic Forest, such as the President of the Institute for the Preservation of the Atlantic Forest, Fernando José Mendes Pinto (heard on Nov. 13, 2009 during a public hearing held by the Chamber of Deputies in Maceió, Alagoas), and *SOS Mata Atlântica* representatives, such as Mario Cezar Mantovani and Roberto Luiz Leme Klabin (see, in this sense, application 75/2010, by Deputy Moacir Micheletto, approved on Mar. 17, 2010; and application 80/2010 by Deputy Aldo Rebelo, approved on Mar. 30, 2010, to listen to “financiers of the NGO SOS Mata Atlântica”). In their presentations, it is evident that they started from the premise of the applicability of the FC to the Atlantic Forest biome.

10 COMPLEMENTARITY AND SPECIALTY OF THE APP AND LR REGIME IN THE FC IN THE DYNAMICS BETWEEN LAW 12.651/12 AND LAW 11.428/06

The lack of an express provision mentioning “Atlantic Forest” in Chapter XIII of the FC does not imply the absence of norms in this chapter on this biome or even that the AFL would prevent the legislator from creating different ways of recomposition in relation to the APP and the legal reserve. As Ingo Sarlet and Tiago Fenterseifer (2014, p. 339) correctly adduce, one of the most suitable examples for talking about dialogue between normative sources is environmental law, since “the complexity and the way in which the different normative sources are interconnected is very characteristic” of this branch of law. In the present case, this dialogue is even more so because it is expressly desired by the AFL in its article 1 and in several other passages, receiving the APP and LR regime of the FC.

Although it is understood that there is no antinomy between Chapter XIII of the FC and the AFL, just to argue, if so, the FC would be the special law (*lex specialis*) in relation to the consolidated rural areas. It is a big

mistake to understand the AFL as a special law in relation to everything that refers to the biome treated by it, excluding the complementarity that exists between the FC and the reception by it of the APP and LR institutes as set out by the FC.¹⁷ If such a perception were well-founded, the Atlantic Forest would be absolutely immune to any provision that was not contained in Law 11.428/2006, which is not true, particularly when it is the AFL itself that expressly receives the APP and LR regime of the Forestry Code, as well as making special mention of this regulatory diploma right in its article 1.

The Forest Code established a specific regime for (rural and urban) consolidated areas across the country, without differentiating where they are installed. The regime was designed for the whole country, with exclusions only being made occasionally by the Code itself, even more considering the broad discussion that took place in parliament, reflecting the social dimension involving the consolidated areas.

Some arguments of the AFL reinforce that it is the FC that should be applied when it comes to the APP and LR regime.

The AFL expressly incorporates the APP and LR institute, making baseless the claim that this law rejects APP and LR, which have regulations in the FC (arts. 7, 8 and 61 et seq.) and, therefore, it is special law. Indeed, Article 1-A of the FC makes it clear that its object includes establishing general rules on APP and LR (“Art. 1 – A – This Law establishes general rules on the protection of vegetation, areas of Permanent Preservation and Legal Reserve areas;”).

Articles 11, II, and 23, III, 35 and 38 of the AFL demonstrate the internalization of the concept of LR and APP from the perspective of the FC, expressly citing it or simply adopting its concept, which demonstrates that, in terms of speciality, it is the FC that has such a characteristic, even in the Atlantic Forest biome.¹⁸

¹⁷ This seems to be the thinking of Pedro de Menezes Niebuhr, when he adduces “that if the Atlantic Forest vegetation occurs outside permanent preservation areas, its suppression is regulated by a specific law (Law No. 12.428/06)” (*Manual das Áreas de Preservação Permanente: regime jurídico geral, espécies, exceções com doutrina e jurisprudência*. Belo Horizonte: Fórum, 2018, p. 280)

¹⁸ “Art. 11. The cutting and removal of primary vegetation or in the advanced and medium stages of regeneration of the Atlantic Forest Biome are prohibited when: [...] II – the owner or squatter does not comply with the provisions of environmental legislation, particularly the requirements of Law No. 4.771, of September 15, 1965, with regard to the *Permanent Preservation Areas and the Legal Reserve*. [...] Art. 23. The cutting, suppression and exploitation of secondary vegetation in the middle stage of regeneration of the Atlantic Forest Biome will only be authorized: [...] III – when necessary to the small rural producer and traditional populations for the exercise of activities or agricultural, livestock or silvicultural uses essential to their own and family subsistence, with the exception of *areas of permanent preservation* and, when applicable, after registration of the *legal reserve*, pursuant to Law No. 4.771, of September 15, 1965; [...] Art. 35. The conservation, in a rural or urban property, of primary vegetation or secondary vegetation at any stage of regeneration of the Atlantic Forest Biome

In terms of APP and LR, this FC's specialty is corroborated by the fact that the AFL itself expressly determines the application of FC's provisions, by stating that it must be observed "in particular" (art. 1): "they will observe what this Law establishes, as well as the environmental legislation in FCe, in particular Law No. 4,771, of September 15, 1965." As the 1965 FC was replaced by the current FC (2012), it is the latter that should be read, as extolled in Article 1 of the AFL, that is, *Law 11.428/06 gives prestige to the FC, not only by citing it, but by determining explicitly its application to the Atlantic Forest Biome with the expression "in particular" of its article 1.*

It is the Atlantic Forest Law itself that expressly refers to observance of the FC (currently, that of 2012) regarding the legal regime of APP and LR, *so that there is no antinomy, but complementarity between AFL and FC*, as pointed out by Attorney General Office in Opinion 115/2019/DECOR/CGU/AGU. This complementarity between FC and AFL, with regard to APP and LR, makes it inappropriate to use the criterion general rule. *vs.* special rule without paying attention to the express reception of the APP and LR regime by the AFL. It would not make sense to apply the special regime of APP and LR to the Atlantic Forest biome, but to deny the weighing clauses made by the legislator regarding this regime in FC Chapter XIII.

The application of the FC Chapter XIII regime to the Atlantic Forest biome cannot be prevented by the absence of its prediction in the AFL or by the characterization of this regime as a "pardon", as the law could not provide for something that was only created by subsequent legislation (FC) and, as seen, there is no forgiveness or amnesty, as highlighted by the STF in the judgment on the constitutionality of the FC. In Law 11.428/2012 there is no rule that prevents the consolidation or application of the rules of chapter XIII of the FC. There is silence (not its prohibition) about the consolidation in the AFL, with provision expressed in the FC for the consolidated areas with no reduction in scope, except in § 16 of article 61-A.

When the FC intended to exclude the application of the rules for

fulfills a social function and is of public interest, and, at the owner's discretion, the areas subject to the restriction referred to in this Law can be computed for the *purpose of Legal Reserve* and its surplus used for purposes of environmental compensation or institution of Environmental Reserve Quota – CRA. Single paragraph. Except for the assumptions provided for by law, the *areas of permanent preservation will not be part of the legal reserve.* [...] Art. 38. Projects involving conservation of native vegetation remnants, scientific research or areas to be restored will be benefited with resources from the Atlantic Forest Biome Fund, implemented in Municipalities that have a municipal plan of conservation and recovery of the Atlantic Forest, duly approved by the Municipal Environment Council. § 1 The projects aimed at the conservation and recovery of *permanent preservation areas, legal reserves, private reserves of natural heritage and areas surrounding conservation units* will have priority support.

consolidated rural areas, it did so expressly (art. 61-A, § 16¹⁹): it excludes from the regime of the article only the UCs of the integral protection group, and even so with some limits, such as the creation of the UC by an act of the public authority until the date of publication of the FC.

Although the breadth of the discussion throughout the entire Chapter XIII of the FC is crystal clear, the absurdity of its non-application is emphasized by an example citing another article on differentiated regime in APP, article 62, because it would generate the contradiction of its application having been admitted by the 4th MPF Chamber²⁰ on the application map of the Atlantic Forest biome (UHE Água Vermelha, Municipality of Riolândia/SP) while denying the impact of the differentiated regime on APP by MPF members in public civil actions and recommendations to environmental agencies.

Environment. Permanent preservation area. Reservoir margin. Água Vermelha Hydroelectric Power Plant. Municipality of Riolândia/SP. Irregular occupation. TAC signature. IBAMA. It was found that the existing buildings on the “Riolândia Artificial Beach” no longer characterized environmental damage. CETESB. Installation Environmental License granted. Archiving promotion for taking the necessary measures for the environmental regularization of the area. For homologation.

Likewise, the Office of the Attorney General of the Republic (PGR), in an opinion issued by the Attorney General of the Republic in Complaint 38.764 before the Supreme Court, also admitted the applicability of Article 62 of the FC to the application map of the Atlantic Forest biome (UHE Água Vermelha, Cardoso/SP). The opinion was emphatic:

It is essential to highlight that there was no modulation of the effects of the judgment professed by the Supreme Court, which would allow, if the Court so wished, to restrict the effects of the decision, *excluding certain situations from its scope* or preventing its retroaction in specific cases (p. 12).

It should be noted that the STF welcomed this understanding when validating the application of article 62 of the FC in the Atlantic Forest biome (Rcl 38.764). Also noteworthy is Rcl 42,786, in which the Supreme Court resolved intertemporal pending on the application of Article 61-A on

19 “§16. The Areas of Permanent Preservation located in real estate within the limits of Integral Protection Conservation Units created by an act of government until the date of publication of this Law are not liable to have any activities considered to be consolidated under the terms of the caput and §§ 1 to 15, except as provided in the Management Plan prepared and approved in accordance with the guidelines issued by the competent body of Sisnama, under the terms of the regulation of the Chief Executive, and the owner, rural possessor or occupant in any capacity must adopt all the measures indicated.”

20 MPF, 4th Chamber, PA 1.34.015.000779/2007-45, 399th Ordinary Session on 02/04/2014, Rapporteur Nivio de Freitas Silva Filho, vote 108/2014.

rural property in the Municipality of Rosana/SP, entirely within the application map of the Atlantic Forest biome.

It should be remembered that Article 5 of the AFL does not allow unauthorized interventions to change the *status* of previously existing vegetation, preventing illegal suppression from being considered valid without the law recognizing this validity, removing effects based on the mere passage of time. *The importance of this observation lies in the fact that the rule of article 5 of the AFL is not special, but general of the system*, so much so that it was provided for in a mere decree (Dec. 750/93, art. 8) without being challenged as to its validity. It forbids what the legal system and the constitutional protection of the environment prohibit and receives express support from the STF and STJ: the very turpitude and the passage of time do not stabilize the situation of environmental illegality, with no acquired right to pollute or degrade the environment.²¹ Alexandre Gaio (2014, p. 90) correctly asserts that this rule does not allow any use of the property on which the illegal suppression of vegetation was focused “other than the duty to make that vegetation reach the stage” of regeneration where it was, emphasizing that it “also aims to repel pretensions and strategies endowed with malice, under the principle that no one can benefit from their own turpitude.”

So much is the rule that the FC itself lays down the obligation to promote, by the owner of the area, possessor or occupier in any capacity, the restoration of vegetation, except for the authorized uses provided for in the Code for the suppression of vegetation APP (art. 7, § 1), such an obligation having a real nature (art. 7, § 2), having no right to regularize future interventions or suppression of native vegetation, in addition to those provided

21 “[...] 2. There is no acquired right to pollute or degrade the environment. [...] 3. Decades of illicit use of rural property do not provide safe conduct to the owner or squatter for the continuation of prohibited acts or make practices prohibited by the legislator legal, especially within the scope of unavailable rights, from which everyone benefits, including future generations, as is the case of environmental protection” (STJ, 2ª T., v.u., REsp 948.921/SP, rel. Min. Herman Benjamin, j. on 23/10/2007, DJe 11/11/2009. In the same sense: STJ, 2ª T., v.u., REsp 1.222.723/SC, rel. Min. Mauro Campbell Marques, j. on 08/11/2011, DJe 17/11/2011). The STF understands that the municipal urban license does not exclude the need for the environmental one, and it is not possible to speak of a fact accomplished by the consolidation of the factual situation in relation to a non-existent right: “REGIONAL DAMAGE IN EXTRAORDINARY APPEAL. ENVIRONMENTAL LAW. SECURITY COMMAND. ABSENCE OF ENVIRONMENTAL LICENSE. INFRACONSTITUTIONAL MATTER. REVIEW OF FACTS AND EVIDENCE. INAPPLICABILITY OF THEORY OF FAIT ACCOMPLI. [...] 3. The theory of the fait accompli cannot be invoked to grant a non-existent right under the allegation of consolidation of the factual situation over time. This is the understanding consolidated by both classes of this Supreme Court. Precedentes: RE 275.159, Rel. Min. Ellen Gracie, Segunda Turma, DJ 11.10.2001; RMS 23.593-DF, Rel. Min. MOREIRA ALVES, Primeira Turma, DJ on 02/02/01; e RMS 23.544-AgR, Rel. Min. Celso de Mello, Segunda Turma, DJ 21.6.2002.” (STF, 1ª T., v.u., AR no RE 609.748/RJ, rel. Min. Luiz Fux, j. on 23/08/2011, DJe 13/09/2011).

for in the FC itself (art. 8, § 4). In relation to LR, it must exist in every rural property according to certain minimum percentages (FC, art. 12). Even suppression in areas subject to alternative land use, the FC orders the recovery of the area (art. 51). It is necessary to highlight that the FC's obligations are real in nature and are transmitted to the successor (art. 2, § 2). In other words, the FC rejects illegalities and determines the return to the *status quo*, but it makes an exception to the consolidated areas for all biomes.

The MMA itself, when regulating Sicar and CAR, instruments of the FC, provides that the “remnants of native vegetation, existing after July 22, 2008, will not lose this classification in cases of fire, deforestation or any other type of unauthorized or unlicensed intervention” (IN MMA 2/2014, art. 3).

So, in addition to the AFL itself recognizing that the specialty of APP and LR is FC, it is wrong to intend to use this AFL rule (art. 5) as if it were something *sui generis*, special, and not general in the legal environmental system, valid for all biomes, regardless of express provision. One cannot be deceived by the fact that the rule is expressly in the Atlantic Forest Law, when what happened was the use of a specific law “to integrate in it principles that were justified in the entire legal order”, as taught by José de Oliveira Ascensão (2016, p. 535), which correctly also differs substantial from formal specialty. There is no substantial reason of specialty for the rule in Article 5 of the AFL; on the contrary, as seen, it is nothing more than the crystallization of Brazilian environmental norms. Therefore, occasional and retroactive changes (special law) remove the rule crystallized in the AFL in the exact terms of its application.

Used to solve antinomies, by the criterion of exceptionality “the exceptional rule must prevail over the common rule” (CHIASSONI, 2020, p. 444). The common norm is one that does not allow the environmental perpetrator to consolidate the removal of unauthorized vegetation (FC, arts. 2, § 2, 7, §§ 1 and 2, 12 and 51; AFL, art. 5), with exceptions being rules of Chapter XIII of the FC that allow, under certain conditions, this consolidation. Thus, since the consolidation is exceptional, it must prevail over the general rule that prohibits it, that is, the rules of Chapter XIII of the FC prevail over the general rules of non-consolidation, such as that of the FC itself and the Atlantic Forest.

Just to argue, even though AFL provisions were special, bringing the second degree antinomy general posterior *versus* special anterior law, the

solution is not necessarily the one advocated, that is, the prevalence of the previous special rule over the posterior general one.

Carlos Maximiliano (2011, p. 293) adduces that the provision that *lex posterior generalis non derogat legi priori speciali* “is a maxim that prevails only in the sense that the emergence of the broad norm cannot cause, by itself, without anything else, the fall of the authority of the current special prescription”, and it is necessary “that this intention clearly follows from the context.” Various types of arguments were seen throughout the text so that such derogation is clear, and it is unnecessary to repeat them.

Maria Helena Diniz (2014, p. 64) teaches that the preference for the specialty criterion in this type of second degree antinomy is not evident, with no defined rule, with an oscillation between prevalence of the chronological and of the special:

In the event of an antinomy between the *specialty criterion* and the *chronological one*, the *lex posterior generalis non derogat legi priori speciali* metacriterion would be valid, according to which the rule of specialty would prevail over the chronological one. This metacriterion is partially ineffective, as it is less secure than the previous one. The *lex posterior generalis non derogat legi priori speciali* metarule has no absolute value, since, at times, *lex posterior generalis derogat legi priori speciali*, in view of certain present circumstances. The preference between one criterion and another is not evident, since there is an oscillation between them. There is no definite rule; depending on the case, there will be supremacy now for one, now for another criterion.

For Italians, in their contemporary legal culture, it is common to think that “the conflicts between the chronological criterion and the specialty criterion do not have a ‘pre-constituted’ solution, and, depending on the case, sometimes the chronological criterion (*lex posterior generalis derogat legi priori specialis*) may prevail, sometimes the specialty one (*lex prior specialis derogat legi posteriori generali*)” (CHIASSONI, 2020, p. 437).

In this context, the metarule *lex posteriori generalis non derogat legi priori speciali* must be understood, because, as adduced by Tercio Sampaio Ferraz Junior (2016, p. 171), it has “application restricted to concrete experience” and is “difficult to generalize.” For Roberto de Ruggiero (1971, p. 148-149), issues that arise in the field of revocation, including second degree antinomies, “are issues of interpretation that must be resolved with the investigation of the legislative will: the brocards in use among the practical: ‘*Generi per speciem derogatur*’, ‘*Lex specialis non derogat generali*’ and the like are false because of their absolutism.”

In short, there is no immunity from the previous special law in relation to the later general one and, as seen, several arguments corroborate the application of what some incorrectly call the later general law (FC, Chap. XIII).

In our legal system, there are cases of a later general rule removing the previous special one, such as the rule that the defendant's embargoes do not have an automatic suspensive effect (CPC/73, art. 739-A and CPC, art. 919) being applied to tax collection proceedings by the STJ in a repetitive appeal (REsp 1,272,827). This understanding was challenged in ADI 5.165, which formed a majority in the STF to reject the allegation of unconstitutionality.²² The scenario is similar to that of the relationship between the FC and the AFL, because the LEF (previous special law) determines the subsidiary application of the CPC (later general) to tax collection proceedings (art. 1), while the AFL determines the pure and simple application of FC provisions, without mentioning subsidiarity. Even so, the STJ recognized the application of the later general law on the previous special, an understanding that the STF has maintained in ADI 5.165.

There is still justice, considered as the criterion of the criteria to resolve the second-degree antinomy. According to Maria Helena Diniz (2014, p. 66), "between two incompatible rules, one should choose the most just one. This is so because criteria are not axioms, since they gravitate in the interpretation alongside evaluative considerations, making the law to be applied according to popular legal conscience and social objectives. Therefore, exceptionally, *justum* value must win between two incompatible norms." Would it be fair to remove the exceptionality of consolidated use only due to the biome in which the property is located, reducing the scope of public policy exhaustively discussed in parliament and practically rendering urban land regularization a dead letter? Obviously not, which is why Chapter XIII of the FC should be applied to the Atlantic Forest biome.

CONCLUSION

Chapter XIII (transitional provisions) of the FC applies to the Atlantic Forest biome, and it is inappropriate to reduce the discussion to articles 61-A and 61-B.

²² Even though in 2010 it has refused to recognize the overall impact by understanding that the dispute can be solved by the application of infra-constitutional legislation (RE 626 468).

The *raison d'être* of Chapter XIII of the FC shows its applicability to the Atlantic Forest biome. The irregularities in rural and urban areas contained in the Atlantic Forest were in the legislative process as one of the main reasons for the need for the new FC, since this biome is home to $\frac{2}{3}$ of the population and the largest number of rural properties. Part of the examples used to justify the need for a differentiated APP and LR regime were from cultures carried out in the Atlantic Forest biome, a fact recognized by the Chamber of Deputies itself (Official Letter 688/SGM/P/2020). The teleological element of adapting non-parameterized properties to the FC is also evident in the explanatory memorandum of the Provisional Measure (MP 571), demonstrating that these rules were intended to affect the entire national territory, without excluding any region and, consequently, biome. The FC's objective of pacifying conflicting situations involving APP and LR is undeniable, both in the countryside and in the city. This weighing of the legislator between the constitutional interests in consolidated areas does not reduce its reach to any biomes or portions of the national territory, on the contrary, they are more necessary where there are more people and rural properties, as is the case of the Atlantic Forest biome.

The application of Chapter XIII of the FC does not materialize into insufficient protection or even setback to the Atlantic Forest biome, because these rules were validated by the STF with an express rejection of allegations of insufficient protection or environmental setback. The application of articles 61-A and 61-B of the Forest Code (FC) does not mean amnesty, much less exemption from recovering the environment, since the Supreme Court expressly dismissed the amnesty thesis and stressed that environmental recovery is guaranteed by the FC.

The fact that it is national heritage (CF, art. 225, § 4) does not exempt the Atlantic Forest biome from being affected by the FC, an argument that implicitly carries a supposed superiority of this biome in relation to the others and disregards that the AFL itself prescribes the application, in particular, of the FC. There is no reason to consider the FC as not applicable to the Atlantic Forest biome, under pain of extending the argument to the Amazon Forest, Pantanal, Serra do Mar and the Coastal Zone, which highlights the absurdity of the argument.

The existence of a law on the Atlantic Forest does not make this biome superior to the others, both from the legal and from the (natural) ecosystemic point of view, classified or not as national heritage, because such classification does not establish hierarchy between biomes and much less

immunity to the terms of law. The ecologically balanced environment provided for in the Federal Constitution (art. 225) presupposes equality in the protection of biomes, guaranteeing the respective individualities, all of which must be protected for the effectiveness of such constitutional clause. One cannot and should not prioritize the conservation of one ecosystem over another, as there would be damage to all biomes, with a disruption of the ecological balance. However, this is what happens when the Atlantic Forest biome is considered immune to the provisions of Chapter XIII of the FC. Its importance to sustain singularities is described, when these peculiarities are inherent to all biomes, aiming to exclude certain FC rules applicable to all biomes, creating an outrageous treatment of the isonomy between the biomes and the clause that guarantees the ecologically balanced environment.

The debate around ecological identity in the Environmental Reserve Quotas (CRA) demonstrates the compatibility of the FC Chapter XIII regime with the Atlantic Forest biome. The STF debated on the scope of article 48, § 2º, of the FC and overturned the core of the thesis of the inapplicability of its Chapter XIII: the need to recover or restore the suppression of vegetation in the Atlantic Forest biome. It also cited examples of environmental compensation on the use of CRAs in the Atlantic Forest biome without excluding areas of this biome from the debates and considerations on the legal reserve area compensation regime through CRA; on the contrary, environmental compensation through CRAs involving areas within the Atlantic Forest biome constituted part of the very reason for deciding on the judged matter, provided that it has the same ecological identity. As CRA is expressly mentioned in article 66, paragraph 5, I, of the FC, which allows the regularization of the legal reserve for its compensation via “acquisition of Environmental Reserve Quota – CRA” (art. 66, III), not requiring that there is recovery or restoration of the LR *in loco*, the admission of consolidation with a differentiated regime of environmental restoration is clear, even in the Atlantic Forest biome. STF’s admission of the CRA – an instrument of the FC exclusive to the legal reserve – in the Atlantic Forest biome overturns the thesis that there would be no space for legal solutions in this biome that were not the solution recommended in the AFL.

The Lindb imposes an analysis of the practical consequences of the thesis of not applying Chapter XIII of the FC to the Atlantic Forest biome, with emphasis on the almost inexistence of urban land regularization (Reurb) in the most inhabited biome in the country and the impossibility

of carrying out the forest recovery and water production programs related to the disruption of the Fundão dam, in Mariana/MG. So, a fundamental part of the FC would not be applicable in a biome that shelters $\frac{2}{3}$ (two thirds) of the Brazilian population, which is even against its wording, since it expressly adduces its application to forests and other forms of native vegetation “existing in the national territory” (art. 2, *caput*), not excluding some part of this territory, mainly a part with such expressive population, distributed across 17 states and responsible for approximately 70% of the GDP.

The suppression of the Atlantic Forest biome under certain requirements, as in Law 12.651/12 and in the FC, does not prove to be incompatible with the regime of consolidated areas of APP or LR brought by the FC, rather it appears as its assumption; it is only possible to consolidate the use of the area if this was not allowed (expressly or implicitly) at the time by the legal system. The FC was expressed when it excluded its application, as occurred in the UCs of the integral protection group (art. 61-A, § 16). In the general definition of consolidated rural area, for example, there was no exclusion of biome or region (art. 3, IV). Interventions not authorized by the AFL do not change the stage of the Atlantic Forest that existed prior to the illegal act (AFL, art. 5), but this does not prevent the legislator from being able, in certain cases, to admit some interventions retroactively and occasionally, as the FC did in its Chapter XIII. There is perfect harmony between the AFL (prohibits illegal interventions) and the transitional provisions of the FC (retroactively authorizes certain activities in certain circumstances, imposing specific solutions), and absolute contradictions between two expressions of law should not be assumed.

All the institutional actors when editing normative acts on the implementation of the CAR and ERP did so to be applied in consolidated rural areas throughout the national territory, not excluding any biome. In the states covered by the IBGE Atlantic Forest application map, it appears that the ERP (FC, art. 59) and CAR, approved by local laws or that followed federal regulations, do not exclude the Atlantic Forest biome from its scope, exactly because they consider the FC (Chapter XIII) applicable to this biome.

The procedural behavior of the actors involved in the judgment of the Forest Code clearly demonstrates the misconception of the thesis of the inapplicability of Chapter XIII of the FC to the Atlantic Forest biome from the perspective of its own defenders. Several actors (*e.g.*, PGR, RMA) involved in FC’s direct actions have admitted the application of articles 61-A

and 61-B to the Atlantic Forest biome when citing examples of this biome to support its unconstitutionality, but now maintain that some rules of the Chapter XIII of the FC do not apply to this biome, which constitutes an offense to the legal discursive rules by exposing the contradiction inherent in its performance.

It is the Atlantic Forest Law itself that expressly refers to the FC's observance (currently, that of 2012) regarding the legal regime of APP and LR, so that there is no antinomy, but complementarity between AFL and FC. This complementarity of the FC to the AFL, with regard to APP and LR, makes it inappropriate to apply the general standard *vs.* special standard criterion.

Law 11.428/06 expressly dialogues with the FC not only in its article 1, but in several passages when expressly incorporating the APP and LR institutes (arts. 11, II and 23, III, 35 and 38), and nothing prevents the application of FC Chapter XIII rules to the Atlantic Forest biome. It internalizes the concept of LR and APP from the perspective of the FC, demonstrating that, in terms of specialty, it is the FC that has this characteristic, making baseless the claim that the AFL repudiates the APP and LR, which have rules in the FC and therefore, is a special law, so much so that its article 1-A clarifies that, its object includes establishing general rules on APP and LR.

It would not make sense to apply the special regime of APP and LR to the Atlantic Forest biome, but to deny the weighing clauses made by the legislator regarding this regime in Chapter XIII of the FC.

In Law 11.428/2012, there is no rule that prevents the consolidation or application of the rules of Chapter XIII of the FC. There is only silence (not its prohibition) about the consolidation in the AFL, with provision expressed in the FC for the consolidated areas without reduction of scope, except in § 16 of article 61-A.

However, in terms of specialty, the FC is undoubtedly a special law (*lex specialis*) when it comes to consolidated rural areas, APP and LR, with its specific regime applicable throughout the country.

Furthermore, Article 5 of the AFL is not a special rule, but a general one in the system, as it prohibits what the legal system and the constitutional protection of the environment prohibit and is supported by jurisprudence: the very turpitude and the passage of time do not stabilize the situation of environmental illegality, with no acquired right to pollute or degrade the environment. In addition to the specialty of the subject APP and LR pertaining to the FC, it is wrong to intend to use this rule of AFL (art. 5) as

if it were dealing with something different, special, and not general in the environmental legal system and valid for all biomes, regardless of express provision. There is no substantial specialty reason in it; on the contrary, it is nothing more than the crystallization of Brazilian environmental norms. Occasional and retroactive changes (special law) remove the rule crystallized in the AFL and elsewhere in the law, in the exact terms of its application. By the exceptionality criterion, used to resolve antinomies, which is allowed only to argue, the exceptional norm (consolidation provided for in Chapter XIII of the FC) must prevail over the common norm (prohibition of the environmental perpetrator to consolidate the unauthorized suppression of vegetation –FC, arts. 2, § 2, 7, §§ 1 and 2, 12 and 51; AFL, art. 5).

Just to argue, even though the AFL devices were special, in the sense of bringing up the second-degree antinomy later general (FC) vs. previous special (AFL) law, the solution is not the non-applicability of Chapter XIII of FC to AFL. The preference for the specialty criterion in this type of second-degree antinomy is not evident, there is no defined rule, with an oscillation between the prevalence of the chronological and that of the special. Several arguments corroborate the application of the FC, Chapter XIII, but it is still worth mentioning a case of a subsequent general rule that would repeal the previous special one, such as that stays of execution do not have an automatic suspensive effect (CPC) being applied to tax collection proceedings (LEF).

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