The Juridical Guardianship of Marine Waters in Brazil and the National Politic Management of Hidric Recourses: International Acts and Incident National Legislation

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ABSTRACT


The pollution on the sea and the Coast Zone, created by accidents involving maritime transport of merchandise, in particular, brute petroleum, contribute annually with 10% to the global pollution on the oceans. When the black tides reach the Coast Zones, their effects became more catastrophics. Besides, they destroy the fauna and flora, with their contacts, they provoke big damages to the fishing and they have a strong negative impact on the touristic activity, since, the residues of petroleum are difficult to be removed, impede the utilisation of the beaches during a long time. Besides the existence of a legal protection in an international level, we can notice that the marine waters guardianship, in general, hasn’t been justly incorporated to the brazilian juridical ordering.

ADDITIONAL INDEX WORDS: Legal protection of the marine waters; public politics of waters management; international environmental rights.

INTRODUCTION

The questions about the environnement orders that involve the management of the water, has been charaterized as one of the two more pressing concern around the world, and de humanity has felt the reflex of this predators conducts and activities, as a base of economy and development, mainly the nouixious effects of pollution that affect de water quality, marines or sweets. In this context, the pollution of the marine waters, besides destroys the fauna and flora, causes a lot of damages to the fishing, and it has a strong negative impact about the tourism, because of the petroleum residue, that is difficult to be removed, it obstructs the time of the beaches utilization.

In spite of the existence of a lawful guardianship in an international level, just incorporated to a brazilian juridic ordering, specifically in direction to the protection of the marine environment, we can observe few attention from many environment public politics, the integration of lawful instruments that would deal with the management of hidric recourses to marine and sweet. According to FREITAS (2000),

When the doctrine and the national legislator deal with hidric recourses, seldom we can see some mention about the sea water. Typically, the sea custody has focused the protection of alive recourses that exists on it, petroleum exploration, the mariner transport, the Coastal States defence and the ocean’s pollution. With this demonstration, we have significant number of pacts and internacional conventions about this specific subjects (...). Regarding property to the water, while the natural recourses utilisable by men or in the economic activity, the concern is directed to the guardianship of the corpus in sweet water (rivers, lakes and subterranean reservatories).

With the purpose of approaching importants aspects about the custody of marine waters, mainly about their conception and legal national and international framing, drawing a paralell between the rule in the National Politic of Hidric Recourses and the guardianship of marine waters have intended to be a reference in this work.

THE LEGAL GUARDIANSHIP OF MARINE WATERS IN THE BRAZILIAN JURIDIC ORDERING

Marine Water: Legal Concept and Dominium

The Constitution of the Federative Republic of Brazil from 1988 defines the dominium of the sweet and marine waters in Brazil. The article 20, incise III, declares that, the lakes, rivers and any running water that is located in its sand, or that wash more than one State, could serve as a limit with other countries, or extend along a foreign territory or that provide from its, belongs to the Union.

In the Brazilian Juridic Ordering, the first legal diploma that refers about waters, was the Waters Code (Decree Law nº 24.643 from 10/07/1934). Nevertheless, it doesn’t indicated in its appliances something especifically about marine pollution, but it just, arranges the public waters in comum use, in its article 2º, paragraph “a”, as the territorial oceans, the Gulfs, Bays, small bays and harbours are also included. To FREITAS (2000):

The Waters Code (Decree number 24.643/1.934), for exemplo, dealt with the territorial ocean, just to classify it, as public water of comum use (art. 2º), pertaining to the Union (art.29). This is because, the utilisation of sea water for human use, irrigation or, the industrial application, is considered remote. The target of legislator concern has always been about the water for the human use, irrigation and generation of hidroeletric energy, not necessarily in this order of priority.

The Law nº 9.433, from 01.08.97, that has established new basis to the management of hidrics recourses, creating the National System of Management of Hidric Recourses, that according to the article 32, arranges the integrated management of waters, arbitrates administrativelly, conflicts related with the hidric recourses and it has attributions to implement the National Politic of Hidric Recourses. The projection, regulation, and recuperation of hidrics recourses, as the promotion of its collection is imputed to the National System of Management of Hidrics Recourses.
The first basis established by the law 9.433, from 01.08.97, considers the water as an asset of public domain, according the article 1º incise I, precepts. The public domain, according to MEIRELLES (1999) in the set of assets or that pertaining to the State. The author continues, that this dominium can happen in three different spheres. In an wide significiation, it would be the domination and regulation power, this is executed on the public assets, the ones called publics. The particular assets of public interest, would be the one of private patrimony and, finally we would have the collective assets, they are also known as res nullius.

However, the public water domain confirmed by the law cited here, doesn´t transform the Public Power as the water owner, but becomes it in the conductor of this asset, that there´s no doubts, consists of an interest for all. It´s detached, in this context, that the water is not susceptible of law property, although, it designates one guardianship for its guard and conductor, so to speak, its collection doesn´t consist of transference of proprieties, but just the remuneration for use, as a conductor instrument of this recourse.

MACHADO (2002) points out the consequence of water reputation as “the asset of people comun use “, inserted in the context of the article 223, from the Constitution of Federative Republic of Brazil, from 1988, as a incorporated asset, therefore, the participant of the environment, would be, so to speak:

a) the utilisation can´t be appropriated just for one physics or juridical person, with total exclusion on the others usuaries with potential;

b) the water utilisation can´t mean the pollution or aggression to this asset;

c) the utilisation of this water can´t exhaust the own asset used and the concession on the authorization or any kind of sanction of the water used, must be motivated or based for the public conductor.

The law number 8.617 from 01/04/1993, that disposes on the territorial ocean, the contiguous zone, the exclusive economic zone, and the brazilian continental platform, defines the territorial ocean as a zone with 12 marine miles in amplitude, measured from the low tide line of the continental coastland and brazilian islander, as indicated in the navigational maps of high scale, recognized in Brazil. SILVA (2002) emphasesy the marine environment juridical regime is complex, whereas:

The marine waters correspond to the territorial ocean, the contiguous zone and the high sea. The marine environment, is, besides, more that than, therefore, it embraces this water and the Continental Platform, and the Exclusive Economic Zone, marine and oceanic grounds and their subsoil. The juridical regime of the marine environment is complex. The constitution declares about the Union domain, the territorial ocean and the natural recourses of the Continental Shelf and Exclusive Economic Zone. (Art. 20, V e VI).

The law nº 9.966 from 04.28.2000, disposes about the prevention, the control and inspection of the pollution caused by oil trowing and other noxious or dangerous substances in the water under a national jurisdiction and gives other precautions in its article 1º, IV, that mention the definitions and among them, we detach the areas ecologically sensibles, this way understood, the regions of the marine and inland waters, defined by the Public Power, where the prevention, the control of pollution and the maintence of the ecologic balance, there are special measures to the protection and preservation of the environment, about the vessels transit.

This law contributes a lot to the guardianship of the marine environment against the pollution, in order the prevention, the control and the inspection, not just about the pollutant oil and their derivatives, but also about all and any substance considerate noxious or dangerous. In this article 3º delimits the protection of marine area, as been: To the effects of the law, are considered waters under national jurisdiction,

I- Inland water;
   a) the water understood between the Coast and the straight line base, where the territorial ocean is measured;
   b) of the ports;
   c) of the bay;
   d) of the rivers and their mouths;
   e) of the lakes, lagoon, and canals;
   f) of the islands;
   g) waters between the sandbank to exposed and the coast;
II- Mariner waters, every under natural jurisdiction that aren´t inland.

SANTOS points out (2003), that:

The new pollution law, nicknamed Oil Law, results from a project elaborated for a work Inteministerial group, created by the decree number 99.349, from 06/26/1990, composed for Secretary Environment and Renovation. Recourses representatives of the Marine Ministry, ( … ) with the intention of introducing a diagnosis about the actual situation of the hidric pollution caused by the oil and others pollutants deriving from embarkations, platforms, ports, terminals and support installations, as well as, present solutions in the intusticial ambit, technical and legal ( … ) consecutively, it comes to complement the Marpol sphere performance, that embraces the ports and others instalation that potencially represent a risk to the marine environment pollution.

Besides, the problems with pollution, exceed the limits of municipal, state and many times national frontiers, getting far places from the polluter source, according we can verify in the International Conventions that refers to the over-frontier concern, what makes unoperated, the attempt of decreasing them without the participation of all, adding here, in the local place, the civilian society.

The Marine Water Pollution under the National Legislation:

The Resolution number 20, from 06/18/1.986, from CONAMA (National Environment Council), establishes the supportable levels with the presence of potential elements, prejudicials in the water. This resolution adopts the definition of salt marsh water, as it has been the water with equal saltishness or superior to 30 %. It classifies the salt marsh water, that ones destined to:

a) to the recreation of primary contact;
   b) to the protection of aquatic comunities;
   c) to the natural creation and/or intensive (aquatic-culture) of species destined to the feed.

The Resolution CONAMA number 274 from 11/29/2000, of the CONAMA classifies the water like sweets, briny and salt marsh, clearing the definition of each specie, the prejudicial substances, the maximum texts. The article 1º destaches itself as the following definitions:

Art. 1º- To the effects of this Resolutions, they adopt the folowing definition:
   a) sweet waters: water with sanility equal or inferior to 0,50º/00;
   b) briny waters: water with sanility understood between 0,50º/00 and 30º/00;
   c) salt marsh waters: water with sanility equal or superior to 30º/00. (…).
It deserves mention the article 3º from the at once reported Resolution CONAMA, number 274 from 11/29/2000, that destaches the necessity of interdiction of the environment beach when it presents a water with bad quality. And its only paragraph destaches that it’ll occur interdiction in the followin cases:

The beaches and health-resort the distance, will be interdicted, if the environment control organ, in any situation of their instances (municipals, states or federals), to consist of bad quality of the recreation water of primary contact justify the degree.

§1º The distance where occur accidents in middle and big charge, are considered as passibles of interdiction of that kind: throwing oil and sewerage system flowing out, the occurrence of toxicity or formation of cream due to the seaweed and another organisms, and in the case of sweet water, the presence of transmitter mollusces with potential in esquistostomose and others disease of hidric veiculation (...).

MILARÈ (2000) in agreement with the cited article:

The National Legislation has been analysed in the Federal Law n° 6.938 from 08.31.1981, that orders on the National Politic of Environment, article 3º, incise III the wide and modern concept, of pollution:

(...) the degradation of environment quality is that results from activities that directly or indirectly:

a) damage the health, the security and the population welfere;
b) create adverse conditions to social and economic activities;
c) affect the biota unfavourably;
d) affect the esthetics or sanitaries contidions of the environment;
e) throw materials or energy in desagreement with the environmental standard established.

On the principle that the environment degradation is the “adverse alteration of the environment traits”, the rule has distinguished pollution, as been that due to the man action, or way, it has utilized the pollution definition as the product of human activity that comes or becomes concentrate in the environment, where it can cause diseases in the humans and/or other organisms and, contamination, that consider the pollutent effects, released a trace of destruction, obligating the suffers with cathastrofe of the oil throwing and its consequences, released a trace of destruction, obligating the State to get organized and deal with the necessity of regulation the marine water pollution. So, we have other Conventions as about importants like CONVEMAR and elaborated in the dimension of understanding, got shaped and the interets transport to an international sphera.

The questions about the contamination and pollution terms, always release to different discussion, because of such definitions sometimes are applied in a different form lime in the MARPOL from 73/78 and on the CONVEMAR 1992. This way, it has utilized the pollution definition as the product of human activity that comes or becomes concentrate in the environment, where it can cause diseases in the humans and/or other organisms and, contamination, that consider the pollutant just when it causes noxious effects, demonstratives, in the perspective that the disposable scientifics technics are really able to detect the changes introduced in the environment.

According we can verify in the Chapter XVII Agend 21, the ocean protection and all kinds of seas, closed or partly closed, of the coasters zones, protection, racional use and developing of its alive recourses is a Mundial Concern, representing the approaching a content of high prominence. The international right, as well as is inserted in the United Unions Conventions about the Sea Right, reaffirmed in the cited chapter of the Agend 21, establishes rights and obligation to the States, and over all, it determines the international base about the ones that must be supported the activities directed to the protection and marine environment developing.
MARINE POLLUTION IN THE INTERNATIONAL ACTION THAT ARE TAKING EFFECT

With base on this studies about the conventions and treaties of environment defense, it can be emphasized the ones that consists of pollution. This way, The International Convention to the Pollution Prevention of Oil for Ocean (London, 05.12.1954), taking effect in Brazil since 07.26.1958, that had the finality, to unify the ecologic conscience and bring the discussion to the Members-States, about the damages that the pollution can cause to the environment, establishing rules to unify the sea utilisation. There were reviews in 1962 and 1969, Conventions about the same topic, modernizing the rules due to the maritim transit growth and the consequent encrease of the pollution.

The Convention about the Intervention in High Sea, in Cases of Incident that can Cause pollution by hydrocarbons, was the Convention realized by the Organization of United Nation, in Brussels, on 11.29.1969, approved by the Legislative decree number 74/76, promulgated by the Decree Law number 79.437 from 03.29.1977. In summary, it deals with the creasit maritim transport of vessels getting petroleum, by petroleum, extend a “ natural mixture of hydro-carbons, from organic materials deposited with the sediments, that full the sedimentaries basins”, it was the reason that this convention, to stablish criterions to the contratants parts of the secury transport, since mineral from the ocean.

This Conventions, brings in their article 1° the embracing that such Conference terms mean. But there isn’t a clear concept about pollution, nevertheless, a damage by pollution that understands “ losts and damages, caused outside the vessels, oil transporter, by contamination that results from a spilling or discharge, (...)”. The Convention about Civil Responsibilities for Damages that cause the Sea Pollution by Oil (Bruxelas, 11.29.69), taking effect since 03.17/1977, deals with the necessity of unifying the rules about the pollution risks, created by international maritim transport, that transports barn oil. The Convention from 1954 and 1962, ratifies and foresees to adopt uniform rules and proceeding in an international plain to define the responsibility questions and guarantees, a equitative reparation about the possible damages caused to the environment, by embarkations that throw in the marine environment, pollution from nouxious substances because of the discharge or eluents, that have forbidden substances for this Convention. Having as the mainly objective, the environmental protection, and appreciating the significant contribution this Convention has made for the environment of the ocean and coasts against the pollution, the States-Members, ratify the present, at least, that the directive expressely changed to serve better to the enviromeny

The Convention about Marine Pollution Prevention by the jettison of Dejets and other Materials, this convention was concluded in London in 12/29/1972, but it was elaborated in Mexico, Moscow and Washington. Approved by legislative decrecde number 10 from 03/31/1982, promulgated by decree number 87566 from 09/16/1982, published in the Union Diary on 09/14.1982. On this convention the Members-states, have as an aim, to avoid the deliberated pouring out, in the ocean, of residues and other substances, efected by embarkations, aerships, platforms, and other buildings, its directives are to unify the conduct and to promote the marine environment prevention, because of this reason, it considers residues and other substances, in any class, form or nature, according to legal text, to residues and substances that could cause the pollution. Hence the diploma doesn’t concept directly what would be a marine pollution.

At once, The Convention about Marine Prevention for Jettinson Residues and Other Materials, we can observe that the contamination in the Ocean, has its origin in many sources, such as spilling and discharges throw the atmosphere, rivers, estuaries, sewerage systems, and pipelines, and it’s important that the States uses the better way, possible to obstruct the cited contamination and that they elaborate products and proceeding that could reduce the number of nouxious residues, that have to be threw. In the understanding of this Convention, pollution by jettinson, is every deliberated pouring out, in the ocean of residues and other substances made by embarkations, aership, platforms or others building on the sea, every deliberated sinking, in the sea, by embarkations, aership, platforms or other building on the ocean.

The International Convention to the Pollution Preservation, caused by vessel, also known as MARPOL. (London, 11.02.73). Convention assigned in London by Brazil and others ONU members, on 11.02.1973, but approved under restriction by Legislative Decree number 04, from 11.09.1987, the Members-States've seemed, to preserve, in general, the environment that the men live, and in particular, the marine environment, recognizing, that oil and other nouxious substances pouring out, constiuates a serious source of pollution. They ratify the importance of the Intervention on the Convention to Pollution Preservation, of the sea by oil from 1954, as well as, the first multilateral instrument to be concluded, and having as the mainly objective to protect the environment, and appreciating the environment preservation of the oceans and coasts against the pollution, as been the MARPOL, the Convention that approximate more of the concept about the vessels as the source of marine pollution.

On 02.17.1978, it was adopted a protocol that changed the MARPOL from 1973, specially in its annex 1, aiming to improve it, it has been known as MARPOL 73/78, where it has looked for ratification the wish of getting the complete eliminacion of intentional pollution, in the marine environment by oil and others nouxious substances and the reducing of accidental pouring out from such substances, not limited just to the pollution by oil, but on Universal appreciation.

About the MARPOL 73/78, is important to add, that it doesn’t deal just with the pollution caused by oil, but includes other substances, ( according this other ones, the Convention of London completes it), but deals with the pollution from garbage jettinson, toxic emanation, by the vessels chimney, the pollution caused by the operation of the ballast and disballast from the tanks on the board of a ship.

MARPOL assumes that the oil pouring out and other nouxious substances, deliberately caused, for negligence or accidental, constitute a serious source of pollution. It considers that the pollution is caused by nouxious substances, that mean any substance that, when poured out in the ocean, is able to create risks to the human health, the coasts and the life, to damage the marine recreative activities or to interfere with other original ocean utilization and include every substance, that can be controled by the Convention.

The International Convention about the Preparation, Answer and Cooperation in Cases of Pollution by Oil, assigned in London (OMI) on 11.30.1990 in Brazil promulgated by decree number 2.870 from 12/10/1.988, it’s also known as the monogram OPCR/90.

This Convention isn’t aplicated to the war vessels, naval succour or to the vessels operated by a government, that aren’t commercials, it’s important to detalch that this Convention understanding about an “Incident with Pollution by Oil”, as the occurrence, having the same origin, that results or can result from an oil discharge and that represents or can represent a threat to the marine environment, or to the coast zone or interests related to one or more States, and request emergencial action or immediate answer, (DOU, 1998b).This Convention was open until March, 14 ,2001, to assignature by the protocol OPRV-HNS 2000.
Recourses and Protection to Marine Waters

Since Federative Republic Constitution of Brazil, from 1988, as we can observe, it was verified a significant change in the legislative posture, trying to adjust the international treaties and referents to the environment to the interests and necessities of our environmental assets. The article 21, XIX, from de Constitution, fixed the Union competence to institute the National System of management of hidric recourses, whereas the competence to legislative about waters, was also attributed to the Union (art.22, IV). The law nº 9.433, from 01.08.1997, executed the determination enclosed in the constitution dispositive and established new basis to management of hidric recourses, but, there are lacunas, when that refers to marine waters.

The Federal law number 9.433, from 01/08/1997, Waters Law, brought new and importants contributions to the utilisation of this recourses, adequating the legislation to the concepts of supported development. It Instituted the Nation Politic of Hidric Recourses, created the National Management System of Hidric Recourses, and classified the waters, as a set from public domain, a natural recource and presented with economic value (art.1º, I and II). It was still cited, the rules about a new form of management, decentralized from the hidric recourses, creating committees, to each hidrografic basins (art.33), as well as, incorporates in the developing politic the management of hidric recourses with the participants from Public Power, the usaries and communities (art.1º, VI).

It also institutes, the consent of rights of the utilization of hidric recourses and qualitatives of the water utilizations and effective exercise of the rights with access to water (art.11). Other innovation is the creation of collection by the water utilization (art.1º), casting the following objectives: to recognize the water as an economic asset, to incentive the rationalisation and get financial recourses, which will bea priority appliance in the hidrografic basins, where they were created (art. 22), cooperating directly to the environment improvement in the region.

They also instruct the committees of Hidrografic Basins (art. 37 and 38), as well as, creates the waters agencies, that have the function of executives secretaries of the hidrografic basins committee (art. 41).

It is still interesting, in this law, that is included the non-governmental organization, (called ONGS), with the intention of defense of diffuse and coletives interests from the society as civils organization of hidric recourses (art.47).

Independently of responsibility for damages, is still instituted the law nº 9.433/97 advance administrative fines and embargos with penalties for infraction of the utilization rules of the hidric recourses, casting in the art.49. Hence, this law brings many modern inovations, detaches, no doubts, the water as an economic asset, that superpose itself. It’s evident that, like the water is part of something bigger, the environment , it’s not possible to be adequated management of the recourses without contemplate every aspects of the environment (forest, cost zone, and so on).

Thus, in the municipals coasts, we also have to notice the National Management Coastal Plain from the influence that the hidric recourses exert on the coast zone quality, as among other one, the transport of sediments, pollutants, circulations regime and so on. In conclusion, FREITAS (2000) that,

The art. 3º VI, from waters law, contemplates the compatibilisation of the management costs programs and the hidrografic basins management, whereas, both will can eventually be implanted inside the geografics spaces that superpose itself. It’s evident that, like the water is part of something bigger, the environment , it’s not possible to be adequated management of the recourses without contemplate every aspects of the environment (forest, cost zone, and so on).

The reference to the hidrografic basins, seems dismiss for ever the ocean waters management. We can observe the mentioned law is fundamentally a legislation that elect the hidrografic basins, as a primordial unity of hidric recourses management. It deals with a legal diploma that intended to enhance a lot, the paper of the hidrografic basins in the hidrographic management. We could say that the legislation in reference is a “hidrografic basins legislation.

CONCLUSIONS

We can observe an international concern about the topics from the sea, so as technologics advances stratthen the relations more and more, that was impossible before, today, with a click on the mouse, we can connect our computer around the world, and it permits that the informations could be more appreciated for many people. This way, the International Organ, advance on their treats, benefiting the marine environment much more, contributing for the peace consolidation too, and the friendly relationships among the nations, according to the conformity with the juridical principles and the rights too, consecutantively, promoting the economical and social progress to all people around the world, this directives are the base of the international treats and conventions.
The environment pollution, is a question, as important as the pollution of our rivers, lakes, once that, the seas are the source of life, work and feed to all humans and in general, especially to people that needs it to work.

In analyses to the legal national dispositives, we can observe firstly a lacuna in the dial with marine waters, when we can observe that there always were a generalization in the treats of water, besides the water code far off the decade 30, the marine waters were refenced on the the Federal Legistation just as an edition from the law 6938/81, the other legal instrument, besides the law number 6938/81, is the law number 7.661/88, that instituted the National Plain to Coastal Management.

The National Politic to Hidric Recourses, doesn’t mention any directives to the marine waters questions, it was however concluded, that the marine waters aren’t sufficiently aboarded in the National Politic to Hidric Recourses Management. The National legislator could have amplified the aplication of the law number 9433/97, supplying in this legal diploma the guardianship instruments to marine waters.

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