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ENVIRONMENTAL EXPROPRIATION: A GREENING APPROACH OF THE BRAZILIAN SUPERIOR COURTS CASE PRECEDENTS

Mariana Barbosa Cirne[1]
Instituto Brasileiro de Ensino, Desenvolvimento e Pesquisa (IDP)

ABSTRACT

The article analyzes the court precedents of the STF and the STJ on environmental expropriation and compensation for the creation of UCs. The 1988 Constitution of Brazil introduced a greening approach on property, which contributed to the implementation of conservation units. By means of both bibliography and court precedent reviews, 24 STF and 199 STJ decisions were analyzed. The outcome was that the STJ adopted a distinction between expropriation and administrative limitation. In the latter case, the duty to compensate for the creation of new UCs is removed, because of the absence of actual administrative possession of the private property. Out of a total of 76 decisions, 24 recognize indirect expropriation; and 64% of the conservation units constitute public ownership lands, considered as administrative limitations, since the public power did not take possession of such areas after the creation of the UCs. In eight decisions the STF demonstrated that in all cases of limitation, compensation would be appropriate, regardless of its public or private ownership. The conclusion is that the understanding of both the STF and STJ does not seem to meet the greening approach on property defended in this article.

Keywords: environmental expropriation; property; Brazilian superior courts; conservation unit.

1PhD in Law from Universidade de Brasília (UnB). Master in law, state and constitution from UnB. Specialist in Public Law from Universidade Potiguar (UnP). Specialist in Civil Procedure from,Instituto Brasileiro de Ensino, Desenvolvimento e Pesquisa (IDP). Federal attorney at Federal Attorney's Office (AGU) – Brazil. Professor at the Programa de Pós-Graduação Stricto Sensu em Direito Constitucional do IDP. Professor of Environmental Law at Centro Universitário de Brasília (UniCEUB). Currículo Lattes: http://lattes.cnpq.br/1742438924529264 / ORCID: https://orcid.org/0000-0002-9832-7225 / e-mail: marianabcirne@gmail.com

DESAPROPRIAÇÃO AMBIENTAL: UMA LEITURA ECOLOGIZADORA DA JURISPRUDÊNCIA DO STF E DO STJ

RESUMO

O artigo analisa a jurisprudência do STF e do STJ sobre a desapropriação ambiental e a indenização estatal pela criação das UCs. A Constituição de 1988 trouxe a ecologização da propriedade, o que corroborou a implementação das UCs. Por meio de revisão bibliográfica e jurisprudencial foram analisados 24 acórdãos do STF e 199 do STJ. O trabalho concluiu que o STJ defende uma diferenciação entre desapropriação e limitação administrativa. Nesse último caso, o dever de indenizar pela criação de novas UCs é afastado, em razão da ausência do efetivo apossamento administrativo do imóvel particular. De 76 decisões, 24 reconhecem a desapropriação indireta. 64% das UCs são de domínio público, entendida como limitação administrativa, já que o Poder Público, após a criação das UCs, não se apossa das áreas. O STF, com oito julgados, demonstrou que em todas as hipóteses de limitação seria cabível a indenização, independentemente de seu domínio público ou privado. Conclui-se que as posições do STJ e do STF parecem não atender à ecologização da propriedade defendida neste trabalho.

Palavras-chave: *desapropriação ambiental; propriedade; tribunais superiores; unidade de conservação.*

INTRODUCTION

This work analyzes the case precedents of the Superior Courts on environmental expropriation from an greening vision of the property. By reading the decisions of the Superior Court of Justice (STJ) and the Federal Supreme Court (STF) on environmental expropriation, this work seeks to unveil a debate on environmental expropriation, regarding the right to compensation in the event of creation of conservation units (UCs). The theme is especially relevant in view of the existence of 334 federal UCs, which represent 171,424,192 hectares of Brazilian territory. Unfortunately, this number does not necessarily mean environmental protection, given the deficit in the implementation of these UCs.

The 1988 Constitution of Brazil brought a new vision of property, by guiding its interpretation in light of Article 225 (ecologically balanced environment), of its § 1, III (duty of the state to protect the balance of specially protected territorial spaces), of Article 170, VI, (limitation of the competition law by environmental values) and of Article 186, II, (social function of rural property – combination of social, environmental, rational and labor components). Therefore, the greening of the property must produce effects on decisions of the Superior Courts.

As presented in this work, environmental expropriation encompasses four possible paths. Expropriation-sanction for social interest for agrarian reform purposes was based on Law Number 8.629, of 1993; expropriation for public utility was based on Decree-Law Number 3.365, of 1941; and expropriation for social interest was based on Law Number 4.132, of 1962. Finally, indirect expropriation, especially when faced with the problem of creating UCs without the necessary payment of prior compensation, gave rise to private action against the Union, in compliance with court precedent requirements.

By analyzing the case precedents of the superior courts based on the idea of environmental expropriation for the implementation of UCs, it can be seen that there is a clash between the concepts of administrative limitation and expropriation, in the legal and constitutional realms. Thus, the limitations given to the right to property by the environmental component are at stake here.

Given this scenario, the questions that challenge this research are the following: How do STJ and STF interpret environmental expropriation for the creation of UCs? Which view best respects the greening of properties?

To answer these questions, this work is divided into three parts. The first deals with the greening of properties. The second is about environmental expropriation for the purpose of land regularization of UCs. Finally, the results of the research of the STJ and STF case precedents on the theme are presented. By means of a bibliographical review, combined with case law research, the study analyzed 24 decisions from the STF and 199 from the STJ.

As a result, the research showed that, of the 76 STJ decisions, 24 materialized as indirect expropriations and 20 of them as administrative limitation. Therefore there is a dispute over the payment of compensation for these areas, in which 64% of the UCs are of public ownership. Even in these cases, the STJ recognized the administrative limitation, since government, after creating the UCs, did not take possession of the areas. The STF demonstrated in eight decisions that in all cases of limitation, compensation is applicable. The private individual deserves compensation, despite the constitutional duty to support environmental limitations. The analysis of the decisions of the Superior Courts showed that the greening of properties seems to have had the expected effects.

1 GREENING APPROACH OF THE PROPERTY IN THE 1988 CONSTITUTION OF BRAZIL

The right to property, under the 1988 Constitution of Brazil must be observed allied to its social function. This is because "property and social function are coexistent and inseparable principles, being the social function intrinsic to properties" (DANI; BORGES DE OLIVEIRA; SABETZKI BARROS, 2011, p. 470). Currently, properties present a socio-environmental dimension, linked to the common good that cannot be disregarded. In this new context, it must be exercised in harmony with social and environmental interests (COELHO; REZENDE, 2016).

Marés (2002) argues that the 1988 Constitution of Brazil brought a paradigm shift by recognizing collective and diffuse rights such as the environment, cultural heritage, ethnic values, and limitations on private property. This materialized a new right based on pluralism. From the content of the 1988 Constitution of Brazil it can be recognized an intrinsic value to nature (WINCKLER; PEREIRA; FRANCO, 2010) that has effects on other doctrines, such as the right to property. This change permitted private properties to leave their essentially individualistic configuration to enter

a more civilized and restrained phase, in which they are subsumed to an environmental order (SANTOS, 2008). This is a fundamental shift that has repercussions on property rights.

This paradigm shift – the greening of properties – is inserted in the 1988 Constitution of Brazil. It should be highlighted that the Constitutional text changed the face of properties in four main points. First, in Article 225, it is established the right to an ecologically balanced environment as an asset for common use by the people and indispensable to a healthy quality of life. This definition gave a broader context to law that used to have an individual vision. The new text introduced a paradigm shift from a liberal and individual state to a social, collective, solidary and diffused state (CIRNE, 2019). This is because the text began to "contemplate collective interests and ensure the promotion of the common good" (DANI; BORGES DE OLIVEIRA; SABETZKI BARROS, 2011, p. 470). There is here a duty of solidarity that has transformed the right to property, which can no longer be seen in an individual or merely collective way. Solidarity is the new vector that drives the greening of properties and that encompasses the establishment of a limited and conditioned exploitation regime, guided by environmental balance (CIRNE, 2019).

The second point, inserted in Article 170, VI[2], deals with free enterprise and at the same time expressly places the environment as one of its limitations. At this point there is a qualification of the right to property by the environment (ARAÚJO, 2017). This provision allows to the conclusion that the harmonization between property and social function is also required in the context of the competition law (VIEIRA, 2009). The materialization of the sustainable development principle has occurred and established environmental and social limits to economic development (CIRNE, 2019).

The third point of the 1988 Constitution, no less important, is in Article 186, II[3], and deals with the social function of rural properties, by including the environment among the cumulative requirements for such that goal. In other words, it includes in the concept of social function the

2 According to "Article 170. The competition law, founded on the valorization of human work and free enterprise is intended to ensure a dignified existence for all, in accordance with the dictates of social justice, observing the following principles: […] VI – protection of the environment, including through differentiated treatment by means of environmental impact of products and services and their processes of preparation and provision" (BRASIL, 1988).

3 According to "Article 186. The social function is fulfilled when the rural property meets, simultaneously, according to criteria and degrees of requirement established by law, the following requirements: […] II – adequate use of available natural resources and preservation of the environment". (BRASIL, 1988).

correct use of natural resources enable their conservation and preservation. "The greening criterion corresponds to the environmental perspective of the social function of rural properties" (VIEIRA, 2009, p. 88). Since the property must fulfill a social and environmental function, valuations for the purpose of compensation must keep in line with this change of paradigm (SANTOS, 2008, p. 76). Thus, it is part of the greening of properties, which in this case is a rural property.

On the last point, § 1º, III of Article 225 established as a duty of the public power

> […]define, in all units of the Federation, territorial spaces and their components to be specially protected, with alteration and suppression only permitted by law, being forbidden any use that compromises the integrity of the attributes that justify their protection (BRASIL, 1988).

This provision entails the greening of properties further protected by the constitutional text, with the safeguarding of its integrity and requiring the legal reserve for the reduction of its protection. On this provision, the STF has already established the position that the reservation of legislation is a requirement only for the modification or suppression of UC, and the public power may avail itself of other acts, in addition to law in the strict sense, as mechanisms for the institution of protected environmental spaces (BRASIL, 2019). This is a state duty to which public managers are bound. In other words, there is no discretion, but rather a state duty to create these specially protected territorial spaces (MARCON, 2014).

The interpretation of the constitutional system of environmental protection reveals the limited exploitability of property (WINCKLER; PEREIRA; FRANCO, 2010). Therefore, it is necessary to be aware of the existence of the social function of property and the need to apply it effectively (LEONETTI, 1998).

In view of this change of perspective on properties, a reflection on the implementation of UCs arouses, since these environmentally relevant areas are one of the main instruments for the protection of biodiversity (COELHO; REZENDE, 2016). Despite their importance, a large part of the UCs has not yet been incorporated into the public patrimony. The land regularization[4] of these spaces, a responsibility of the executive branch, has proven deficient (BRASIL, 2014a). This set up a false notion of protection (GODOY; LEUZINGER, 2015). Because of this, it is necessary to address

4 By land regularization it is meant the "process necessary to ensure that the area comprising the UC is in the possession and dominion of those entitled to it" (BRASIL, 2014a, p. 8).

one of the main instruments that can contribute to this implementation: environmental expropriation actions, which is performed in the next topic.

2 ENVIRONMENTAL EXPROPRIATIONS

Expropriation is the "most onerous form of state intervention in property since it effectively removes from the private individual his property" (SILVA, 2017, p. 22). It is an "administrative procedure through which the government, based on a prior declaration of public necessity, public utility or social interest, forces the private individual to lose an asset that will be replaced in its heritage by a fair compensation" (DI PIETRO, 2014, p. 144). In other words, expropriation is a harsh measure to be taken by the public authorities regarding private property, which requires the payment of fair compensation.

Among the possibilities of environmental expropriation, there are four modalities. The first is expropriation-sanction, for social interest for agrarian reform purposes (SEFER; RODRIGUES, 2016), which materializes one facet of the socio-environmental function of property and is regulated in Law Number 8.629/93 (BRASIL, 1993a; SANTOS, 2008) and in Complementary Law Number 76/1993 (BRASIL, 1993b; HARADA, 2007)[5]. In this case the objective is to promote agrarian reform and punish non-compliance with the social function of property. As these are cumulative requirements, one of them being environmental, it would be feasible to apply expropriation-sanction (VIEIRA, 2009). However, as this work has chosen to deal with expropriations for the implementation of UCs, this type is not a focus of attention.

The second type is based on the social interest and is regulated by Law Number 4132 of 1962[6] (BRASIL, 1962). This is one of the legal foundations used by the ICMBIO to expropriate private areas within UCs of public ownership.

There is also expropriation for public utility, with its normative framework in the Decree-Law Number 3,365/41 (BRASIL, 1941). According to Article 5 of Decree-Law 3,365/41[7], among the hypotheses applicable

5 For more on this topic see: Cirne (2011) and Salles (2006).

6 As "Article 2 is considered of social interest: […] VII – the protection of the soil and the preservation of water courses and springs and forest reserves. [VIII – the use of areas, places or goods that, due to their characteristics, are appropriate for the development of tourism activities. (Included by Law Number 6.513, de 20.12.77)" (BRASIL, 1962).

7 According to "Article 5, the following are considered cases of public utility: […] k) the preservation and conservation of historic and artistic monuments, isolated or integrated into urban or rural groups, as well as the necessary measures to maintain and highlight their most valuable or characteristic aspects,

to expropriation for public utility are the places particularly endowed by nature (COELHO; REZENDE, 2016).

Finally, there is the indirect expropriation, which results from a jurisprudential innovation. Under the case precedents firmed in the STJ, the simultaneous requirements of indirect expropriation are the following:

> (a) the unquestionable ownership of the ownership of the property at the time of the issue of the decree creating the UC;
> b) the location of the property within the limits of a UC of public ownership and ownership;
> c) the effective administrative appropriation of the private property by the environmental agency, through the practice of concrete acts of limitation of use, enjoyment and disposal of the property capable of completely emptying the content of this right (BRASIL, 2019).

This is an institute that stems from the prevalence of public over private interest, but it is viewed with many reservations by part of the doctrine (SOUZA, 2010).

As shown by the case precedent analysis, the great clash that occurs in the Superior Courts focuses on the payment of compensation. In the case of indirect expropriation, compensation would be applicable, but in the case of administrative limitation, no compensation should be paid. Administrative limitation is different from expropriation. In the latter, there is a transfer of individual property to the ownership of the expropriator, with full compensation. In the other there is "restriction on the use of property, imposed generically to all owners, without any compensation" (MEIRELLES, 2009, p. 645-646).

Regarding the administrative limitation, "the public power creates restrictions of general character to the right of ownership of the individuals administered, with no right to compensation" (BRASIL, 2014a, p. 10). In other words, the administrative limitation corresponds to "all imposition of the state, of general character, which conditions the property rights of the owner, regardless of any compensation" (SANTOS, 2008, p. 101).

It is known that the creation of a UC profoundly alters the socio-environmental function of the properties existing within the enacted area, but such alteration should not generate, by itself, a reparatory obligation on the part of the government. Therefore, it must be evaluated whether the concrete situation implies the complete emptying of the economic content of a given property (BRASIL, 2014a). The creation of a UC

and also the protection of landscapes and places particularly endowed by nature (our emphasis)

always materializes a public interest (LEUZINGER, 2003) that deserves to be shared by all. If there is incompatibility between the right of the collectivity for the effective implementation of UCs and the right of the owner to exercise his private rights, the public interest must prevail (COELHO; REZENDE, 2016). The greening of properties provides this orientation.

3 ENVIRONMENTAL EXPROPRIATION IN BRAZILIAN SUPERIOR COURTS

The parameters of this research are the collegiate decisions of the Brazilian superior courts on the subject of environmental expropriation. To this end, searches were conducted on the websites of the STF (https://jurisprudencia.stf.jus.br) and the STJ (https://scon.stj.jus.br/SCON/) using the words "*desapropriação* (expropriation)" and "ambiental (*environmental*)". It was defined that only the decisions would be part of the research and that the motions for clarification would be excluded from its object[8]. And it was unnecessary to define a time interval as the normative landmarks on expropriation that apply to the UCs debate are quite old. As the greening of properties begun with the Brazilian Constitution of 1988, this is the initial time frame of decisions.

The research material for this work was 199 judgments from the STJ and 24 judgments from the STF. The words "conservation units" were not used in the search as they would excessively reduce its object, and be detrimental of the research. In the STJ, for example, by including the words "conservation units", the number of judgments to be analyzed would be reduced to only15. It was noted that in some cases the term "specially protected territorial spaces" were used, while in others the specific type of UC that was object of the decision, without standardization.

The research was based on the categories of UCs established in Law Number 9985, of 2000, regardless of whether they are federal, state or municipal. Article 7 of the SNUC Law (BRASIL, 2000) defined two groups of UCs, with specific characteristics (PEREIRA; SCARDUA, 2008): fully protected areas, allowing only indirect use of their natural resources; and

8 This is because, according to Article 1.022 of the Code of Civil Procedure (BRASIL, 2015): "A motion for clarification may be filed against any judicial decision in order to: I – clarify obscurity or eliminate contradiction; II – supply omission of point or issue on which the judge should have pronounced ex officio or upon request; III – correct material error". Should these decisions be included, there would be duplicity in the results

sustainable use units, allowing direct use of their resources[9]. The SNUC law established that the ownership should be public or private with restrictions, depending upon the 12 categories of UC. What appears in all categories[10] is the prevision that "the private areas included within their limits will be expropriated, in accordance with the law" (BRASIL, 2014a). This work focused on this guideline and, from the reading of the decisions, it was possible to separate those that dealt with UC, in the scope of the research.

As announced in the introduction, there are questions guiding this research: How do the STJ and the STF interpret environmental expropriation for the creation of UCs? Which would be the view that best respects the greening of properties?

Having explained the main methodological choices, the following item show the results

3.1 STJ avoiding the unnecessary payment of compensations

From the total of 199 decisions, 76 dealt with expropriations involving UCs. The decisions on expropriation of social interest for agrarian reform purposes, discussing environmental liabilities[11] and separate compensation for forest cover[12]; those on protection of the Atlantic Forest[13] and those on permanent preservation areas (APP)[14] of the Forest Code, were all excluded from the research object, as they did not involve UCs.

The main point to note is that the STJ case law makes a clear difference between administrative limitation and indirect expropriation. This is because, according to the STJ, administrative limitation is distinct from expropriation. In the latter, there is a transfer of individual property to the ownership of the expropriator, with full compensation; in the former, there is a restriction on the use of property, imposed generically to all owners, without any compensation (SOUZA, 2010).

The reading of the material allowed us to build a codification

9 According to Article 7 […] "§1 The basic objective of the Full Protection Units is to preserve nature, being admitted only the indirect use of its natural resources, with exception of the cases foreseen in this Law. § 2º The basic objective of the Sustainable Use Units is to make nature conservation compatible with the sustainable use of a portion of their natural resources".

10 Except for RPPNs, which are always private.

11 For more on this topic, see:Cirne (2011) & Sefer and Rodrigues (2016).

12 As an example, REsp 789481 e o REsp 878939 can be quoted.

13 As REsp 752813/SC.

14 As AgInt in AgInt no AREsp 974689

(SALDAÑA, 2009) for the main themes identified in the judgments, as follows: (a) Expiration of the Decree[15]; (b) Direct Expropriation[16]; (c) Indirect Expropriation[17]; (d) Expropriation for social interest[18]; (e) Taking possession; (f) Prevent expedition of the decree of creation of the UC; (g) Administrative corruption; (h) Invalidation of environmental licenses due to loss to the UC; (i) Administrative Limitation[19]; (j) Nullity of the decree due to lack of prior consultation with the population; (k) Statute of limitations for compensation claim; (l) Overlapping of ARIE and Expropriation for agrarian reform purposes; (m) Lawful tredestination of the Decree[20].

Chart 1 brings the synthesized information of the 76 judgments on: (a) number of each appeal in the STJ; (b) synthesis of the decision, according to the codification explained; (c) UC involved, when identifiable; and (d) ownership of the UC from the categories of Law Number 9.985/2000[21]. Here are the results:

Chart 1. STJ decisions on environmental expropriation and UC

	Appeal	**Decision**	**UC**	**Ownership**
1	AgInt no AREsp 1443672	Administrative limitation	APA do Rio Batalha	Private
2	AgInt no AREsp 1551978 / SC	Administrative limitation	ARIE da Serra da Abelha	Private

15 In the hypothesis of applying the five-year term for expropriation, according to Article 10 of Decree-Law 3365/1941: "Article 10. The expropriation must be carried out by means of an agreement or be judicially sought, within five years, as of the date of issuance of the respective decree, after which it will expire" (BRASIL, 1941).

16 In the hypothesis that the action was brought by the Executive Branch, based on Decree-Law Number 3365/1941.

17 In the hypothesis resulting from case precedent creation, when a private individual proposes an action against the Public Power seeking compensation.

18 In the hypothesis of an action proposed by the state based on Law Number 4.132, from 1962 (BRASIL, 1962).

19 In the hypothesis that the limitation considered is general and abstract, not giving rise to compensation.

20 In the hypothesis that the discussion involves the modification of the object of the Decree lawfully modifies its public interest.

21 In this part of the work, UCs are separated into public (those in which the land can only be public) and private (those in which it could be either public or private). This division is justified because of the interest in the discussion of compensation for the implementation of UCs (BRASIL, 2000).

3	AREsp 1548774 / SC	Administrative limitation	ARIE da Serra da Abelha	Private
4	AgInt na AR 4951 / SP	Indirect expropriation	Parque Estadual Da Serra do Mar	Public
5	REsp 1653169 / RJ	Indirect expropriation	Monumento Natural dos Costões Rochosos	Private
6	AgInt no REsp 1781924	Expiration of the decree	ESEC de Murici	Public
7	REsp 1784226 / RJ	Administrative limitation	Not identifiable	Not identifiable
8	AgInt no AREsp 1019378 / SP	Administrative limitation	Not identifiable	Not identifiable
9	AgInt no AREsp 1187586 / SP	Statute of Limitation for compensation claim	APA Ilha Comprida	Private
10	AgInt no AgRg no REsp 1434520	Expiration of the decree	Parque Nacional Ilha Grande	Public
11	REsp 1524056 / ES	Administrative limitation	Parque Estadual de Itaúnas	Public
12	AgRg no AREsp 611366 / MG	Expiration of the decree	Parque Nacional da Serra da Canastra	Public
13	REsp 1582130 / DF	Administrative limitation	Parque Recreativo Sucupira	Public
14	AgRg no REsp 1513043	Taking possession	Not identifiable	Not identifiable
15	AgRg nos EDcl no REsp 1346451 / GO	Administrative limitation	Parque Nacional das Emas	Public
16	REsp 1406139 / CE	Administrative limitation of the buffer zone	Parque Nacional de Jericoacoara	Public
17	REsp 1297394 / AC	Expropriation for Social Interest	Reserva Extrativista Chico Mendes	Public
18	AgRg no AgRg no REsp 1416333 / SP	Direct expropriation	Parque Estadual da Serra do Mar	Public
19	AgRg no AREsp 166481 / RJ	Administrative corruption	Parque ecológico	It is not in the SNUC typology
20	AgRg no AREsp 155302 / RJ	Administrative limitation	Parque Municipal	Public

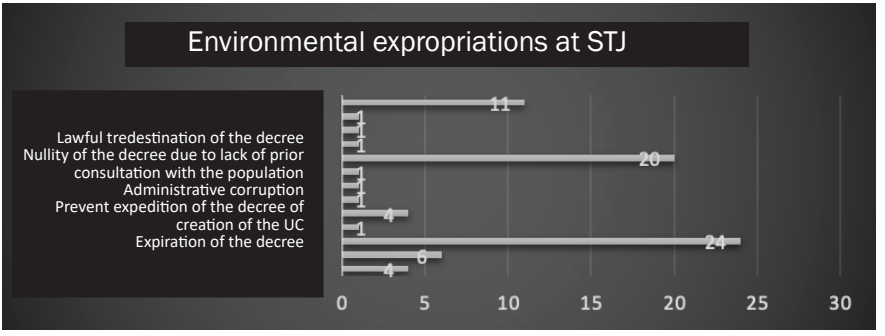
21	AgRg no AREsp 150138 / SP	Indirect expropriation	APA Federal	Private
22	AgRg no REsp 1235798 / RS	Administrative limitation	Parque Nacional da Serra Geral	Public
23	REsp 996203 / SP	Direct expropriation	Parque Estadual do Aguapeí	Public
24	REsp 866651 / SP	Lawful tredestination of the decree	Parque Ecológico	It is not in the SNUC typology
25	AgRg no REsp 1192971	Administrative limitation	APA da Bacia Hidrográfica do Rio Paraíba do Sul	Private
26	REsp 848577 / AC	Expropriation for social interest	Reserva Extrativista Chico Mendes	Public
27	AgRg no REsp 486645 / SP	Direct expropriation	Estação Ecológica Juréia-Itatins	Public
28	REsp 1122909 / SC	Invalidation of environmental licenses due to loss to the UC	Parque Nacional Das Araucárias	Public
29	EREsp 486645 / SP	Direct expropriation	Reserva Ecológica	It is not in the SNUC typology
30	REsp 853713 / SP	Lawful tredestination of the decree	Parque Ecológico	It is not in the SNUC typology
31	EREsp 628588 / SP	Administrative limitation	Parque Estadual Xixová-Japuí	Public
32	REsp 995724 / SP	Lawful tredestination of the decree	Parque Ecológico	It is not in the SNUC typology
33	REsp 909781 / SP	Lawful tredestination of the decree	Parque Ecológico	It is not in the SNUC typology
34	REsp 975599 / SP	Lawful tredestination of the decree	Parque Ecológico	It is not in the SNUC typology
35	REsp 868120 / SP	Lawful tredestination of the decree	Parque Ecológico	It is not in the SNUC typology
36	REsp 765872 / SP	Administrative limitation	Parque Estadual da Serra do Mar	Public
37	REsp 746846 / SP	Administrative limitation	Parque Estadual da Serra do Mar	Public

38	REsp 727404 / SP	Administrative limitation	Parque Estadual de Ilhabela	Public
39	EREsp 209297	Administrative limitation	Parque Estadual da Serra do Mar	Public
40	RMS 20281 / MT	Nullity of the decree due to lack of prior consultation with the population	Parque Estadual Igarapés do Juruena	Public
41	REsp 659220 / SP	Indirect expropriation	Estação Ecológica de Juréia	Public
42	REsp 835366 / AC	Expropriation for social interest	Reserva Extrativista	Public
43	REsp 730464 / SP	Expiration of the decree	Parque Estadual de Ilhabela	Public
44	REsp 847092 / SP	Lawful tredestination of the decree	Parque Ecológico	It is not in the SNUC typology
45	REsp 474301 / SP	Administrative limitation	Parque Estadual da Serra do Mar	Public
46	REsp 819772 / SP	Lawful tredestination of the decree	Parque Ecológico	It is not in the SNUC typology
47	REsp 786658 / AC	Expropriation for social interest	Reserva Extrativista Chico Mendes	Public
48	REsp 819191 / SP	Lawful tredestination of the decree	Parque Ecológico	It is not in the SNUC typology
49	MS 11140 / DF	Prevent expedition of the decree of creation of the UC	Florestas Nacional do Amaná	Public
50	REsp 816251 / SP	Lawful tredestination of the decree	Parque Ecológico	It is not in the SNUC typology
51	REsp 648833 / SC	Overlapping of ARIE and Expropriation for agrarian reform purposes	ARIE Serra da Abelha	Private
52	REsp 628588 / SP	Administrative limitation	Parque Estadual Xixová-Japuí	Public
53	REsp 710065 / SP	Lawful tredestination of the decree	Parque Ecológico	It is not in the SNUC typology

54	REsp 503357 / SP	Indirect expropriation	Parque Estadual de Ilhabela	Public
55	REsp 519365 / SP	Indirect expropriation	Parque Estadual de Jacupiranga	Public
56	REsp 591948 / SP	Indirect expropriation	Parque Serra do Mar	Public
57	REsp 612202 / SP	Indirect expropriation	Parque Serra do Mar	Public
58	REsp 468405 / SP	Administrative limitation	Parque Serra do Mar	Public
59	REsp 440157 / SP	Indirect expropriation	Parque Serra do Mar	Public
60	REsp 408172 / SP	Indirect expropriation	Parque Serra do Mar	Public
61	REsp 258021 / SP	Indirect expropriation	Parque Estadual Turístico do Alto Ribeira	Public
62	REsp 402598 / SP	Indirect expropriation	Parque Estadual de Ilhabela	Public
63	REsp 94297 / SP	Indirect expropriation	Parque Serra do Mar	Public
64	REsp 316261 / SP	Indirect expropriation	Parque Serra do Mar	Public
65	REsp 433251 / SP	Indirect expropriation	Parque Estadual de Ilhabela	Public
66	AgRg no Ag 387279 / SP	Indirect expropriation	Not identifiable	Not identifiable
67	REsp 416511 / SP	Indirect expropriation	Parque Serra do Mar	Public
68	REsp 136593 / SP	Direct expropriation por utilidade pública	Estação Ecológica Juréia-Itatins	Public
69	AgRg no REsp 146358 / PR	Indirect expropriation	Parque Estadual de Marumbi	Public
70	REsp 141596 / RJ	Indirect expropriation	APA de Massambaba/ RJ	Private
71	REsp 150603 / SP	Indirect expropriation	Parque Serra do Mar	Public
72	REsp 142713 / SP	Indirect expropriation	Zona do Cinturão Meântrico	It is not in the SNUC typology
73	REsp 43751 / SP	Indirect expropriation	Estação Ecológica Juréia-Itatins	Public
74	REsp 40796 / SP	Indirect expropriation	Parque Serra do Mar	Public
75	REsp 8690 / PR	Indirect expropriation	Parque Marumbi	Public
76	REsp 2640 / PR	Direct expropriation	Bosque do Batel	It is not in the SNUC typology

Source: own elaboration

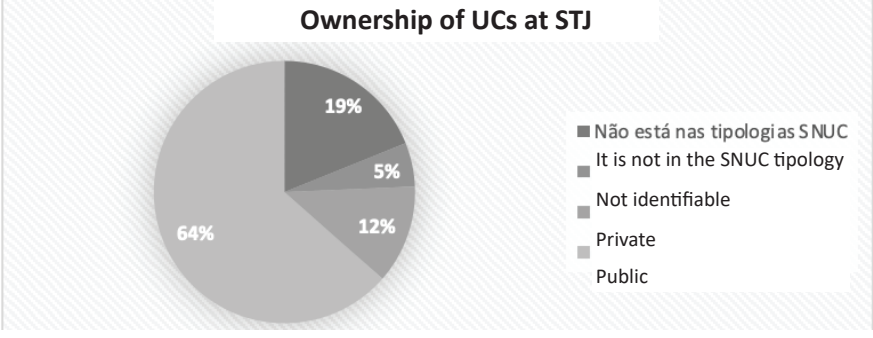
It can be noted then that, of the 76 decisions, 24 are hypotheses of indirect expropriation, with the payment of compensation to private individuals, while 20 of them deal with administrative limitations, in an interpretation that establishes a property right that incorporates environmental obligations. Here are the results:



Graph 1. Environmental expropriations at STJ.
Fonte: elaboração própria.

Therefore, there is a predominance of the payment of compensations in private actions against the government in the judgments of the STJ. However, case precedents has been evolving. The most recent decisions are more judicious with regard to the hypotheses of comensation. In short, a revision of the case precedents on indirect expropriation is underway. Currently, the requirements are more stringent, although previously it was easier to receive such amounts. Thus, the hypotheses of compensation in the most recent case precedents are more restrictive, indicating greater compatibility of the property with environmental limitations.

Furthermore, the survey sought to evaluate the dominance of these UCs, as shown in Graph 2:



Grsph 2. Ownership of UCs at STJ.
Fonte: elaboração própria.

Most of the demands over UCs brought before the STJ – 64% of the cases – involve public areas. The STJ held that no compensation was due if the type of UC allowed for the limited exercise of property rights. In this sense, it explained that in the case of ARIE, which could be private, no compensation was due since it was "an administrative environmental limitation resulting from a general cogent norm for territorial planning" (BRASIL, 2020). The problem is to realize that in most cases the litigation deals with public areas, in which compensation would be necessary.

However, this has not gone unnoticed by the STJ. In REsp 848577/AC (BRASIL, 2010b), about the Reserva Extrativa Chico Mendes, which is public, in view of the limitations already arising from the Forest Code and even before the creation of the UC, the rappourteur dismissed the payment of compensation. He was stated that "granting compensation in cases in which the property is located in an area of environmental preservation, would make it impossible to legally exploit the area, meaning, first of all, unjust enrichment, which is known to be prohibited by the Brazilian legal system" (BRASIL, 2010b). In REsp 765872/SP, the rapporteur was even harsher, when applying the same reasoning and clarifying that it violates the principle of objective good faith

> […]the one who, knowing or being able to know about the incidence of environmental or urban planning limitations on the property, acquires it and then charges the Administration for reducing the economic exploitation of the property, a quality that was already lacking at the time the legal transaction was entered into (BRASIL, 2009).

This is justified by the fact that many decisions initially recognize the indirect expropriation and then there is a claim to receive large compensation from the state.

However, in the most recent STJ decisions this research found that the reason for dismissing the compensations does not deserve celebration. As already clarified, one of the requirements is to demand "that the public power assumes effective possession of the property, destining it to public use, so that indirect expropriation is characterized" (BRASIL, 2019). This means that the payment of compensations is being ruled out because the public power has not been effective in taking possession of the properties where UCs are created. In short, the state is not paying compensations because the real possession of the property on which the UC is located has not occurred. What seemed like a victory is just another acknowledgement

of the state's difficulty to implement UCs. Thus greening, does not seem to have had much effect on STJ decisions.

Next, we will analyze the decisions of the STF.

3.2 STF compensating for every limitation to the right to property

At the STF, the situation has been even less encouraging. The right of property seemed to be those predating the 1988 constitutional events, since of 24 STF decisions most of them did not deal with UCs. A good part of the decisions dealt with expropriation for agrarian reform, such as MS 25186 and MS 25189, which forced the exclusion of case precedents.

Only eight decisions were within the object of study, summarized in Chart 2. The same information and categories already explained were used here:

Chart 2. STF rulings on environmental expropriation and UC

	Appeal	Decision	UC	Ownership
1	AI 529698 AgR / SP	Indirect expropriation	Reserva Florestal Serra do Mar	It is not in the SNUC typology
2	ADI 5012/DF	Reduction of protection by parliamentary amendment	Parque Nacional Mapinguari, Estação Ecológica de Cuniã e Floresta Nacional do Bom Futuro	Public
3	MS 25284	Incompatibility with agrarian reform	Reserva Extrativista Verde para Sempre	Public
4	AC 1255 MC-AgR	Interfederative conflict and compensation to state-member	Reserva Extrativista Baixo Rio Branco – Jauaperi	Public

5	AI 640707 AgR / PR	Indirect expropriation	Área Litorânea de Preservação no Interesse Paisagístico	It is not in the SNUC typology
6	RE 471110 AgR	Indirect expropriation	Reserva Florestal Serra do Mar	It is not in the SNUC typology
7	AI 820552 AgR	Review of facts	Parque Nacional da Serra Geral	Public
8	AI 653062 AgR	Indirect expropriation	Estação Ecológica de Jureia-Itatins	Public

Fonte: elaboração própria.

The STF has a well-established position to the sense that regardless of the limitation, the state must compensate, no matter whether it involves UCs or any other type of environmental limitation. In short: "the areas referring to vegetation cover and permanent preservation must be compensated, notwithstanding the restriction on the right of ownership that may apply to the entire property that is included in an environmental protection area"[22]. This harms the greening of properties and its socio-environmental function by forcing the state to an unnecessary expense (LEUZINGER, 2007). The right of property does not seem to have been greened to the STF.

This is even more evident in the case of UCs, since in AI 529698, the STF expressly ruled that "the case precedents of this Court are well-established that compensation is due for the expropriation of an area belonging to the Reserva Florestal da Serra do Mar, regardless of the administrative limitations imposed for the environmental protection of this property" (BRASIL, 2006). Accordingly, in AI 653062 AgR, about the Jureia-Itatins Ecological Station, it is stated that

> The Federal Supreme Court has established the understanding that the areas referring to vegetation cover and permanent preservation must be compensated, notwithstanding the incidence of restriction on the right of ownership that may apply to the entire property that may be included in an environmental protection area (BRASIL, 2014b).

It is clear that it does not matter whether the ownership is public or private, the state must compensate. Therefore, the property seems not to

22 According to the following precedents**:** RE Number 612.860/RJ; RE Number 134.297 e AI 529698 AgR.

have gained a new feature limited by environmental obligations.

In MS 25284 (BRASIL, 2010a) it is interesting to note that the STF defined that the "creation of an extractive reserve does not require a budget forecast to satisfy compensations". This, however, does not rule out the duty to compensate. On the contrary, compensation is reaffirmed.

The only argument accepted by the STF to rule out the duty to compensate would be to analyze the "emptying of the economic content" of the property that would give rise to compensation. This implies the analysis of the infra-constitutional legislation and the reexamination of the factual-probative context. Verifying the

> […] modality of intervention practiced by the state in the property, whether administrative limitation or indirect expropriation, would require the reexamination of the factual framework contained in the regional decision and analysis of infra-constitutional rules applicable to the species, which makes any offense oblique and reflexive (BRASIL, 2014b).

Only the procedural obstacle could prevent the recognition of compensation.

Therefore, the reading of the case precedents identifies a series of problems in such judgments, since the STF: (a) does not distinguish between administrative limitation and indirect expropriation; (b) does not evaluate whether the UC is of public or private ownership; (c) does not verify whether the UC is of full protection or sustainable use. An indication that endorses such conclusions is in the denomination "Reserva Florestal Serra do Mar", used in RE 471110 and AI 529698 AgR/SP. When drawing a parallel with the STJ decisions, it must be recognized that the name of the UC is wrong, as it is Parque Estadual da Serra do Mar, created on August 30, 1977, by Decree 10.251 (SÃO PAULO, 1977). Not even the name of the UC appears correctly in the STF's decisions.

CONCLUSION

This research investigated constitutional innovations regarding the relationship between property and the environment. To this end, it indicated the right to an ecologically balanced environment (Article 225, caput), the environment as a limiting factor of the competition law (Article 170, VI), the socio-environmental function of rural property (Article 186, II) and the state duty to establish and assist especially protected territorial spaces (Article 225, § 1º, III). In attempting to ally this greening of properties with one of the main instruments for the implementation of UCs, it presented

the possible paths for environmental expropriations.

By visiting the decision path of the STJ, a breakthrough was found, since initially all properties in the UCs area were seen as indirect expropriations, without considering the level of limitation or the type of each UC. Compensations were always applicable, although in more recent decisions, the STJ has come to defend the creation of UCs as an environmental administrative limitation. This has ruled out the payment of compensations.

In the general context, 24 decisions of indirect expropriation and 20 cases of environmental administrative limitation were identified. This seemed to be a victory for a new form of property rights, but it is not. There is a prevalence of 64% of public ownership areas, and fair compensation should have occurred. However, this was not so because the government has not taken possession of these areas. The UCs exist only on paper, therefore there would be no reason to compensate.

On the other hand, the STF has understood that any type of environmental limitation can be compensated, not only the UCs. Only a few procedural obstacles prevent the payment of public resources to UCs that do not exist. The diagnosis undertaken in this research demonstrated how ineffective the instrument of environmental expropriation seems to be in implementing the greening of properties.

This work brought only one aspect of the gigantic challenge of implementing protected areas. To this end, it argued that the vision that best respects the greening of properties is the one that pays attention to its effects on the implementation of protected spaces, based on their ownership (public or private) and the peculiarities of their category (full protection or sustainable use).

The creation of UCs is not enough; the implementation phase is indispensable, as it passes not only through state action, but also the interpretation of its instruments, to be given by the Superior Courts. This work intended to show that there is a problem with the environmental expropriation instrument in conjunction with the constitution. The environment constitutes not only a right, but also a duty of shared responsibility between the state and the citizen. Then, property needs to reflect this commitment.

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