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Water As A Fundamental Rigth: An analysis of the water market in the light of the brazilian legal ordinance

El agua como derecho fundamental: Un análisis del mercado del agua a la luz del sistema jurídico brasileño

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Abstract: Introducing water markets as an instrument to promote more efficient allocation of water resources, gives rise to a series of discussions with legal repercussions. and social about the National Water Resources Policy and the need to critically reflect on the management and management of water resources as an essential element to life. Although it is necessary to recognize the innovations brought about, it is essential to analyze and seek legal protection in line with human dignity, ensuring balance and maintenance of life for present and future generations. In this context, there is a necessary problem for the development of the research: How are the guidelines of the water market established under the perspective of federal law 9,433/97 and its correlation as a fundamental right to life in the legal system? As a method of approach, the deductive method will be used, the method of procedure will be qualitative, and the research technique will be exploratory, documentary and bibliographic. In fact, the commodification of water in Brazil has been the subject of a series of discussions among scholars, environmentalists, jurists and even society in general. The issue has caused several divergences and, for the most part, has been treated as an unfeasible proposal, as it emphasizes the privatization of water, a measure prohibited by the Federal Constitution and, therefore, unconstitutional. Thus, noting its social relevance, it is necessary to recognize water as a fundamental guarantee, in addition to the participation and awareness of society in the discussions surrounding the topic.
Keywords: *Water market; Fundamental right; National Water Resources Policy.*

Resumen: La introducción de los mercados de agua como instrumento destinado a promover una asignación más eficiente de los recursos hídricos da lugar a una serie de debates con repercusiones jurídicas y sociales sobre la Política Nacional de Recursos Hídricos y la necesidad de reflexionar críticamente sobre la gestión y administración de los recursos hídricos como elemento esencial para la vida. Si bien es necesario reconocer las innovaciones aportadas, es imprescindible analizar si la protección legal está en consonancia con la dignidad humana, asegurando al ser humano, el equilibrio y el mantenimiento de la vida para las generaciones presentes y futuras. En este contexto se plantea un problema necesario para el desarrollo de la investigación: ¿Cómo se establecen las directrices del mercado del agua en el marco de la ley federal 9.433/97 y su correlación como derecho fundamental a la vida en el ordenamiento jurídico? Se utilizará el método de enfoque deductivo, el método de procedimiento será cualitativo y la técnica de investigación será exploratoria, documental y bibliográfica. El tema ha causado varios desacuerdos y ha sido tratado en su mayoría como una propuesta inviable, ya que hace hincapié en la privatización del agua, una medida prohibida por la propia Constitución Federal, siendo, por lo tanto, inconstitucional. Por lo tanto, teniendo en cuenta su relevancia social, es necesario el reconocimiento del agua como una garantía fundamental, así como la participación y sensibilización de la sociedad en los debates en torno al tema.
Palabras clave: *Mercado del agua; Derecho fundamental; Política nacional de recursos hídricos.*

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INTRODUCTION

Considering water as an essential asset for the survival of biotic beings, the maintenance of life itself and the ecosystems of the planet, being this asset directly connected to health and human dignity, it can be said that there is no life on earth without water.

Therefore, in mid-2010, the United Nations began to recognize the right to clean and safe water as a Human Right, essential for the full enjoyment of life and all other rights, seeking to minimize the vulnerable effects arising from risks, diseases and conflicts caused most often by unfair, limited or even non-existent access to water.

However, recognizing this right is not as binding and effective in Brazil's internal legislation, since we are facing a serious water crisis marked by inequalities in guaranteeing access to drinking water in quantity and quality, suitable for consumption, in order to enable livelihoods, well-being, and socioeconomic development itself.

Likewise, it is noted that the severity of this crisis that affects water resources, affects all biodiversity, the environment, its species, and the future of generations, pointing out ethical issues of the human relationship with water and its impact on the most vulnerable populations, resulting from its poor distribution.

Humanity, often inconsistently, has viewed water within a culture of abundance, seeing it as a renewable, infinite, and always available good, and as a natural abundance. However, this view has been demythologized by environmental concerns and its scarcity, becoming a latent concern for many and expanding the universe of ethical and moral problems related to this issue, in addition to legal and public management issues.

Thus, the exacerbated and inconsequential use of water resources has highlighted the water crisis, a reason for legal and economic discussion in our society. From this point of view, we can face several questions, from the distribution of water, its quantity, quality, its economic and human value, its management, and the various conflicts resulting from it, being necessary to see, besides all this, the understanding of water as an indispensable right for all individuals, fulfilling its social function and evidencing the principle of human dignity.

This exacerbated use makes room for countless negative environmental impacts, caused, in most cases, by man. Such impacts have an irreversible character and, as a result, put in check the environmental balance and the maintenance of life. Moreover, inefficient management also leads to water scarcity, making poor water distribution a reality in several regions of the country, compromising the lives of thousands of people in subhuman conditions.

The Magna Carta of 1988 establishes, in its article 225, the right to an ecologically balanced environment as a right of all, treating it with isonomy and attributing it to all citizens, as a way of highlighting the relevance of the theme and its dimension in the legal branch. At the same time, other legal provisions also contribute to this idea, aiming at the legal protection of water. Thus, Law 9433 of January 8, 1997, establishes the National Water Resources Policy and recognizes water as an essential element for life.

Although the Brazilian legal system has made possible the protection of water resources and instituted its National Policy as a way to create the National Management System, it is necessary to develop a theoretical study in order to verify the main issues that involve the theme and its legal and social implications, resulting from the enforcement of this right.

Starting from the premise of the recognition of water as a Fundamental Right and based on the water crisis resulting from its scarcity and/or management, it seeks to answer the following problem: Are the guidelines set forth in Federal Law 9433/97 through the water market established in accordance with the Federal Constitution, being related to the fundamental right to life?

It denotes its importance by contributing to the identification of ways to guarantee the fundamental right to life, highlighting the right to water as an essential and indispensable asset for the maintenance of life.

METHODOLOGY

The methodological procedures applied in the present work can be classified as exploratory bibliographic research and document analysis, since it seeks, through articles, works and documents already elaborated, the collection of information about the object of study under analysis, being necessary to carry out a theoretical survey through recognized materials to guide the construction and raising of hypotheses, in order to trigger the importance of the theme with its legal and social consequences. The deductive approach will be used, since it starts from a general analysis of the Policy of Hydric Resources introduced in Brazil and the evolution in the management and planning of this resource.

The work includes descriptive research, since there is a need to observe and analyze the theme of the water market in Brazil from a normative point of view, considering the project of law and amendment to the constitution which is strong on the theme, besides correlating the theme to the fundamental right to life. Regarding the methodological procedures that underlie this research, the method of procedure to be adopted is the qualitative, since it suits the doctrinaire and legal understanding about the introduction of the water market in Brazil and its constitutional aspects. Its feasibility is made by collecting information

through direct (legislation) and indirect (articles, doctrines, opinions, project information, among others) documentation.

RESULTS AND DISCUSSION

Water: historical context and legal aspects

Before understanding the importance of the recognition of water as a constitutional right and its legal relevance, it is necessary to present the concept of water, which, according to the Aurélio dictionary, is a colorless and odorless liquid composed of hydrogen and oxygen. For Vanessa Sardinha dos Santos (2008), water is a natural element that makes up not only the planet Earth, constituting the hydrosphere, but also the human body, and is therefore essential for the existence and maintenance of life.

The importance and essentiality of water for life on earth is undeniable. It is indispensable for almost all the activities performed by human beings, whether for their own subsistence, for their needs, for the economy, for agricultural or industrial production.

So important is it that it is recognized that access to water is part of the right to human dignity, and its quality, quantity, management, and distribution must be observed.

Despite its indispensable character, the waste and irrational use of water has caused scarcity in several regions of the world, becoming a latent concern for the population and other sectors that suffer with its limitation, causing risk to future generations.

Notwithstanding the fundamental rights guaranteed by the 1988 Federal Constitution, the right to a balanced environment as a right for all has also gone through several phases until it reached the present day, overcoming major limitations on its protection until it reached a phase of complete legal foundation to guarantee effective protection.

Despite being a recognized right, its exacerbated use and human greed has taken other directions, threatening the lives of many regions that suffer without access to water, in addition to putting the survival of this and future generations in jeopardy.

In order to achieve this right, it is important to mention the entire chronological evolution of the environmental constitutionalization process. The Constitution of 1891 was the first normative document that mentioned the protection of the environment, after the advent of the Republic. For Campos (2003), the normatization was limited to the elements of nature, that is, its protection was directed only to specific natural resources. In this author's view, the concern with the environment translated only into a protection of land and mines, which aroused harsh criticism for protecting only the interests of the bourgeoisie and institutionalizing the exploitation of the soil.

The subsequent Constitutions of 1934, 1937, 1946 and 1967 maintain the same characteristics, protecting the environment and directing it to specific natural resources. Campos (2003) claims that both constitutions did not demonstrate a collective awareness of effective defense of the environment, but only significantly expanded the regulations about the subsoil, mining, water resources, among others.

One can see that the intention at that time with the normative regulation was not to protect the environment as a whole, but rather to glimpse a utilitarian purpose, protecting the resources from nature that had economic and utilitarian value, with the aim of ensuring the interests of a dominant minority.

As the years went by, economic and social transformations arose that led to changes in the attitude towards environmental issues. In the 1970s, these transformations opened the door to water and environmental crises, a moment marked by international and national discussions about the ecological crisis caused by the adoption of the developmentalist model. All these transformations contributed to the questioning that led to the emergence of a new ecological vision that reflected on the effective Constitutionalization of Environmental Protection in Brazil.

As a landmark of transformation, Bruno Gurski (2010), highlights the Stockholm Conference held in 1972 in Sweden, whose approach was focused on discussing environmental problems. Gurski (2010) points out that this conference was the first major meeting of heads of state organized by the UN to discuss issues related to environmental degradation and seek alternatives to improve the relationship between man and the environment, seeking a balance between economic development and reduction of environmental degradation.

About the 1972 Stockholm Conference, Wellington Barros (2008) teaches:

> The First World Conference on the Environment, held in Stockholm, Sweden, in 1972, was the first milestone in the UN's handling of environmental issues. This pioneering event was important, despite its modest achievements. Thanks to it, however, it was possible to open important discussions about issues that were once relegated to the background, despite their controversial nature.

In the view of Barros (2008), this event marked the first moment in which the search for environmental protection was treated as a way to protect a fundamental right and ensure a balanced quality of life, because until then, the attempt to protect the environment was reduced to the economic desires of a minority.

With this, the legal system with respect to environmental issues began to be observed more closely, in view of the devastation of nature, environmental degradation and water problems such as disasters, droughts, floods, poor distribution or scarcity.

During the 1970s, when the Stockholm Conference took place, the pillar of sustainable development was raised as a way to ensure environmental balance. Thus, a major fruit was produced, the Declaration of the Environment, rich in principles that elucidate a greater protection of the environment and produce reflections of the current Constitution.

Later, in 1981, Law 6.938/81 was drafted, which became known as the National Environmental Policy Law (PNMA). According to the first article of this law, its creation has the objective of preserving, improving, and recovering the environmental quality that is favorable to life, aiming to ensure, in the country, conditions for socioeconomic development, the interests of national security, and the protection of the dignity of human life.

Although Law 6.938/81 gave visibility to the environment as an important branch of society and that it should be observed in a valorous way and with special protection, it was only with the promulgation of the 1988 Constitution of the Federative Republic of Brazil that we have the theme in evidence, attributing the responsibility for environmental preservation not only to the public power, but also to the entire community.

Thus, it was necessary for the Law to regulate this matter and ensure a balanced environment for the current and future generations. This understanding is set forth in the caput of Article 225 of the Federal Constitution of 1988:

> Art. 225. Everyone has the right to an ecologically balanced environment, an asset for common use by the people and essential to a healthy quality of life, imposing on the Public Power and the community the duty to defend and preserve it for present and future generations.

The 1988 Federal Constitution ended up positing the issue as a fundamental right, entirely linked to the dimensional guarantees of equality, in observance of the constitutional order and the principle of human dignity. In fact, it must be said that without access to a minimum amount of drinking water, the right to life, health and even well-being become unattainable, given the interdependence of one issue to the other.

For Campos (2003), the Constitution granted water the visibility of a legally protected good, being protected by diffuse interests, that is, those that transcend human individuality, belonging to everyone. As a consequence of this right, it is essential and indispensable to the life of human beings and to the maintenance of the environmental balance itself.

After the recognition of water as a constitutional guarantee, Law 9433 was passed on January 8, 1997, instituting the National Water Resources Policy and creating the National System for the Management of Water Resources (SINGREH), reinforcing the protection and recognition of water as an essential element for life. Legal analysis of Federal Law 9433/97 and the commodification of water in

Brazil. Federal Law 9.433 of January 8, 1997, popularly known as the Water Law, besides creating the National Policy for Water Resources and establishing paths for the management of water and creating its Management System, innovates by bringing the foundations that should guide the National Policy for these resources, its objectives, the actions for implementation and the instruments necessary for its effectiveness, allowing the integration between the Union and the States.

Article 1 of the above Law points out the fundamentals that should be the basis of the National Policy for Water Resources:

> Art. 1 The National Policy for Hydric Resources is based on the following fundamentals:
> I - water is an asset of public domain;
> II - water is a limited natural resource, endowed with economic value;
> III - in situations of scarcity, the priority use of hydro resources is human consumption and the desedation of animals;
> IV - the management of hydro resources must always provide for the multiple use of water;
> V - the hydrographic basin is the territorial unit for the implementation of the National Water Resources Policy and the operation of the National Water Resources Management System;
> VI - the management of hydro resources must be decentralized and rely on the participation of the Public Authorities, users and communities.

Subparagraph I deals with water as a public good. In fact, according to José Afonso da Silva (1998), all water is not subject to private appropriation and must be free for human and animal consumption, and for agricultural and industrial purposes. For this author, most water resources, such as rivers and lakes, are unquestionably of a public nature, under the domain of the Union and the States.

Subsection II presents water as a limited natural resource with economic value. In fact, this clause confirms the idea that water resources are exhaustible and vulnerable, and is capable of awakening in us an awareness for their use. Machado Granziera (1993) confirms that this understanding is already universally accepted and that it was even made explicit in the Dublin Declaration, Ireland in 1992, when it dealt with issues pertaining to water resources.

Subsections III and IV confirm the idea of balance among the various uses of water, establishing the needs that must be given priority, since the management of hydric resources must provide for the multiple use of water, but that, in cases of scarcity, priority use must be given to water resources for human consumption and animal feeding.

The idea that the hydrographic basin is the unit for planning and managing water is stated in item V.

Finally, item VI defends that the management of hydro resources must be decentralized and must count on the participation of the government, the users, and the communities. In fact, Law 9433 wanted to posit the participation of citizens and communities that are users of water resources, in order to make an isonomic discussion with the participation of all, allowing a free environment and broad public access.

The idea defined by Federal Law No. 9.433 of 1997 must take into consideration the regional and geographical singularities of space, the socio-environmental diversity of each region, culture, and the whole process of establishing hydric policies in Brazil. Another very interesting point of the above-mentioned Law that deserves to be highlighted refers to the instruments of the National Policy for Hydric Resources. These instruments are set out in art. 5:

> Art. 5 The instruments of the National Policy for Hydric Resources are
> I - The Hydric Resources Plans;
> II - The framing of bodies of water in classes, according to the predominant uses of the water;
> III - Granting of the rights to use hydro resources;
> IV - Charging for the use of hydro resources;
> V - Compensation to municipalities;
> VI - The Hydric Resources Information System.

Although these instruments are included in the Water Law, it is imperative to highlight that not all of these instruments of the National Policy for Hydric Resources are accepted as such by a part of the doctrine, thus demonstrating the complexity of environmental discussions by the interdisciplinary system of sciences, reinforcing the idea that there are many matters that need to be discussed and analyzed, taking into consideration the regional culture, with its peculiarities and characteristics. Still, for Campos 2003, these instruments serve, in general, as mechanisms for the correct application of the hydro resources policy, from planning to the exercise of command and control of the waters.

According to this understanding, it can be seen that the National Water Resources Policy and the National System for the Management of Water Resources, created and instituted by Federal Law 9.433 of January 8, 1997, recommend, in addition to the principles, the general rules that must govern the management of the waters, and should be used as a national parameter for discussion and propositions of new laws and regulations, as a way of observing and meeting the needs of each region, taking into consideration its culture, its management, its principles and all the institutes linked to the theme of its legal protection as maintenance of the environmental balance.

Although the Law has this intention, many other problems have arisen along the way, lacking appreciation and a sense of justice. The use of water in an exacerbated way, made its demand grow rapidly, being necessary to develop discussions on rational use to try to minimize the problems arising from water

scarcity. For Frederico Amado 2016, water is the main reason for war and discontent in contemporary times, surpassing even oil. For this author, water scarcity is due, essentially, to natural determinations and, more recently, to misuse, done in an exacerbated, unconscious, and inconsequential manner, becoming a limiting condition for human development.

As a way to minimize the consequences brought by the scarcity of water resources and even to ensure environmental balance for present and future generations, authors such as Fiorillo (2018) point to the regulation and introduction of a water market in Brazil as an alternative.

Such discussions about the introduction of the water market in Brazil led to the drafting of Bill No. 495 of 2017, authored by Senator Tasso Jereissati (PSDB/CE) and proposes to amend Law No. 9,433 of January 8, 1997, to introduce water markets as an instrument designed to promote more efficient allocation of water resources. This bill aims to prioritize multiple use and more efficient allocation, to create water markets, with priority application in areas of high incidence of conflict over the use and management of water resources.

With the analysis of this bill, the water markets are considered an instrument for the management of water crises and operate through the assignment of the rights to use resources between users in the same basin or sub-basin, for a fixed period of time.

The bill proposes significant changes to the Water Law, from changing the fundamentals of the National Water Resources Policy to providing for the creation of water markets in water resources plans.

In the justification of the bill, Senator Tasso Jereissati (PSDB/CE) claims:

> The introduction of water markets into Law 9433 of January 8, 1997, which institutes the National Water Resources Policy (PNRH), is a necessary measure to promote the efficient allocation of water resources to activities that generate more employment and income, in order to optimize socio-environmental and economic benefits. Negotiations within the water markets intensify when demands match water availability or in situations of drought. The water market is a useful tool for regions affected by droughts and prolonged dry spells, such as the one that occurred in the São Francisco river basin and the São Paulo Metropolitan Region (RMSP).

For Tasso Jereissati, the water market should act as a necessary alternative to seek to minimize all the losses suffered by the regions most affected by prolonged droughts and droughts. In the same justification, Tasso Jereissati clarifies that it is not about privatizing water:

> It is important to emphasize that the project does not intend to privatize the waters, for these are inalienable and have public dominiality guaranteed by arts. 20, item III, and 26, item I, of the Federal Constitution. What is proposed is only the negotiation of

> the rights to use water resources, granted by the competent authorities, notably in situations of water shortage, observing the requirements of this proposal. The project is inspired by successful international experiences with water markets, observed in the United States, Australia, Chile, and Spain, countries that also have a strong agricultural vocation. Also on the international level, the proposal is in line with the Dublin Declaration on Water and the Environment, which states that "water has economic value in all competitive uses and should be recognized as an economic good (...) the management of water as an economic good is an important means to achieve efficient and equitable use and to encourage conservation and protection of water resources".

The bill is available for popular consultation on the Senate portal and as of July 17, 2017, of the 108,997 votes counted, 107,681 are votes against and only 1,316 votes in favor of Bill No. 495 of 2017, which clearly denotes a high rate of rejection, thus lacking popular legitimacy. There are many opinions and discussions about the processing of said bill. Petterini (2018), makes a comparison of how it happened in the US and how it may happen in Brazil. He believes that the creation of the water market in Brazil would enable the privatization of water, and thus would be infringing its public dominiality, as safeguarded by the Federal Constitution of 1988. For Petterini (2018), the commodification of water would end up hindering the supply of water for people and animals, since its privatization would lead to selective use.

Indeed, the issue of the introduction of the water market in Brazil is the center of many discussions and conflicts among scholars, environmentalists, and jurists. From the legal point of view, this goes beyond legal limits, since the Federal Constitution of 1988 itself forbids the privatization of water. On the other hand, society in general is against these changes. However, some parliamentarians have been defending the creation and legal recognition to treat water use in a commercial way and apply significant changes to the Water Law.

CONCLUSIONS

In light of what has been exposed throughout this work, it is possible to understand the historical and normative evolution of environmental protection and the legal and social recognition of water as an indispensable good for the environmental balance and the guarantee of the present and future generations.

The research does not aim to exhaust the scientific discussions held by environmentalists, jurists and society in general on the subject in evidence, but only to understand the National Water Resources Policy from the normative standpoint and its implications.

Although some consider the constitutional guarantee of a balanced environment to be utopian, this theme cannot be minimized. One must seek to raise awareness and awaken preservation for a human and animal life in environmental harmony, positing this understanding in effective legislations that should

ensure this foundation. On the other hand, studies prove that the destruction of the environment, pollution, waste of water resources, and so many other factors make human life on earth unviable. Thus, the importance of a National Policy that guarantees effective instruments and enables the maintenance of life. The right to a balanced environment goes through the principle of human dignity and seeks to raise the issue to a level of security and respect for the environment, establishing it as a right for all.

This research presents the historical context of the theme and seeks, through normative analysis, to study the possibility of the water market under the pretension of the National Water Resources Policy and its implications. The appreciation of Bill No. 495 of 2017 seeks to introduce the water market in Brazil and alter, significantly, the Federal Law 9.433/97, being necessary the strengthening of participatory and decentralized management of water resources, in addition to the defense of the constitutional principles of public dominiality of water and effective social awareness about this discussion.

It is noteworthy that the introduction of the water market in Brazil seeks to turn water into a private good that can be traded, going against the Federal Constitution of 1988, which regulates water as a public good, essential to life and to the environmental balance.

Finally, it is imperative to say that the discussion is extremely relevant in our times, due to the countless environmental problems resulting from the unbalanced use of water resources and the attempt to commercialize water, as well as the legal and social impacts that this may cause with its alterations.

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