

SHORT COMMUNICATION

Brazilian's Legal Framework and Water Regulation

Marcelo Kokke 

Department of Law, Dom Holder Camara College, Belo Horizonte, 30150-250, Brazil

ABSTRACT

The legal framework of water regulation can assume different characteristics according to each country's reality. The preservation and conservation of water and ecosystems depend on rules configuration in the Constitution and legal prescriptions. This manuscript presents the Brazilian legal framework and water regulation. The analysis confirms that in the Brazilian system water is regulated as environmental resource and environmental good. From a descriptive methodology, the article explains how the Brazilian legal system works. The article also remarks on the regulation of multiple uses of water, approaching the legal regulation among industrial, agricultural, and human consumption of water. The aim of the paper is to explain normative regulation of water in Brazil, including the court's activities in cases of discharges of sewage directly into the rivers.

Keywords: Water regulation; Brazil; Environmental resource; Environmental good

1. Introduction

Water is a fundamental good recognized as a human right by the United Nations. In spite of this, water must be understood in several ways, according to each peculiar regulatory system of each country and its legal framework. This short article aims to show how water regulation is established by the Brazilian legal framework. First of all, it is necessary to

note that each country regulates the water according to its political law-maker system. In this point, it is remarkable that Brazil has a political federative system. It means that Brazil has not one legal framework source, but three.

Brazil's federative system has three levels. These levels are federal law, state laws, and local laws. In Brazil's constitutional system, there are not two, but three federative levels. The federal level is occupied

***CORRESPONDING AUTHOR:**

Marcelo Kokke, Department of Law, Dom Holder Camara College, Belo Horizonte, 30150-250, Brazil; Email: marcelokokke@yahoo.com.br

ARTICLE INFO

Received: 30 June 2023 | Revised: 20 September 2023 | Accepted: 7 October 2023 | Published Online: 16 October 2023

DOI: <https://doi.org/10.30564/mmpp.v5i4.5819>

CITATION

Kokke, M., 2023. Brazilian's Legal Framework and Water Regulation. *Macro Management & Public Policies*. 5(3): 36-40. DOI: <https://doi.org/10.30564/mmpp.v5i4.5819>

COPYRIGHT

Copyright © 2023 by the author(s). Published by Bilingual Publishing Group. This is an open access article under the Creative Commons Attribution-NonCommercial 4.0 International (CC BY-NC 4.0) License. (<https://creativecommons.org/licenses/by-nc/4.0/>).

by the “Union of States”, the state level is occupied by twenty-six states and by federal district, and the local level is occupied by the counties or cities. Nowadays, Brazil has more than five thousand and five hundred counties or cities. This article aims to demonstrate how the Brazilian system works and how the water regulation is built.

This article uses a descriptive methodology. It is focused on normative acts. The conclusion is that the Brazilian system treats the water in a double way. The water as environmental source, used by market relationship, and the water as an environmental good. In this case, water has a peculiar regulatory framework. It is interesting to note that if water is regarded as an environmental resource, it will have a different regulation from when water is categorized as an environmental good.

2. Brazilian federalism and water regulation

The Brazilian Constitution ^[1], in Article 20, determines that the water in the nation’s rivers and lakes is a federal good. It is also considered a federal good in cases of rivers or lakes located in two or more states or between Brazil’s border with another country. In another way, it is possible to say that it is a federal property, but the water is good of the Brazilian people. It is a diffuse legal good. The water belongs to the Brazilian people. But for the task of water management, water was turned into a federal good. In Article 26, I, the Constitution says that if a river or a lake is situated in a state’s area, the water is the property of this state only. In addition to that, subterranean water is the property of the state where it is located. There is no provision that cities or counties have water property. And, if someone asked, the rainwater has no owner. In other words, all individuals can collect rainwater and use it.

The consequence of this system is that under the point of view property, the Brazilian system has a double federative regulation. The regulation of water has federal rules and state regulations. Article 22, IV, determines that competence for law regulation of water system is a federal responsibility. In this

way, the Federal Union makes rules, acts, and laws about the water, treating the water as an environmental resource. Even though water as environmental resource is under federal regulation, the States are responsible for applying federal regulations in their territories. For instance, if a company wants to use river water in its production, the company must check first if it is a federal or a state river. In the case of being a federal river, a federal government agency needs to authorize this use. On the other hand, if it is a state river, the attribution is by state government agency. But if it is a subterranean water the competence is just by state government agency.

Therefore, the law that regulates water as an environmental resource is a federal law, but both federal and state agencies apply federal rules. At the same time, each state has its rules about the agencies that will apply the federal rules in their territory. There are regulatory rules of water and execution rules of the water legal framework. Federal acts determine the rules. State rules say how to implement in each state the regulatory execution.

The most important act of the water legal framework is the Federal Act 9.433, published on January 8, 1997. This act establishes the National Water Resources Policy. The article 1° determines:

Art. 1 The National Water Resources Policy is based on the following grounds:

I—water is a public good;

II—water is a limited natural resource, endowed with economic value;

III—in situations of scarcity, the priority use of water resources is human consumption and the watering of animals;

IV—the management of water resources must always provide for the multiple uses of water;

V—the hydrographic basin is the territorial unit for the implementation of the National Water Resources Policy and the performance of the National Water Resources Management System;

VI—the management of water resources must be decentralized and rely on the participation of the Government, users and communities.

It is important to note that the characteristics of public good are linked to multiple uses of water. Article 1° requires conjugating industrial, agricul-

tural, and human consumption of water. In this way, government agencies verify the limits of water use. In periods of drought the water agency must reduce industrial and agricultural use of water in favor of human and animal consumption. The management of water provided for by the law is so relevant that impact several regions of the country.

Although Brazil has high indicators of water availability, the distribution of water is unequal in the territory. The provisions of Art. 1º makes possible the effectiveness of water management. On the other side, water crisis, for instance, in result of climate change provokes hard questions between human direct necessity and agricultural necessity. In a long-term process, the reduction of water in agricultural activities provokes effects on food availability.

Regarding water as an environmental resource, the act determines that those who use the water must pay for it. The public payment is named “*outorga hídrica*” [2]. The payment works as a tax based on the use of water. So, if a company wants to use river water or subterranean water, it must pay the government for this use of water. Article 11 says that “the purpose of granting rights to use water resources is to ensure quantitative and qualitative control of water use and the effective exercise of rights of access to water”. It is important to note that insignificant use of water is free of charge. Therefore, small population groups do not have to pay for their water needs. The Act provides:

Art. 11. The purpose of granting rights to use water resources is to ensure quantitative and qualitative control of water use and the effective exercise of rights of access to water.

Art. 12. The rights of the following uses of water resources are subject to grant by the Government:

I—derivation or capture of a portion of the water existing in a body of water for final consumption, including public supply, or input for the production process;

II—extraction of water from an underground aquifer for final consumption or as input for the production process;

III—discharge of sewage and other liquid or gaseous waste, whether treated or not, into bodies of water, for the purpose of dilution, transportation or

final disposal;

IV—use of hydroelectric potential;

V—other uses that alter the regime, quantity or quality of water existing in a body of water.

§ 1º Independent of grant by the Government, as defined in regulation:

I—the use of water resources to meet the needs of small population centers, distributed in rural areas;

II—derivations, funding and releases considered insignificant;

III—accumulations of water volumes considered insignificant.

§ 2 The granting and use of water resources for the purpose of generating electricity will be subject to the National Water Resources Plan, approved in accordance with the provisions of item VIII of Art. 35 of this Law, obeying the discipline of the specific sectoral legislation.

The law states the cases where the water agencies require authorization to water use. It does not mean that just the capture of water requires authorization. The discharge of liquids or other products also requires state authorization. Here there is a big problem in the Brazilian system. The network of sewers and treatment plants are legal requirements. However, there are so many problems in the law effectiveness. The water agency has elaborated the Atlas of sewage [3]. According to the water agency, only 43% of the Brazilian population has sewage collected and treated. Moreover, 12% utilize septic tanks. Therefore about 45% of population has proper treatment of sewage.

Unfortunately, 18% has collected but not treated sewage. The other 27% have not collected or treated sewage. The situation provokes water contamination and environmental problems. The environmental problem comes to Courts. There are so many class actions about the subject. In May 2023, the Superior Tribunal de Justiça, the second highest Court of Brazil, judged the obligation of environmental damage reparation in cases of throwing sewage without treatment in the rivers [4]. The environmental liability in Brazil is covered by the principle of liability without fault. The Courts use this argument to force public and private agencies to make effective sewage collection and treatment [5].

Act 9.433 [6] regulates water as environmental

resource ^[7]. On another hand, the Brazilian system regards water as an environmental good. In this situation, water is regarded as an important good, or even as the most important good, by nature's environment. Here, water is analyzed as an ecological good. The use of water entails effects on human life and on ecosystem relationships. From that point of view, the Brazilian constitutional framework determines the regulation by Article 24, VI. This article says that it is the competence from Federal Union, States and counties or cities to regulate together the environmental protection. It is also their competence the environmental defense and pollution control.

As previously said, the Brazilian system has federal, regional, and local rules according to its perception of water as an environmental good ^[8]. Of course, the local rules must be according to the regional rules and both according to federal rules. However, it is not so simple, and that is why conflicts about the application of the adequate rule for each case are not rare. For instance, there are judicial conflicts concerning whether or not a local rule can forbid an activity or a certain water utilization. It is not always that a federal rule has a preponderance over a local rule. It depends on the kind of rule and their relationship with the environmental good protection. It is possible that the use of water is forbidden in a vulnerable place, and it is allowed in another place.

The Act n. 6.938, by August 31, 1981 ^[9], regulates the water as environmental good, it also establishes the National Environmental Policy. The act created the National Environmental System. Hence, if a company wants to use water in its activity, it must have an environmental authorization and a sectorial authorization. The first is granted by regulatory agencies, regarding water as environmental resource. The second, considers water as environmental good. It is possible that a company has sectorial license but does not have environmental license. If the local rules are not applicable in the case of the use of water, as environmental resource, after all the counties or cities are not owners of the water, their rules are important in the analysis of environmental license.

3. Conclusions

The Brazilian system is remarkable for its diverse and several normative fields. Regarding the Brazilian legal framework, it is relevant to highlight that water is regulated according to each regulatory field. The federal agency of water is the *Agência Nacional de Águas e Saneamento Básico—ANA*, or National Water and Basic Sanitation Agency. This agency must dialogue with the regional agencies, according to the rules from the National Water Resources Policy and its National Water Resources Management System.

In addition to that, the federal government environmental agency is the *Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis—IBAMA*, or the Brazilian Institute for the Environment and Renewable Natural Resources. This environmental agency must keep in touch with the state and local environmental agencies. It is necessary to get coherence into the federative legal framework system.

Sectorial regulations and environmental regulations must walk side by side. In fact, judicial and normative system in Brazil recognized that there is a preponderance of the water as environmental good. But it does not mean that economic needs are regardless. Never. Indeed, it is not possible to think environmental questions without taking into account society's needs. The secret and at the same time the problem is how to make a complex system efficiently work. The problem does not have one correct answer. But in all cases is relevant the participation of federal, regional, and local spheres of government as well as the stakeholders. It is not possible to solve environmental problems or economic problems about environmental resources without complex answers.

Conflict of Interest

There is no conflict of interest.

Funding

This research received no external funding.

References

- [1] Brasil, 1988. Constituição da República Federativa do Brasil de 1988 (Portuguese) [Constitution of the Federative Republic of Brazil 1988] [Internet]. Available from: https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm
- [2] Purvin, G., 2017. Justiça ambiental, acesso à água e ao saneamento: algumas considerações por ocasião dos vinte anos de edição da Lei n. 9.433/1997 e dos dez anos da Lei n. 11.445/2007. Purvin, G. (Coord.). Direito ambiental, recursos hídricos e saneamento. Estudos em comemoração aos 20 anos da Política Nacional de Recursos Hídricos e aos 10 anos da Política Nacional de Saneamento (Portuguese) [Environmental justice, access to water and sanitation: some considerations on the occasion of the twenty years of National Water Resources Policy and 10 years of National Sanitation Policy]. Environmental law, water resources and sanitation. Studies in celebration of 20 years of National Water Resources Policy and 10 years of National Sanitation Policy]. São Paulo: Letras Jurídicas, 25-47. p. 38.
- [3] Agência Nacional de Águas—ANA, 2017. Atlas esgotos: despoluição de Bacias Hidrográficas (Portuguese) [Atlas sewers: depollution of watersheds]. Brasília: ANA.
- [4] Brasil. Superior Tribunal de Justiça, 2023 (Portuguese) [Superior Court of Justice]. AREsp n. 1.407.773/RJ, relatora Ministra Assusete Magalhães, Segunda Turma, julgado em 23/5/2023, DJe de 26/5/2023.
- [5] Brasil. Superior Tribunal de Justiça, 2019 (Portuguese) [Superior Court of Justice]. AgInt no AREsp 777.724/RJ, Rel. Ministro NAPOLEÃO NUNES MAIA FILHO, PRIMEIRA TURMA, DJe de 01/10/2018; AgInt no AREsp 1.725.379/AL, Rel. Ministra ASSUSETE MAGALHÃES, SEGUNDA TURMA, DJe de 06/04/2021; REsp 1.814.111/SE, Rel. Ministro FRANCISCO FALCÃO, SEGUNDA TURMA, DJe de 18/11/2019.
- [6] Brasil, 1997. Lei n. 9.433, de 8 de janeiro de 1997. Institui a Política Nacional de Recursos Hídricos, cria o Sistema Nacional de Gerenciamento de Recursos Hídricos, regulamenta o inciso XIX do art. 21 da Constituição Federal, e altera o art. 1º da Lei nº 8.001, de 13 de março de 1990, que modificou a Lei nº 7.990, de 28 de dezembro de 1989 (Portuguese) [Law n. 9.433, of January 8, 1997. Establishes the National Water Resources Policy, creates the National Water Resources Management System, regulates item XIX of art. 21 of Brazilian Constitution, and amends Art. 1 of Law 8.001, of 13 March 1990, which modified Law 7.990, of 28 December 1989]. Available from: https://www.planalto.gov.br/ccivil_03/leis/19433.htm#:~:text=Institui%20a%20Pol%C3%ADtica%20Nacional%20de,28%20de%20dezembro%20de%201989
- [7] Milaré, E., 2018. Direito do ambiente (Portuguese) [Environmental Law]. Prefácio Ada Pellegrini Grinover. São Paulo: Thomson Reuters Brasil. p. 945.
- [8] Antunes, P.B., 2021. Direito Ambiental (Portuguese) [Environmental Law]. São Paulo: Atlas. p. 823.
- [9] Brasil, 1981. Lei n. 6.938, de 31 de agosto de 1981. Dispõe sobre a Política Nacional do Meio Ambiente, seus fins e mecanismos de formulação e aplicação, e dá outras providências (Portuguese) [Law n. 6.938, of August 31, 1981. Provides for the National Environment Policy, its purposes and mechanisms of formulation]. Available from: https://www.planalto.gov.br/ccivil_03/leis/l6938.htm