

Marine Protected Areas: Legality and Traditional Populations

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ABSTRACT

The global trend for the conservation of marine biodiversity consists in the establishment of Marine protected areas. In Brazil, the Federal Constitution in its art. 225, § 1, III, imposed the responsibility of creating protected areas by the public authorities, with the purpose of protecting biodiversity. Law No. 9.985/00, regulating the matter, created a National System of Conservation Units (SNUC), not establishing differences between the Conservation Units with regard to the protected ecosystem, but as to the purpose that is intended to be achieved, and it can categorize it in conservation unit that can be of full protection or of sustainable use. In the marine ecosystem, the Conservation Units of Sustainable Use, mainly the Marine Extractive Reserves (Marines RESEX) are outnumbered and growing, because, in theory, they can combine the marine ecosystem protection and the maintenance of the activities of the traditional communities. Extractive reserves, initially created for the purpose of enabling the extraction activity by rubber tree tappers in the Amazon, they came to be used analogically for the coastal and marine ecosystem by promoting the exploitation by traditional fishermen of marine resources. The big question that this article seeks to address, using the bibliographical and documentary research, consists in the analysis of the compatibility of the establishment of the Marine Extractive Reserve with the Federal Constitution of Brazil, in the light of the rights of the traditional populations.

Keywords: Marine extractive reserves; Legality; Territorial sea; Traditional population.

1. Introduction

The Conservation Units (UCs), as a rule, prevent or establish limits on access of resources in State-owned or private areas. This means that whoever has the control of the area, as long as obeying the law on this subject, can impose restrictions on its use and on resources inherent to it.

For the Marines UCs this logic cannot be applied with the same force, because the sea is of very common use by people, and therefore the granting of their use and of the resources available, should observe the principle of equality constitutionally established.

This work aims to discuss the application of legal standards established for the UCs of Sustainable Use, in particular the RESEX, in marine environments, especially considering the traditional rights of the population.

1.1. *Marine Conservation Unit (UCM)*

In Brazil, the Federal Constitution (CF) of 1988, art. 225, § 1, III, enforces to the Government the duty to establish protected areas with the purpose of protecting biodiversity, be it terrestrial or marine.

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In 2000, law No. 9,985 created a national system of Conservation Units (SNUC) (BENSASUN, 2006), not bothering to establish differences between the Protected Areas as to the covered ecosystem, but as to the purpose that one wants to achieve, and being able to categorize it into full protection area (SILVA, 2010), or sustainable use, allowing the presence of traditional communities (SCHENINI; COSTA; CESARIN, 2004).

Despite the omission of the national legislation regarding the conceptualization of UCM, such absence does not preclude their application. The International Union for Conservation of Nature (IUCN) states that Marine Protected areas are those which encompass the marine aquatic areas, not reaching the coastal territory, usually where the communities live. But it admits, however, that the Member States make the necessary adaptations (IUCN, 2008).

Making the relevant adjustments, the SNUC has been applied to Marine Conservation Units, these being considered the most viable world strategy for defending the marine ecosystem (MASCIA; CLAUS, 2007), and there are already 59 (fifty-nine) catalogued federal areas (MMA, 2012), not including the state and municipal marine conservation units.

Please note that the Marine Conservation Units Sustainable Use, particularly the Extractive Reserve (Marine RESEX), are in greater numbers and growing, once it becomes possible with their institution, at least in theory, to combine nature conservation with sustainable use of their resources by traditional communities (Smith, 2010). Besides, being economical for the State it is highly feasible to create Marine RESEX, especially when the protected area is, for the most part, the part of the sea in the public domain, because, in these cases, it will not be necessary to expropriate and to indemnify, being that a large part of the mobilization for the imposition of this UCM is up to the Association of traditional population (MOURA, 2011).

2. Material and Methodologies

The Marine RESEX has been growing as the main strategy for biodiversity conservation, aligned to maintenance of sustainable extraction by the traditional peoples. However, this article seeks to examine whether the institution of Conservation Units in the marine environment is protected by our legislation.

To accomplish this task, initially the documentary base was sought; primarily the exegesis of the Federal Constitution, for it is at the top of the normative hierarchy, being also necessary the interpretation of the ordinary law, Law 9.985/00.

The bibliographic research was needed in the analysis of legal articles and books, especially to meet the definitions of public welfare, territorial sea and traditional populations.

3. Marine Extractive Reserve

The SNUC classifies the Extractive Reserve as a category of Conservation Units of Sustainable Use, conceptualized in art. 18 as "area used by traditional extractive population, whose livelihood is based on extracting" it cannot neglect the need to use natural resources sustainably.

This category of Brazilian protected area, was the result of the struggles of rubber tappers in the Amazon, in order to facilitate the extraction of natural resources in a sustainable manner, combining conservation with the livelihoods of traditional populations (ALLEGRETTI, 2002) and analogically applied to marine and coastal ecosystem by promoting the exploitation of marine resources by traditional fishermen.

The first Marine RESEX was established in 1992, being called Pirajabaé (LOBÃO, 2010). On the twentieth anniversary of the creation of the first Marine RESEX, over 18 (eighteen) (MMA, 2012) were created at the federal level, demonstrating a viable theoretical solution to solve the problem of dwindling fish stocks and the survival of traditional populations (PRATES et. Al., 2007).

However, it is needed to analyze the legality of the establishment of the RESEX on the marine environment, since the territorial sea is a possession under federal management, but of common usage of the people.

3.1. The Territorial sea – Possession of the common usage of the people

Article 20, sections VI and VII, of the CF, it provides that, the territorial sea, the marine land and their accessories are possessions of the Federal Union. The Civil Code of 2002, art. 99, when discussing on the public possessions, subdivided into 03 (three) categories: possessions of common use of the people, special possessions and church possessions. When it comes to the possession of common use of the people, it specifically cites the rivers, seas, roads, streets and squares (Smith, 2010). This way, it is uncontested that the territorial sea as well as the marine land, are public possession, under federal management, and of common usage of the people.

MEIRELLES (2011), talking about the theme, reveals that "people in the common the users are anonymous, random, and the possessions are used by all members of the community – *uti universi* – that is the reason why no one has the right to the exclusive use or privileges in the use of the possession".

Thus, the territorial sea, being considered legally as possession in the common use of the people, may experience restrictions as to its use, when it is found that the overuse of the resources damages the environment, being advisable the restriction, but being allowed the access to all interested parties that enjoy the same prerogative, not admitting that fishermen are repelled, for not being considered to be traditional.

3.2. The affected populations

The RESEX was created with the main purpose of housing "traditional extractive populations and gathering people, whose livelihood is based on extraction", as does the SNUC in his art. 18, as previously commented.

The SNUC tried to establish what would be understood as traditional populations, but the President vetoed it, since it would cause greater argument (BESUSAN, 2006).

MACHADO (2010), after interpreting several law articles in the SNUC, it considers that the traditional population as being the one that was in the area "before the creation of the conservation unit, whose livelihood is based on sustainable systems of exploitation of natural resources, developed over generations and adapted to local ecological conditions".

With the imposition of this category of UCM, Marine RESEX, only the people who make this use reiterated (from one generation to another), and sustainable, usually composed of fishermen, with the purpose of extracting marine natural resources, excluding fishermen who make use of the same tools, but which are not considered as traditional fishermen.

LOBÃO (2010) cites conflicts between tourism operators and traditional populations in Arraial do Cabo, stating that, with the installation of the Marine RESEX of Arraial do Cabo, tourism companies were banned from operating or required to pay a fee, since the maritime area is now managed by the Deliberative Council of Conservation Unit.

Similarly, if other fishermen who do not fit the criteria established by the Deliberative Council, even if they make a fishing which preserves biodiversity, they cannot

use the area reserved for the RESEX. (MASCIA; CLAUS, 2008).

It is noted that "the structure of the decision-making processes has a major impact on the way the rights are relocated and for whom" (OSTROM, 1990, apud MASCIA; CLAUS, 2008).

By these access criteria, and exclusion, it is concluded that there is only the analysis of the conditions of traditional populations, without prejudice to the rights of other spheres of society that must be observed.

It is to be clear that there is no law in favor of free access to marine resources and by the indiscriminate fishing. Limitations and restrictions, even when the possession is of common use of the people are justified to the very existence of the appeal, however, restrictions or benefits cannot be only in privilege of a particular population.

Creating criteria to be able to fish in a particular area, seeking for a planned activity and thereby increasing the offerings of fishing resources (KALIKOSKI, 2007), is entirely praiseworthy, but allowing that only a specific population fishes in an area of common use of people is illegal.

It is unconstitutional by transgressing the art. 225, already described, as well as it is unconstitutional by creating a criterion of inequality where CF/88 does not create, once Art. 5, *caput* proclaims that "all are equal before the law, without distinction of any kind".

In creating a Marine Conservation Unit of Integral Protection, internationally known as marine reserve (KALIKOSKI, 2007), which does not enable the direct use with extractive purpose, there has been no speaking of illegality, since the restriction on the use of a possession in common use of the people, in this case, is for everyone.

MACHADO (2010) treating on environmental equity provides that this "it must guide the fruition or use of water, air and soil. The equity will give equal opportunities on the same or similar cases".

However, what has not been observed is that when a Marine RESEX, is established restricting access to the sea, which is a possession of common use of people, several other sections of the community, which do not characterize themselves, according to the board of managers, as traditional population, will have their access restricted.

4. Conclusion

The establishment of Marine RESEX is one of the most viable strategies for the protection of the marine ecosystem, but the relevant legislation to the matter cannot be overrated. According to the legislation that currently exists, only those populations considered traditional by the Deliberative Council of Conservation Unit, can occupy and exploit the territory demarcated for the use of those communities.

This way, in order not to transgress the principle of environmental equity, it is required the issuing of a legal norm which establishes, initially, who should be considered the traditional community, the use and occupation which will be able to exercise in the marine space, as well as the extent of restrictions to non-traditional ones, especially when dealing with Marine Conservation Units.

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