

WATER POLITICS IN BRAZIL: SUBSIDIARITY AND HUMANITY ASPECTS FOR THE SEMI ARID SUSTAINABLE RIVER BASIN MANAGEMENT¹

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ABSTRACT

This paper examines Brazilian national constitutional law interpretation about water resources management, environmental protection and sustainable development principles. Institutional scenario is characterized under an economical format, important to conciliate human rights guaranties, national development and water protection. We provide subsidies for legal and institutional analysis considering human rights and an equity desirable scenario. Institutional context in Brazil assumes that Federal Law No. 9433/97 determined that water management must improve its multiple uses, decentralization and social participation. Water resources management in Brazil is legally and institutionally marked by the presence of the subsidiarity principle. We analyze the case in current national scene, with its consequent conflict in São Francisco River Basin, a semi arid Northeastern River Basin. This work also reflects some aspects of water pricing as defined by State politics. Some parameters are discussed as an elementary presupposition for water regulatory instruments that will define respective water management policy. Therefore, when defining criteria water fees, laws must comply with constitutional principles and the parameters established by the Brazilian Water Law (Law 9.433/97). The lack of reasonability and proportionality in dealing with the formal aspects and, specially, in defining water allocation, can obstruct the subsidiary principle application as determined by the Law 9433/97 and National Water Resources Policy. The question is observed in a more detailed focus over Northeastern Brazilian semi-arid region, where scarcity and traditional relations on politics are difficult to deal with, according to a renewed vision of the State and sustainable development principles.

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1 INTRODUCTION

The jurisdictional protection of the environment is a recent phenomenon. Compared to other movements for rights protection, it requires a high dose of maturity by their institutional interpreters. Brazilian constitution (Brazil,1988) absorbed this environmental inspiration, but the practice of constitutional interpretation still lacks evidence that the subsidies given are applied as the systemic characters that environmental and legal analysis requires.

This study exams a representative constitutional conflict environmental case locked in Brazilian Constitutional Court, to verify the applicability of interpretive techniques, and the principiology applied to conflicts between national development and environment protection, localized at São Francisco river basin, in the Brazilian Northeastern region.

2 CHARACTERIZATION OF ENVIRONMENTAL CONFLICT TREATMENT IN BRAZILIAN LAW

The environmental conflict is characterized by the violation or the mere possibility or threat of violation. The legal and environmental principles granted by Brazilian law, from the definition of the Federal Constitution³:

Art. 225. Everyone has the right to an ecologically balanced environment to people's common use, essential to a healthy quality of life, imposing to the public and the community the duty to defend and preserve it for present and future generations.

The court's structure offers opportunities to both the jurisdiction, in the strict sense, and the so called "alternative means of social pacification". So that "are gaining strength

³ Brasil (1988) Constituição da República Federativa do Brasil. "Art. 225. Todos têm direito ao meio ambiente ecologicamente equilibrado, bem de uso comum do povo e essencial à sadia qualidade de vida, impondo-se ao poder público e à coletividade o dever de defendê-lo e preservá-lo para as presentes e futuras gerações."

in recent years, alongside the traditional means of jurisdiction exercise, the *alternative of peace*, whose main types are the conciliation and arbitration, supported by various procedures and specific standards”⁴. The environmental conflict, to deal with complex elements, requires multiple approaches, a variety of court procedures with interpretative flexibility.

3 THE LEGAL WATER PROTECTION IN BRAZIL

The concept of *diffuse rights*⁵ involves water as a common good as determined by Brazilian law. Any water conflict use may be determined by variables such as population increase, industrial development and the risks created by them, and the amount of water must be enough to supply human needs in its various aspects. Above all, water is viewed as one of the natural components that reflects some aspects of the climatology of land with innumerable adverse effects, as widely discussed today in the global *agenda*⁶.

Brazilian environmental legal and institutional views, after the 1988 Constitution, are marked by a public character, revealing a wide margin of action for the judiciary and prosecutors. Any law analysis applied to water use and in particular, the standards defined by Brazilian National Water Politics (BNWP) is focused in the Federal Water Law No 9433/97 (Water Law). It gives responsibility for promoting Brazilian National Environmental Policy⁷ (BNEP). Another essential characteristic given by this legal document is the River Basin Committee (RBC) legitimation to arbitrate in the first instance level conflicts in the watersheds.

The RBC works as an operation manager for the use of water in each river basin, due to the subsidiarity principle. It’s clearly an institution under the French inspiration⁸,

⁴ ANTUNES, Paulo de Bessa. *Direito Ambiental*. 9 ed. Rio de Janeiro: Lumen Juris, 2006, p. 8.

⁵ A Brazilian legal expression, that means some kind of rights that don't have a precise destination, and can't be attributed individually to anyone in society, but refers to everyone's interests. Brazil, Law n° 8.078/90.

⁶ MANCUSO, Rodolfo de Camargo. *Direitos difusos: conceito e legitimação para agir*. 5 ed., São Paulo: Revista dos Tribunais, 2000, p.108.

⁷ This legal reference is determined by Law n° 6.938/81, widely received by The National Constitution, from 1988.

⁸ “O modelo francês, implantado a partir de 1964, serviu de inspiração para todo o arcabouço

legal e institucional do sistema brasileiro de gestão de águas. Muitas das questões que atualmente despertam grande interesse no Brasil, especialmente no que se refere aos planos de recursos hídricos, também na França, durante muito tempo motivaram intensos debates.”

generally well adapted for the Brazilian context. We can find many representations of those institutions in all of the Brazilian geo-political divisions: North, Northeast, South, Southeast and the Central-West region.

We propose to examine a recent constitutional conflict, very expressive for water management in the country, in an attempt to operationalize the interbasin transfer from the São Francisco River Basin to some semi-arid river basins in the Northeastern region, took placed by the federal government as a priority, important to national development⁹.

The initial project, from the imperial phase in 1800's, while the country was dominated by Portugal, has significant implications for the Northeastern region, with inumerous and traditional development difficulties, caused very strong political movements from Minas Gerais, Bahia, Alagoas and Sergipe. Paraíba, Pernambuco, Rio Grande do Norte and Ceará, located mainly at the semi arid portion are favorable to the project, by parliamentary action and popular representation.

This particular case makes it possible to analyze the conflict between some constitutional principles: regional inequalities reduction (art.170, 3º, III), sustainable development (art 170 combined with art. 225, IV and VII) and the Federal Pact (art. 18), with their distribution of powers (Articles 23 et seq.) (Brazil, 1988).

4 THE CONFLICT REGION CHARACTERIZATION

The São Francisco River is 2,700 km long and rises in Serra da Canastra, Minas Gerais, draining towards the north-south to Bahia and Pernambuco, reaching the Atlantic Ocean through Alagoas and Sergipe bounderies (Figure 1).

HUBERT, G., PEREIRA, J. S., LANNA, A. E. (2000) *Os novos instrumentos de planejamento do sistema francês de gestão de Recursos hídricos: reflexões e propostas para o Brasil*. II. ABRH, V.7, n° 2. <http://www.abrh.org.br/novo/rev_rbrh_vol7_n02_a07.php> p.11.

⁹ The Constitution determines as a legal principle the regional differences reduction, as an imperative government plan in all levels. Brazil, 1988, art.170, 3º, III.

Figure 1: São Francisco River Basin in Brazilian territory.

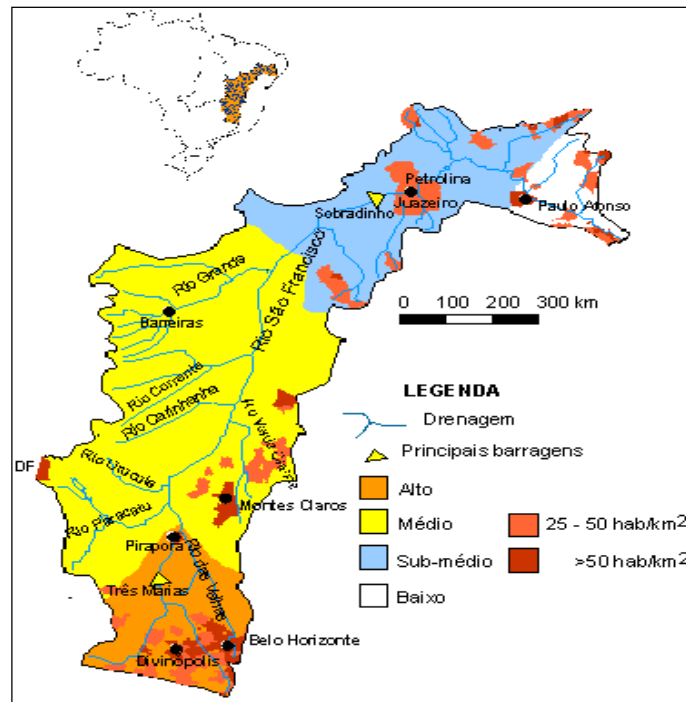


PBHSF. Plano Decenal de Recursos Hídricos da Bacia Hidrográfica do Rio São Francisco (2004-2013). Obtido em <http://www.ana.gov.br/prhbsf/arquivos/Modulos/Mod_2/Modulo%202.pdf>. Acesso em 21 de abril de 2008.

This enormous river basin englobe seven Brazilian federative units: Bahia (48.2%), Minas Gerais (36.8%), Pernambuco (10.9%), Alagoas (2.2%), Sergipe (1.2%), Goiás (0.5%). Approximately 16.14 million people (9.5% of the population) live in São Francisco river basin, with more concentration on High (56%) and Middle San Francisco (24%). The urban population represents 77% of the total population and population density is 22 inhabitants/km². In other regions it is about 10% in Sub-Middle and Lower San Francisco¹⁰ (Figure 2).

¹⁰ Ministério da Integração Nacional. *Os números do rio*. Obtido em <<http://www.integracao.gov.br/saofrancisco/rio/numeros.asp>>. Acesso em 02 de fevereiro, 2008.

Figure 2: São Francisco River Basin localization in Brazil.



CBHSF. <<http://www.cbhsaofrancisco.org.br/>>. Acesso em 12 de março de 2007.

There are seven federal units involved and this fact determines federal law jurisdiction and characterizes the extensive San Francisco river basin as an intensive conflict area.

The project is located in a region named *Drought Polygon*¹¹, in the north São Francisco river basin. People there support the effects of prolonged droughts. The portion involves four federal units: Pernambuco, Ceará, Paraíba and Rio Grande do Norte.

The inter-transfer basin water, used to conduct certain volume of water from a basin to another, has generated in this case, an unprecedented conflict in Brazilian history. The main motivation and primary objective is to increase the assurance water level for human and animal supply and economical activities. Such actions are generally supported formally by equity principle, determined by *The Water Law*, to grant water access rights, especially as provided for moral and ethical principles embodied in *supra* legal documents. In general, those who propose discussions about the operation of technical excellence projects, considers the economic benefits and contributions to

¹¹ “Polígono das secas”: a particular administrative in the semi arid region, with some benefits given by statal incentives from Brazilian federal government traditional public policies.

global development of society. Their *opponents* try to show, moreover, that social and environmental costs are too high and therefore unacceptable to society.

For the most recent project, the implementation proposed by the Government, through the Ministry of National Integration, aims to meet the semi-arid lands, starting from Pernambuco-Paraíba and the metropolitan region of Fortaleza, Ceará, as regions for water reception.

5 THE JUDICIAL CONFLICT AROUND SÃO FRANCISCO RIVER BASIN

The conflict mediation in the first instance on São Francisco project should be dealt by the river basin organization, the RBC, which has legitimacy for interpretation as determined for the popular will, as institutionalized by Law No. 9433/97. So, the RBC is a legitimate entity for managing the river basin under the subsidiarity principle.

Some essential steps characterize a project of this size, as the obvious environmental impact both for the donor and receiving region receiving. The project must receive the legal treatment given to any similar project, with potential for environmental damage or risk, completing all steps that guide the process for environmental licensing. Brazilian law provides as a tool from Law No. 6.938/81, art. 9, IV, the environmental licensing system that "aims at the preservation, improvement and restoration of environmental quality conducive to life, to ensure, in the country, conditions for socio-economic development, the interests of national security and the protection of dignity human life".¹² In the activities that represents significant risks of damage to the environment, it is necessary an administrative procedure to the competent environmental agency that approves the location, installation, expansion and operation of these activities. Here comes the need for submission of technical reports that subsidize the authority, as the Environmental Impact Report (EIR)¹³.

For the São Francisco case, the licensing stages to authorize the project had been the subject of numerous legal questions. Moreover, some actions and processes intended exactly the opposite, arguing that licensing process had not included public audiences needed for the legal authorising procedure, with the participation of all groups and communities involved, in particular the indigenous or *traditional communities*¹⁴.

¹² Brazil. Law n° 6.938/81.

¹³ Called RIMA in Brazilian Law 6.938/81 and it's complements.

¹⁴ This is a recent national legal terminology for indigenous people, including different forms of ancient societies living in brazilian territories.

The EIR report that subsidizes the project, took place in some stages of analysis: Studies of regional integration, with assessment of availability and demand for water, considering technical feasibility studies; Economic alternatives evaluation to define the best option to execute the planning, including costs and economic viability. "These studies considered socioeconomic benefits that could be expanded.[...] The methodology used had identified a lot of impacts, both positive and negative: a total of 44 (forty four)".¹⁵

The most significant positive impacts to be expected: to increase the security of water supply and generation of jobs; boosting regional economy; to increase the amount of water for urban supply; Water supply of rural populations; Reducing exposure of the emergency situations of drought; Boosting of agricultural activity and incorporation of new areas to the production process; to improve water quality in the receiving basin; rural *exodus* and emigration reduction; population exposure to diseases and deaths reduction; pressure reduction on health infrastructure.

Among the negative environmental impacts, the most relevant are the possibilities of change over biological communities composition; to modify native aquatic life in receiving basins; biodiversity reduction risk of native biological aquatic communities in the receiving basin; Possibility of interference with indigenous peoples; Loss and fragmentation of large amounts of areas, with native vegetation habitats for animals; Risk of introducing potentially strange fish species; Modification of river drainages in recipients basins.

The EIR mentions that "the assessment of environmental impacts arising from the installation and operation for São Francisco River Basin integration project for the Northeastern region makes available 24 Environmental Programs" which will be implanted to "enable prevention, mitigation and correction of impacts". As a measure to increase the local and regional development, the RIMA indicates "the reduction of migration and therefore retention of an important human contingent in the region, boosting productive activities, generating business and jobs, reducing migratory pressure on small and medium regional cities, reducing their social and environmental problems." The report for environmental impact study (EIS) should support the

¹⁵ RIMA. *Relatório de impacto ambiental para obra da transposição de bacias do rio São Francisco*. Obtido em ww.integracao.gov.br/saofrancisco/rima/download.asp. Acesso em 02 de fevereiro. 2007.

application of the precautionary principle¹⁶. In this case, it was attacked in the conflict judicialization, during the project initial phase. The actions were directed to IBAMA¹⁷, the responsible authority for granting the corresponding environmental permits. The case was appreciated by Brazilian Constitutional Court, under the assumption of federative pact violation¹⁸.

Brazilian procedural law allows several kinds of judicial actions in the case. River basin stakeholders claimed for the right to oppose the project. Some of them must have preferential treatment as legal interpreters, as the São Francisco River Basin Comitee (SFRBC) members, due to Law n° 9.433/97.

Several processes were proposed to attack the Federal Administration project, beyond the Brazilian Institute of Environment and Renewable Natural Resources (IBAMA). The most important ones discussed the ERI (RIMA).

The action considered only federal conflict hypothesis, arguing that subjects were interesting to more than one Federative unit. The conflict between environment and development was not mentioned formally. The precautionary principle, however, was widely used as an argument for RBCSF, attacking the EIR technical aspects.

Finally, Constitutional Court decided to authorize project execution, without considering the subsidiarity principle and the river basing comitee authority and legitimacy.

6 CONCLUSIONS

The Brazilian National Water Resources Policy is responsible for water resources regulation. There are well-defined environmental laws and institutions, playing their roles. Law No. 9433/97 establishes a control policy on shared water resources, under the RBC decisions, under subsidiarity principle. This institutional condition provides

¹⁶ The precautionary principle is a moral and political principle which states that if an action or policy might cause severe or irreversible harm to the public or to the environment, in the absence of a scientific consensus that harm would not ensue, the burden of proof falls on those who would advocate taking the action. Raffensperger C. & J. Tickner (eds.) (1999) *Protecting Public Health and the Environment: Implementing the Precautionary Principle*. Island Press, Washington, DC.

¹⁷ Instituto Brasileiro de Meio Ambiente (IBAMA), executive agency for Brazilian Environmental Ministry, created by Federal Law n° 6.938/81.

¹⁸ Brazil is formally defined as a federative union, with 27 federal units, under centralized Constitutional power. The impossibility of separation, determined by a federative pact, is a constitutional principle. Brazil (1988).

elements for implementing sustainable development rights in Brazil. This analysis showed that, despite the presence of institutions, norms and rules involved in this case, they all were not sufficient to resolve the conflict.

Multiple water use is a legal principle, considering a sustainable development manner, that could not provide an equitable access to development, but only if under popular legitimacy.

The lacks in the regulatory structure, represented in this case by the disobedience to the river basin plans approved by SFRBC, and the lack of transparency, self-referenced in the examination of this conflict, led to these conclusions. In addition, it was not possible to recover the precautionary principle application.

The credibility of institutions such as laws and interpretations of the Courts depends on the proper handling of the conflict. Interpretation based on pre-defined principles as regional inequalities elimination and environment protection (Brazil, 1988) in constitutional principles under collision would bring a contributory factor for safety.

Collective decisions under subsidiarity principle were not considered in this particular case by Constitutional Court. The process was judged in most aspects under a mere procedural and instrumental manner. The Judiciary, in this case, seems to adopt a general poor condition of legitimacy for public policies. The conflict appreciation only considered checks *and balances* for the Brazilian political system.

To interpret Constitution must be daily life in Superior Courts, according to Brazilian condition as a developing country, especially for environmental protection. These conditions may be largely increased, recovering some ethical questions, and considering legitimate citizens' decisions.

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