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# ANALYSIS OF THE PRECAUTIONARY DECISION ABOUT THE USE OF PERMANENT PRESERVATION AREAS (ADI N. 3.540/2005) IN LIGHT OF MACCORMICK'S ARGUMENTATIVE THEORY

**Ana Maria D'Ávila Lopes**

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Doctor and Master of Constitutional Law from the Federal University of the  
State of Minas Gerais (UFMG).  
Professor in the Law Post Graduation Program at the Fortaleza University (UNIFOR).  
CNPq's Research Productivity Scholarship.  
Email: anadavilopes@yahoo.com.br

**Diego Monte Teixeira**

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Attending Master of Constitutional Law at the Fortaleza University's  
Law Post Graduation Program (UNIFOR).  
Analyst at the Federal Public Prosecution/Legal Support/Law  
Email: diegomontet@gmail.com

## ABSTRACT

The present work aims to analyze, in the light of MacCormick's argumentative theory, the precautionary decision issued at ADI n. 3.540/2005, which stated the constitutionality of Provisional Measure n. 2.166/2001 that regulated the use of Permanent Preservation Areas. On that purpose, a bibliographic, documentary and jurisprudential research was made. The conclusion was that the decision is not universalizable since it was exceptional as it admitted the regulation of a provision in art. 225 of the Federal Constitution by use of a Provisional Measure. It was also not consistent because the systemic arguments used in the vote of Minister-Rapporteur, with which most Ministers agreed, were contradictory. It was also not coherent because the mention to some abstract constitutional standards to support it does not ensure that there was no violation to other standards. If the decision is not based on universalizable, consistent and coherent arguments, it cannot be considered an adequate or legitimate solution in a Democratic State of Law and it should not guide the analysis of seemingly similar cases as referred to in ADIs n. 4901, n. 4902 and n. 4903 on the new Forest Code.

**Keywords:** Permanent Preservation Area; Juridical Argumentation; MacCormick.

*ANÁLISE DA DECISÃO CAUTELAR SOBRE A UTILIZAÇÃO DE  
ÁREAS DE PRESERVAÇÃO PERMANENTE (ADI Nº 3.540/2005) À LUZ  
DA TEORIA ARGUMENTATIVA DE MACCORMICK*

**RESUMO**

*O presente trabalho objetiva analisar, à luz da teoria argumentativa de MacCormick, a decisão cautelar prolatada na ADI nº 3.540/2005, na qual se decidiu pela constitucionalidade da Medida Provisória nº 2.166/2001, que regulamentou o uso das Áreas de Preservação Permanente. Para tal, realizou-se pesquisa na doutrina, legislação e jurisprudência nacionais, concluindo-se que a decisão não foi universalizável, já que se deu de forma excepcional em termos de admitir a regulamentação de um dispositivo do art. 225 da Constituição Federal por meio de Medida Provisória. Não foi também consistente, eis que os argumentos sistêmicos utilizados no voto do Ministro-Relator, com os quais concordou a maioria dos Ministros, mostraram-se contraditórios, e também não foi coerente, porque a invocação de alguns dispositivos constitucionais de caráter abstrato para fundamentá-la, por si só, não assegura que houve a inviolabilidade de outras normas do ordenamento. Se a decisão não está baseada em argumentos universalizáveis, consistentes e coerentes não pode ser considerada uma solução adequada, nem legítima, no Estado Democrático de Direito, e tampouco deve servir para orientar a análise de casos aparentemente similares como os veiculados nas ADIs nº 4901, nº 4902 e nº 4903 relativos ao novo Código Florestal.*

**Palavras-Chave:** *Áreas de Preservação Permanente; Argumentação Jurídica; MacCormick.*

## INTRODUCTION

With the imminent judgment of three Direct Unconstitutionality Actions (ADIs n. 4.901/2013, n. 4.902/2013 and n. 4.903/2013) under preliminary injunction requests in which the Attorney General questions several provisions of the new Forest Code (Law n. 12.651/2012), it is necessary that the doctrine analyzes the argument used by the Federal Supreme Court within the scope of the precautionary measure issued in ADI n. 3.540/2005, in which it decided to maintain the validity of Provisional Measure n. 2.166-67, in the part that changed the wording of art. 4, caption and §§1 to 7 of Law 4.771/1965 (former Forest Code), to allow for the use of Permanent Preservation Areas in exceptional cases.

The issue raised in ADIs n. 4901, n. 4902 and n. 4903, the relationship between State economic development (article 3, II, c/c article 170, VI of the 1988 Federal Constitution) and the safeguard of the ecologically protected environment (article 225 of the 1988 Federal Constitution), is the same one that was raised in ADI's precautionary measure n. 3.540/2005, which could lead the interpreter to a hasty reference to its grounds when analyzing the cases that now reach the appreciation of the *Praetorium Excelsior*, as if they were similar situations.

In view of this scenario, this article aims to analyze the arguments of the precautionary decision issued in ADI n. 3.540 / 2005, in which the Federal Supreme Court, by a majority, denied a *referendum* on the decision of the Minister President that had suspended the effectiveness and applicability of the provision questioned in Provisional Measure n. 2.166/2001. Such provisions remained in force until 2012, when they were repealed together with Law n. 4.771/1965 (former Forest Code) by Law n. 12.651/2012 (new Forest Code), which also led to the supervening loss of the object of ADI n. 3.540/2005.

The comparison of the decision is based on Neil MacCormick's theory that proposes parameters to identify the correctness of decisions in practical and complex situations. On that purpose, the work is structured as follows: first of all, a brief sketch is presented on Neil MacCormick's theory of interpretive arguments; then a survey on the linguistic, systemic and teleological arguments of STF's decision is carried out; finally, an assessment on whether the requirements of universality, consistency and coherence have been met in order to evaluate the correctness of STF's decision regarding the reasoning that justifies it.

## 1 A BRIEF OUTLINE OF NEIL MACCORMICK'S THEORY ON INTERPRETATIVE ARGUMENTS

Article 93, item IX of the 1988 Federal Constitution establishes that all the decisions issued by the Judiciary Power's bodies must be justified, under penalty of nullity. That is a provision deriving from the very concept of Democratic State of Law, in which only decisions based on a rational conviction of the courts can be considered legitimate. In this sense, for Moreira (1998, p.90), extra-procedural control must be exercised, first and foremost, by citizens under jurisdiction themselves *in genere*, such control being an essential condition for strengthening the trust in jurisdictional protection as a factor of social cohesion and the soundness of the institutions.

In this context, the argumentative theories that aim at proposing parameters to assess whether a decision was justified or not are highlighted. Among these, focus is given on the one developed by Neil MacCormick.

MacCormick sees the legal argumentation as a branch of practical argumentation, both when a decision is taken from the deductive reasoning of the standard (syllogistic) and when other non-deductive elements are used, as it happens in certain difficult cases (MACCORMICK, 2006, p. IX). In these latter cases, the justification of the choice between possible rival deliberations within the same operating legal system becomes critical (MACCORMICK, 2006, p 127-129).

According to MacCormick (2010, pp. 70-75), when giving a preference to one of the possible readings of some legal provision, the interpreter and applicator of the Law uses the following types of interpretative arguments: linguistic, systemic and teleological-evaluative. In summary, linguistic arguments are divided between those who deal with the ordinary meaning of the term used in the legal text (common language) and those dealing with the specialized vocabulary of the normative proposition (technical language). The systemic arguments are those oriented to the understanding of the normative provisions as part of the legal system, divided into: a) the contextual harmonization; B) the legal precedent argument; C) the analogy; D) the logical-conceptual (general concept already recognized in the doctrine); E) the general principles of Law; F) the historical argument. The teleological arguments are those referring to the purpose of certain normative provisions from the assumption

that they were produced by a rational legislator. (MACCORMICK, 2010, pp. 70-74).

Due to the possibility of conflicts between those kinds of arguments, MacCormick (2010, p. 75) says that one must start from the linguistic arguments, then moving on to the systemic ones, and only use the teleological ones when the other types of arguments are insufficient. Thus, there would be a kind of “golden rule” created by part of the Scottish and English doctrine, which would act as a maxim of practical wisdom in order to give priority to linguistic arguments, leaving the teleological arguments as the last case.

However, MacCormick warns (2010, p. 76) that it would be incorrect to leave the teleological arguments to the end in some cases, especially when such a practice could create injustice in relation to a legally recognized principle of justice or when it frustrates public policy objectives pursued by legislation.

In view of these considerations, it would be up to the judge to know how to handle the different types of arguments to keep a balance between them (LOPES; BENÍCIO, 2015, p. 44).

## **2 ANALYSIS OF INTERPRETATIVE ARGUMENTS USED IN ADI N. 3.540/2005**

The Permanent Protection Areas - APPs were created by the currently revoked Forest Code, Law n. 4.771 dated September 15, 1965, art. 1, paragraph 2, item II, “with the environmental function of preserving water resources, landscape, geological stability, biodiversity, the fauna and flora gene flow, protecting the soil and ensuring the wellness of human populations” (BRAZIL, 1965).

In 2001, Provisional Measure n. 2.166-67 was published (BRAZIL, 2001). It amended the wording of art. 4 of the above mentioned Code so as to allow the suppression of vegetation in the APPs in cases of public utility or social interest. At the same time, the Provisional Measure included items IV and V in paragraph 2 of article 1, which defined what should be understood by public utility and social interest. Other unusual cases of human intervention were envisaged in the seven paragraphs of article 4, including situations in which just the authorization of the federal<sup>1</sup>,

<sup>1</sup> In 2006, the National Council of Environment - CONAMA issued Resolution n. 369 in which the exceptional cases of public utility, social interest or low environmental impact, which allow for interventions or suppression of vegetation in APPs, were regulated.

state and municipal environmental protection agency would be necessary, contrary to art. 225, §1, item III of the 1988 Federal Constitution - CF/88 (BRAZIL, 1988), which establishes that the Public Power shall “define, in all units of the Federation, territorial spaces and their components to be specially protected, changes and suppression being allowed **only by the law** and any use that compromises the integrity of the attributes that justify its protection is forbidden” (bolded by the author).

In the face of this situation, the Attorney General of the Republic filed a Direct Unconstitutionality Action (ADI n. 3.540/2005) before the Federal Supreme Court - STF, whose rapporteur was Minister Celso de Mello (STF, 2005). At that time, the request for a preliminary injunction was made and was initially granted by Minister Nelson Jobim, President of the Court, once the request was made during court holidays. After the holidays, the Ministers decided the precautionary measure.

The following is an analysis of the arguments used by the Attorney General of the Republic, the author of ADI 3.540/2005, to defend the unconstitutionality of Provisional Measure n. 2.166-67 in the part where it conferred the wording of art. 4, caption, and paragraphs 1 to 7 of Law n. 4.771/65, as well as the arguments invoked by the STF Ministers in the precautionary decision issued on September 1, 2005. The analysis is carried out in the light of Neil MacCormick’s theory, making a difference between the linguistic interpretative, systemic and teleological arguments used.

### **A) Arguments of the Federal Attorney General**

- *Linguistic argument*: Provisional Measure n. 2.166-67/2001, in the part where it conferred the wording of art. 4, caption, and §§1 to 7 of Law 4.771/1965, violated art. 225, §1, III of CF/88 that requires acts of modification and/or suppression of specially protected territorial spaces to be submitted to the postulate of the absolute rule of law in a formal sense.

- *Systemic argument*: the competence to authorize the change and suppression of a Permanent Preservation Area (APP), a species of the gender especially protected territorial area, belongs exclusively to the Legislative Branch and that competence cannot be delegated to the administrative authority.

- *Teleological argument*: article 225 of CF/88 defines the protection of the ecologically balanced environment and Provisional Measure n.

2.166-67/2001, in the part that conferred the wording of art. 4, caput, and §§1 to 7 of Law n. 4.771/1965, has the opposite purpose since it allows the use of APPs in certain cases.

## **B) Minister Celso de Mello (Rapporteur)'s Arguments**

- *Linguistic argument*: only the change and suppression of the legal regime relevant to especially protected territorial areas qualify, because of the clause contained in art. 225, paragraph 1, III of CF/88, as subject to the principle of reservation of formal law, not covering the cases of suppression of existing vegetation.

- *Systemic arguments*: i) The fundamental right to the ecologically balanced environment is in the category of third generation rights, according to Celso Lafer and Paulo Affonso Leme Machado's doctrine, as well as a precedent of the STF itself (RTJ 158/205-206); ii) There is a link between the ecologically balanced environment and the enjoyment of adequate living conditions for the human race, so that the environment is a public heritage that must necessarily be ensured and protected by social organizations and state institutions, as set out in the 1972 Stockholm Declaration on the environment, at the United Nations Conference on Environment and Development (Rio 92), in addition to the doctrinal approach of Geraldo Eulálio do Nascimento e Silva and José Afonso da Silva; iii) The doctrine understands that the ecologically balanced environment, as public heritage, qualifies as an inalienable charge of the Public Power and of the collectivity that is always imposed for the benefit of present and future generations. Examples of scholars mentioned: Maria Sylvia Zanella de Pietro and Luis Roberto Barroso; iiiii) The doctrine argues that national legal orders and formulations at the international level are no longer disconnected from the reality that qualifies the right to the ecologically balanced environment as of collective ownership. Example of scholars mentioned: José Francisco Rezek and José Afonso da Silva; iiiiii) Provisional Measure n. 2.166-67/2001 was issued in absolute fidelity to such constitutional values and the practice of the last four years (as presented by *amici curiae*) did not result in a predatory effect on the environmental heritage.

- *Teleological arguments*: i) The overcoming of the antagonism between the national development imperative (article 3, II, CF/88) and the need to preserve the integrity of the environment (article 225, CF/88) depends on the concrete situation, interests and rights under conflict in

order to harmonize them and prevent them from annihilating each other. The interpretative vector is the principle of sustainable development, as formulated in the Rio de Janeiro Declaration on Environment and Development - Rio 92 and recognized in doctrine. Scholars mentioned: Celso Antônio Pacheco Fiorillo, Luís Paulo Sirvinskas, Marcelo Abelha Rodrigues, Nicolao Dino de Castro e Costa Neto, Daniel Sarmiento, Luís Roberto Barroso, José Carlos Vieira de Andrade, J. J. Gomes Canotilho, Edilson Pereira de Farias, Wilson Antônio Steinmez and Suzana de Toledo Barros; ii) The provisions questioned, far from compromising the values enshrined in art. 225 of CF/88, would be establishing State control mechanisms regarding activities carried out within the scope of the permanent preservation areas

### **C) Minister Nelson Jobim's Arguments (President of STF)**

- *Linguistic argument*: the changes and the suppression referred to in item III of § 1 of art. 225 of CF/88 relate to the very constitution of the geographical space encompassed by the preservation area and not the suppression of existing vegetation.

- *Systemic argument*: the STF, in the case of *Chapada dos Veadeiros*, would have established that not only the suppression of the preservation area, but also the change to its topographic design should be the subject to a law, not being left to the Executive Branch. However, in this case, the object of the challenged provisions would only be the form by which the exploration of an established area of environmental preservation would be feasible.

### **D) Minister Eros Grau's Arguments**

- *Linguistic argument*: the manifestation of the legislative branch referred to in item III, paragraph 1, art. 225 of CF/88 concerns changes and suppression of especially protected territorial spaces and not the existing vegetation.

### **E) Minister Carlos Britto's Arguments**

- *Linguistic arguments*: i) The term “suppress” is equivalent to extinguish, extirpate, pull out, eradicate, eliminate. On the other hand, the



term “vegetation” would be the collective of vegetal, or a whole set of botanical specimens; ii) The final part of item III, paragraph 1, art. 225 of the CF/88 establishes a constitutional limitation for the Legislative itself, that is, even via the law, any use that would compromise the integrity of protected space attributes would be prohibited.

- *Systemic argument*: When it comes to the case of expropriation of an individual good, the formal law defines and lists the hypotheses of social interest, social utility and public need. In the case under review, the Provisional Measure delegated everything to the discretion of the administrative entities;

- *Teleological argument*: a spirit of leniency, laxity pervades Provisional Measure n. 2.166-67/2001 in such a way that even the vegetation that protects the springs can be suppressed.

#### **F) Minister Cezar Peluso's Arguments**

- *Linguistic argument*: the first sentence in art. 225, §1º, III of CF/88 deals with the change and suppression of especially protected spaces, while the second one deals with the use of the space. Thus, the Constitution only imposes the requirement of a law to change and suppress space and that is not the case of the Provisional Measure, which is only regulating the use.

- *Teleological argument*: the literal interpretation mentioned above also corresponds to the rationality of the rule in art. 225, §1º, III of CF/88, firstly because otherwise, a series of projects, activities and works of public interest and an urgent nature would be rendered unfeasible by the absence of legal regulations; secondly, because it would be easier to control the practice of an administrative act than issuing a formal law.

#### **G) Minister Ellen Grace's Arguments**

- *Systemic argument*: the reasons for the Minister Rapporteur's vote were added to the ones presented by the *amici curiae* when listing a large number of major construction initiatives that would be rendered unfeasible by the confirmation of the preliminary measure granted in the decision under the referendum of the Plenary.

#### **H) Minister Marco Aurélio's Arguments**

- *Linguistic argument*: the word “change” has its own vernacular meaning and the 1988 constituent did not make any exceptions as to the purpose of this change. Thus, where CF/88 requires the existence of a law, one cannot accept that the change takes place through a Provisional Measure.

- *Systemic arguments*: i) It was not the responsibility of the Head of the Executive branch to discipline matters that could entail irrecoverable damage, in addition to the urgency and relevancy requirements for the issuance of a provisional measure not being present, considering that the Forest Code had been in force for many years; ii) There was a formal defect in the standardization of the subject, which should have gone through the evaluation of the Brazilian people’s representatives - the federal deputies and the representatives of the states - the senators; iii) All the provisions in art. 225 refer their regulation to the law in a formal and material sense, and the STF would never have considered that it was possible to regulate the CF/88 by means of a provisional measure; iii) the provision in item III, §1, art. 225 of CF/88 is necessarily aimed at the issuance of a law that, given the circumstances involved in the respective project, makes an exception to the preservation, to the intangibility of the protected territorial space.

- *Teleological argument*: considering the values related to the economic development and the preservation targeted by CF/88, there is a greater risk in maintaining Provisional Measure n. 2.166-67 / 2001.

### **I) Minister Sepúlveda Pertence’s Arguments**

- *Systemic argument*: referring to the Minister Rapporteur’s vote where he states that the Provisional Measure replaced the original wording of the Forest Code, which would be more open than the wording of Provisional Measure n. 2.166-67/2001 itself.

### **J) Arguments on the Abstract of the Decision**

- *Linguistic argument*: only the change and suppression of the legal regime pertaining to especially protected territorial areas qualify as matters subject to the principle of the legal reserve, as a result of the clause contained in art. 225, § 1, III, CF/88.

- *Systemic arguments*: i) Everyone has the right to an ecologically balanced environment. It is a typical third-generation (or brand-new) right,

which assists the whole human race; ii) The State and the collectivity itself have the special obligation to defend and preserve, for the benefit of present and future generations, this collective trans-individual ownership right; iii) The fulfillment of this incontrovertible burden represents the guarantee that serious intergenerational conflicts marked by disrespect for the duty of solidarity imposed on all in the protection of this essential good of common use of people in general shall not be installed within the collectivity; iiiii) environment safety cannot be compromised by business interests in the economic activity, considered as the constitutional discipline that rules it, subordinated, among other general principles, to the one that favors “environment defense” (CF/88, article 170, VI); iiiiii) The instruments of a legal and constitutional nature aim to make effective environment protection possible so that the inherent properties and attributes are not changed, which would cause unacceptable impairment of health, safety, culture, work and of the population’s wellness, besides causing serious ecological damages to the environmental heritage considered in its physical or natural aspect; iiiiii) the principle of sustainable development, besides being impregnated with an eminently constitutional character, finds legitimizing support in international commitments assumed by the Brazilian State and represents a factor in obtaining the fair balance between the demands of the economy and those of the ecology, subordinated, however, to the invocation of this postulate when there is a situation of conflict between relevant constitutional values, to an unavoidable condition, the observance of which does not compromise or empty the essential content of one of the most significant fundamental rights: the right to environment preservation, which translates goods commonly used by people in general, to be safeguarded in favor of present and future generations;

- *Teleological arguments*: i) Provisional Measure n. 2.166-67/2001, where it introduced significant changes to art. 4 of the former Forest Code, far from compromising the constitutional values enshrined in art. 225, CF/88, established mechanisms that allow for real control by the State over the activities developed in the context of the PPAs in order to prevent predatory and harmful actions against the environmental heritage, whose situation of greater vulnerability demands more intense protection that is now appropriately provided in the constitutional text by the normative document referred to; ii) the Public Power can lawfully, whatever the institutional dimension it may have in the federative structure, authorize, permit or allow for the execution of construction works and/or the

performance of services within the especially protected territorial spaces, provided that the restrictions, limitations and requirements abstractly set forth by the law are respected and since that does not compromise the integrity of the attributes that justified the creation of a special protection legal regime regarding those territories (CF/88, art. 225, § 1, III).

### **3 THE APPLICATION OF THE UNIVERSABILITY, CONSISTENCY AND COHERENCE REQUIREMENTS PROPOSED BY MACCORMICK**

If, on the one hand, one agrees with Streck (2014, p. 19) in the sense that the great challenge of the current Brazilian doctrine is to establish conditions to strengthen a democratic space for the construction of legality according to the constitutional text, it is clear that even the main defenders of the possibility of a deductive debate over the text of the law, such as Alexy and MacCormick, acknowledge the inadequacy of this deduction in the so-called difficult cases. Likewise, even positivists such as H.L.A Hart recognize the existence of certain cases in which the Law fails to directly provide the elements for a decision (TOMAZETTE, 2011, p. 163).

As pointed out in topic 2, ADI case n. 3.540/2005 is just another typical hard case in which it is not possible to deduce the decision to be made from the letter of the Law. Before such cases, Neil MacCormick proposes a second order justification so that the decision must comply with the requirements of universality, consistency and coherence (MACCORMICK, 2008, p. 247).

The requirement of universality arises from the application of the principle of equality so as to prevent different decisions for similar situations. This is because “the notion of formal justice requires decision justification in individual cases to always be based on universal propositions that the judge is willing to adopt as a basis for defining other similar cases and deciding them similarly to the current one” (MACCORMICK, 2006, p. 126).

By means of the consistency requirement, the decision must be based on arguments that do not contradict each other (LOPES; BENÍCIO, 2015, p. 50). For Atienza (2006, p. 128), the consistency requirement must be extended to the factual assumption, so that the decision is according to the reality presented in terms of evidence. However, the analysis of this aspect is not going to be necessary for the comparison of the arguments

of the precautionary measure in ADI n. 3.540/2005 once it is an abstract constitutionality control in which the matter under discussion is eminently law.

The coherence requirement, in turn, demands the several standards in a system to make sense when considered as a whole (MACCORMICK, 2006, p. 197), that is, the criterion of coherence concerns the justification of the decision in the general context of the juridical system.

Concluding with Martins, Roesler and Jesus (2011, p. 214-215), there are two important distinctions between consistency and coherence for Neil MacCormick: the first one concerns consistency linked to the idea of no logical contradiction between two or more rules, while coherence would be present when the group of propositions, taken as a whole, makes sense as a whole; the second one refers to the connection between the idea of coherence and the valorative characteristic of the legal order, so that coherence would be the “axiological compatibility between two or more rules, all of them justifiable from the perspective of a common principle.”

Within this framework and from the tables in topic 2, it is possible to check whether the requirements of universability, consistency and coherence in the precautionary decision issued in ADI n. 3540/2005 have been met.

### 3.1 Universability

From an overview of the decision, that is, without unitarily considering the votes of the Ministers, it is possible to notice that the precautionary decision issued in ADI n. 3.540/2005 does not comply with the universability requirement since it was the first and only time the Federal Supreme Court has exceptionally allowed the possibility of regulating one of the provisions of art. 225, CF/88 by means of a provisional measure.

This aspect was clarified in the Plenary with Minister Marco Aurélio's argument: “Items and paragraphs of article 225 refer to the law [...] The Federal Supreme Court has never stated that it is possible to regulate, by law, the Federal Constitution through a provisional measure” (STF, 2005, p.589).

However, the votes of each one of the Ministers, except the votes of Ministers Carlos Britto and Marco Aurélio, admit the possibility of reducing the protection spectrum of especially protected spaces by means of a provisional measure, although they were created with the clear

intension of ensuring the effectiveness of environmental hygiene.

### 3.2 Consistency

The Minister-Rapporteur, Celso de Mello, was responsible for the vote leading the decision followed by the majority in the Plenary, and he did it, as usual, through a complex hermeneutical construction supported by a comprehensive doctrine on environmental issues.

However, the arguments used by Minister Celso de Mello in the constitutional interpretation of art. 225, §1, III of CF/88 were contradictory among themselves, but they still influenced the decision of most of his peers.

At the outset, the Minister devoted seven pages of his vote in defense of a systematic interpretation of art. 225 of CF/88, raising the right to the ecologically balanced environment to the level of a 3rd generation fundamental right, whose ownership transcends the plan of the present generations and goes beyond the national scope of protection to be faithful to the commitment of Nations in favor of all Humanity (STF, 2015, p. 542-548).

We notice here the rich argumentative load of Minister Celso de Mello, who clearly sees the double force of the right to the ecologically balanced environment, conceived both as a human right that should be ensured at the international level, and a fundamental right duly declared and protected in the Brazilian constitutional sphere.

The Minister-Rapporteur reinforced this understanding by citing the 1972 Stockholm Declaration on the Environment and the United Nations Conference on Environment and Development (Rio 92) in his vote, together with various doctrinal positions that recognize the right to the ecologically balanced environment as a human right stated in international documents having supralegal hierarchy<sup>2</sup>. Although they cannot be used as parameters for the control of constitutionality, they are an interpretive source for the understanding and application of national standards due to their relevance for the protection of human dignity.

Likewise, in affirming that the environment is a public heritage to be “necessarily assured and protected by social bodies and state institutions” (STF, 2005, p. 547), Minister Celso de Mello indicated the unavailability of that right, reflecting a duty that is not only moral, but also

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<sup>2</sup> Pursuant to the positioning of STF in Extraordinary Appeal n. 466.343-1/SP (STF, 2008).

legal in the transmission of such heritage to future generations. (MILARÉ, 2015, p.175).

Then, breaking the line of argument he had developed in favor of this fundamental right, the Minister Rapporteur stated that Provisional Measure no. 2,166-67 / 2001 maintained absolute fidelity to constitutional values and that the practice of the four years of validity of this norm Had not shown any damaging and predatory effect on environmental heritage, as argued by the representatives of the Executive Branch who defended the constitutionality of the aforementioned Provisional Measure (STF, 2005, pp. 549-556).

Then, breaking the line of argument he had been developing in support of the fundamental right referred to, the Minister Rapporteur stated that Provisional Measure n. 2166-67/2001 was absolutely loyal to constitutional values and that the practice during the four years when the standard was in force had not shown any damaging and predatory effect on environmental heritage, as argued by the representatives of the Executive Branch who defended the constitutionality of the Provisional Measure mentioned above (STF, 2005, p. 549-556).

Thus, if Provisional Measure n. 2.166-67/2001, in the part where it conferred the wording of art. 4, caput and paragraphs 1 to 7 of Law n. 4.771/1965, changed the use of the PPAs in order to relativize the permanent preservation regime in certain cases, how to say that such standard would be in compliance with the constitutional values that recommend the fundamental right to the ecologically balanced environment?

Permission to intervene in areas declared by law as permanent preservation will inevitably lead to damages to the environment. What can be discussed - from one side or the other - is whether interventions in these areas would be such as to affect environmental balance and touch the core of the fundamental right protected, but arguments of that kind were not analyzed by the Ministers.

In fact, there was a brief clash in the Plenary following the vote of Minister Carlos Britto when he tried to carry out an interpretation of the provisions in Provisional Measure n. 2.166-67/2001 according to CF/88 to avoid that administrative bodies had wide discretion to authorize even the suppression of vegetation in APPs. The clash, though, did not last, as Minister Celso de Mello stated that the constitutional clause itself (article 225, paragraph 1, III) forbids any use of the protected space that could compromise the integrity of the attributes that justify its protection (STF,

2005, p. 576-579).

Minister Marco Aurélio stated that the term “change” of the protected area could, in the case under consideration, imply the total suppression of vegetation in an APP, representing a substantial change, which could not occur by means of a provisional measure (STF, 2005, p. 591).

In summary, after making a long defense of the right to an ecologically balanced environment, Minister-Rapporteur Celso de Mello, without analyzing the benefits of the APPs for the effectiveness of the fundamental<sup>3</sup> right referred to and the potential risks that would be caused from the forecast in a Provisional Measure of intervention in these areas, concluded that this regulatory standard would represent a step forward in strengthening measures aimed at preserving the attributes that characterize PPAs.

In fact, what one can notice after reading the Ministers’ votes is that contested Provisional Measure n. 2.166-67/2001 was issued to privilege national development (article 3, II of CF/88). The Minister-Rapporteur even pointed out the existence of a permanent state of tension between this constitutional value and the one of environmental balance. Both values, according to him, should be pondered to be harmonized, having the principle of sustainable development as an interpretive vector (STF, 2005, p. 565). However, the reasons why the prevalence of national development took precedence were not pointed out.

The contradiction of the Minister Rapporteur’s arguments that Provisional Measure n. 2116-67/2001 would be in harmony with constitutional environmental values is evident in the teleological argument invoked by Minister Cezar Peluso when he states that the interpretation of the provision in art. 225, paragraph 1, III of CF/88 given by the Rapporteur corresponds to the rationality of the standard once the absence of the Provisional Measure “would invalidate [...] a series of projects, activities and construction works having public interest and urgent characteristics because they depend on regulation, authorization or permitting through Legislative Power’s acts, which demands time [...]” (STF, 2005, page 583).

Considering that Ministers Nelson Jobim, Eros Grau, Ellen Grace, Sepúlveda Pertence and Cezar Peluso followed the interpretation of the

3 APPs’ environmental functions are foreseen in art. 3, II of the Forest Code in force: preserve water resources, the landscape, the geological stability and biodiversity, ease the flora and the fauna’s gene flow, protect the soil and insure the wellness of human populations (BRAZIL, 2012).



constitutional mechanism adopted by the Minister Rapporteur, one could register an inconsistency by dragging. Most of the abstract corresponding to precautionary measure for ADI n. 3.540/2005 is intended to emphasize that Provisional Measure n. 2.166-67/2001 was issued to make the fundamental right to an ecologically balanced environment effective, but it simultaneously refers to the country's economic development.

Regarding the linguistic argument, there are no inconsistencies in the interpretation of art. 225, paragraph 1 of CF/88 by the Minister Rapporteur, who understood that the rule of law was only required to change and suppress the legal regime corresponding to especially protected territorial spaces.

### 3.3 Coherence

The notion of coherence calls for a rationality that must be reflected in the decision both internally, regarding the arguments used in the decision, and externally, as there must be a rational connection between the arguments used, the facts narrated and the legal order as a whole (MARTINS, ROESLER and JESUS, 2011, p. 215).

From the analysis of the arguments listed in the decision abstract (table 10), one can notice that the decision is coherent from an external perspective since the fundamental principle of national development, foreseen in art. 3, II of CF/88, as well as the principle of sustainable development, a value already absorbed by several international treaties, were invoked “as a factor to achieve the right balance between the demands of both the economy and the ecology” (STF, 2005). In invoking these principles, the *Praetorium Excelsior* demonstrates an advantage to guarantee a relative coherence to the judgment so as to harmonize the group of constitutional propositions related to economic development (article 3, II of CF/88) and the need to preserve environment integrity (arts. 170, VI and 225 of CF/88).

In what regards the internal arguments of the decision itself, one cannot say that the requirement of coherence has been met. This is because, although Provisional Measure n. 2.166-67/2001 does not confront the letter of the standard contained in art. 225, paragraph 1, III of CF/88, in which a formal law is only required in case of change or suppression of APPs, the possibility of suppressing vegetation in these areas by means of administrative authorizations may seriously and definitively jeopardize

their ecological balance. Not considering this aspect in the arguments empties the pure and simple invocation of the principle of sustainable development and reveals the incoherence of the decision.

## CONCLUSION

Injunction decision in ADI n. 3.540/2005 issued by the Federal Supreme Court (STF) on the validity of Provisional Measure n. 2.166-67/2001, which regulated the hypothesis of using Permanent Preservation Areas (article 4, caption, and §§ 1 to 7 of Law n. 4.771/1965), is a typical hard case. A case is considered hard when it is not possible to conclude the decision to be made directly from the letter of the law. In these situations, it is necessary to use special criteria to assess the accuracy of the decision, given that judicial decisions must be rationally justified in a Democratic State of Law.

The need for judicial decisions to be appropriately substantiated and the criteria to assess compliance with this requirement has been addressed by the argumentative theories. Among these theories, we highlight the one defended by Neil MacCormick, who proposes universality, consistency and coherence as criteria to determine the accuracy of a decision.

Following this proposal, the types of interpretive arguments used by the author and by each one of the STF Ministers in the precautionary decision in ADI n. 3.540/2005 (linguistic, systematic and teleological arguments) were initially identified. After that, the accuracy of the decision was analyzed based on the three criteria proposed by Neil MacCormick.

From the analysis undertaken herein, the conclusion was that the precautionary decision regarding ADI n. 3.540/2005 is not universalizable because the possibility of regulating a provision in art. 225 of the 1988 Federal Constitution by means of a Provisional Measure was considered an exceptional situation and should not therefore be repeated. It is also not consistent because the systemic arguments used in the vote of the Minister-Rapporteur, with which most of the Ministers agreed, were contradictory. Finally, although apparently coherent from an external perspective, from the harmonization of the group of constitutional propositions regarding economic development (article 3, II, CF/88) and the need to preserve the integrity of the environment (article 170, VI and 225 of CF/88), the absence of evaluation of the potential compromise of the ecological balance due to the suppression of vegetation in APPs, based on predictions of the

challenged standard, empties the argumentation itself of the principle of sustainable development and reveals the internal inconsistency within the decision.

However, there is a need to recognize some positive aspects of the decision, since it built a systematic interpretation of art. 225 of the 1988 Federal Constitution, in order to raise the right to an ecologically balanced environment to the level of a third generation fundamental right and also to draw an interconnection between this fundamental right and human rights aspirations at the international level. Thus, the arguments used in the decision would suggest a revisitation when the *Praetorium Excelsior* examines similar cases in which there would be a tension between the ideals of economic development and the environment. If the decision in ADI n. 3.540/2005 is not based on universalizable, consistent and coherent arguments, it cannot be seen as an adequate or legitimate solution in the Democratic State of Law and it should not be used to guide the analysis of apparently similar cases such as the ones published in ADIs 4901, 4902 and 4903 on the new Forest Code.

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