

THE ARBITRAL TRIBUNAL AS AN ALTERNATIVE LEGAL INSTRUMENT FOR SOLVING WATER CONFLICTS IN BRAZIL¹

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1. Introduction

For Brazil and many other countries water scarcity is a reality that is usually felt with more intensity in arid and semi-arid areas. We can point to the world's accelerated pace of environmental degradation as one of the main factors behind water scarcity. This environmental degradation eventually turns once prosperous regions into areas that are considerably less productive, thereby increasing the water availability issue in quantitative terms (TUNDISI, 2008). Costa *et al.* (2010) emphasize that water scarcity is a limiting factor for development, which could possibly be a motive for future global conflicts.

Water scarcity does not simply imply a decrease in the amount of available water around the world; it is also related to the major problem a reduction in the supply of good quality water, which is essential to maintain life (AITH; ROTHBARTH, 2015). Therefore, based on the aforementioned, it is possible to affirm that there is a direct connection between the quantity and quality of water. When water supplies decrease, water quality can also be degraded by several factors, such as increasing concentrations of soluble salts, toxic substances and microbiological contaminants, among others (JORDÃO; MORAES, 2002).

According to Tundisi (2008), problems regarding water scarcity are severely affected by climatic oscillation, which intensifies the vulnerability of many populations around the world. For many countries, this situation is also a result of bad management and a lack of adequate water supply planning, as well as being a direct outcome of world population growth (COSTA *et al.*, 2010). In turn, the situation of global water scarcity tends to become worse as the population continues to grow at an accelerated rate, and

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consequently, the future will see even more people demanding the same scarce amount of water (REBOUÇAS, 2003). Despite Brazil being one of the world's most water-rich nations, it faces problems regarding water availability in some regions (BORBA; BAYER, 2015). The Northeastern Region's constant water crises, and at the same time, the Northern Region has huge water reserves (COSTA *et al.*, 2010; AITH; ROTHBARTH, 2015). In addition, Netto (2002, p. 29) states that Brazil has a false sense of abundance, because "in truth we have a false wealth" when it comes to water availability.

Brazil has a tremendous legal and procedural collection regarding water management and legal ways of resolving water conflicts. Aith and Rothbarth (2015) and Valadão (2013) specified that due to water being recognized as one of our most important natural resource, which is central to the maintenance of human life, the world began to develop and provide national and international standards to step up efforts to better manage and plan for meeting basic water needs. In Brazil, one of the greatest achievements is the *Política Nacional de Recursos Hídricos* (National Water Resources Policy) (Law 9,433/97), which explicitly states the priorities for water use, as well as considers water as a public good of limited natural resource that is endowed with economic value (BORBA; BAYER, 2015). Nevertheless, in the context of water conflicts, the Judicial Power faces several challenges to achieve effective resolutions. This current situation may be derived from the exacerbated amount of processes that make the decision-making process even slower. Alternatively, this problem could be due to the poor specialization of the judges, higher economic labor costs, or because of the high number of legal procedures.

Therefore, this study aims to demonstrate that it is possible to adopt other conflict resolution methods when facing water crises, which can be used in addition to the current ones. Thus, by using the Brazilian state as a case study to achieve this goal, we will conduct a study of the National Water Resources Policy, based on the part concerning the competence of the Basin Committees in arbitrating conflicts related to water resources, through the use of so-called alternative tools. Due to the great importance that Law 9,433/97 assigned to these Committees, they have the ability to administratively arbitrate conflicts that exist within their scope of practice. This paper will cover the meaning of this assignment, justifying an extension of the current comprehension, in a way to delegate more power to the possible and future decisions made by the Basin Committees.

Legal and extra-legal arguments shall be presented, and the legislative measures that need to be changed in order to give legitimacy to the new method(s) of proposed dispute settlement(s) will be identified, both with the scope of contributing to the improvement of water resources in Brazil.

2. The necessity to establish legal instruments for solving water conflicts

2.1 Where lies the problem of the effectiveness of Brazilian environmental standards for water resources?

We can start from the following questions: is the quality of surface and groundwater in Brazil increasingly becoming worse because the penalties provided for in

laws are too lenient, or is it due to the major crisis that the Brazilian Judicial Power is facing?

There is no doubt that Brazilian environmental legislation is one of the most advanced in the world in terms of environmental protection, and the sanctions it provides are almost always compatible with the infringement (SILVA, 2000). As soon as the view of the environment changes, new environmental laws are passed to solve these new challenges in a more appropriate way. This can be seen, mainly due the advent of Law 9,605 (1998), which is known as the Environmental Crimes Law. One of the most important innovations that the Environmental Crimes Law includes is to criminally punish legal entities (FREITAS, 2002), combined with Decree 6.514/08, which regulates environmental management responsibility by imposing a range of sanctions in this area.

Regarding the legal framework surrounding water resources, in addition to these aforementioned standards, Valadão (2013) states that the development of these laws followed social wishes, and along with the higher demand for the use of this resource, the legal frameworks for water resources were born in Brazil. It is worth highlighting that the 1997 Brazilian National Water Policy enhanced the 1934 *Código de Águas* (Water Code). The National Environmental Policy (Law 6,938/81) and others ordinary laws that provide instruments to the National Water Resources Policy (NWRP) should also be mentioned. The environmental constitutional provision to the environment is located in Article 225 of the 1998 Brazilian Constitution, which has reached a “status” of peremptory norm. The Brazilian constitution also characterizes water as a legally safeguarded public good.

The NWRP strengthens the statement that water is a public good and acknowledges water as a limited resource (AITH; ROTHBARTH, 2015). The entire Brazilian Water Policy was designed to optimize the management of this valuable and scarce natural resource. The institutional structure of NWRP was created with this goal in mind, assigning competences in order to work together with civil society to achieve a decentralized and efficient management system for rationally using this resource. During water scarcity, the NWRP states that human consumption and watering livestock is the priority for its use.

The Brazilian Water Policy can be pointed out as an innovative legal framework for our society. Thus, as it is not possible to ascribe the “responsibility” to material legal standards, the procedural legal norms remaining, through existing lawsuits today. If the standard is not lenient then the concern may be in its own application by the courts.

If the problem is related to how the law is applied to the concrete case, and that is the task of the courts, it is necessary to take a more judicial approach with the scope of solving environmental conflicts. The Popular Environmental Action is not widely used by Brazilian citizens. Despite including the exemption of court costs in its legal text (Law 4.717/65) and in the 1988 Federal Constitution (Article 5, paragraph LXXIII), except in cases of bad faith (AYALA; LEITE, 2014), there still remains the burden of paying the legal fees of its patron for the plaintiff. Another problem faced in the course of a Popular Action is the slow and complicated machine of the Judicial Power, which makes a judicial demand such as this take a very long time at the various instances of Justice. Probably for these reasons, the Popular Action is not exercised to a great extent (AKAOUI, 2015).

The Environmental Public Civil Action has proved to be the most extensively used legal means to resolve environmental problems, which are most likely through the actions of the Environmental Public Prosecutor's Office, or even by environmental associations, among many other legal entities that may also attempt this.

Despite being a useful judicial instrument with a noble purpose, we can note that this action is "contaminated" by the problematic crisis that the Judicial Power faces nowadays. Since it is a judicial process and while taking into account its complexity, the Environmental Public Civil Action is required to take significant time during its stages, until reaching the sentence, as the subject may be appealed to the Court, which is a constitutional right. This time-consuming nature could represent harm to the environment while the final results in the cognition process are reached; and only after years of discussion, will there be an enforceable judgment that can be executed. The effective repair of the environmental damage will still await the judicial sentence being executed, within the judicial title execution process, before the Judicial Power, despite the protective measure possibly having been requested early in the cognition process, without having any guarantee regarding its acceptance by the judge (FREITAS, 2002)

The crisis that the Brazilian Judicial Power is facing is undeniable, particularly in relation to the large volume of cases, which blocks any possibility of quickly solving these conflicts (YARSHELL, 2004). There is also, regarding the environmental demands, the issue of the poor specialization on the part of the judges; the burden of traditional litigation; the problem of numerous judicial procedures that may engender possible judicial remedies, which causes the court proceedings to go on for years, sometimes decades, without a definitive solution.

2.2 Where lies the solution of the problem?

The solution can be found in the NWRP. Included in this national policy is a forecast concerning the competence to the Basin Committees, within their area of expertise, to "*arbitrate in the first administrative instance, conflicts related to water resources*" (Article 38, section II). Nevertheless, by simply reading this device it is not possible to know whether the legislator wished to bring the traditionally arbitration applied to the contractual field for water conflicts, or if this form of administrative arbitration is only an attempt to reach a solution, without transforming itself into an enforceable judicial decision to the Watershed Committees.

We come to the main point of this study, namely to achieve an understanding of the competence of Basin Committees to "arbitrate" the existing conflicts in their field. Should this arbitration only exist for the administrative management of water resources? On the other hand, should there be an extension of this competence, making it legally possible to solve other conflicts within a Watershed Committee, notably involving issues of civil and administrative responsibilities?

Only when the time-consumption problem, the not always efficient operation of the Judicial Power to resolve water conflicts, and the solution presented by the PNRH, with the use of a method considered alternative for conflict resolution, namely arbitra-

tion, are identified, can the reasons that led us to choose this method be presented; after the justification of the proposal; the suggestions to change certain legal provisions as a way of immediate implementation will then be outlined, so that a solution is presented regarding this troubling picture of degrading water resources.

3. Water arbitration

As soon as any country faces a challenge related to the reduction of the water supply, which occurs following conflict regarding its equal distribution, Courts specialized in the resolution of such immediately appear, or even those to prevent such conflicts from beginning (FREITAS, 2002). The introduction of a new arbitration system in Brazil is a positive aspect, since it will provide “*greater agility to the Judicial Power by reducing the workload in complex issues that, as a general rule, demanded that litigants bear high costs in any economic or temporal order*” (FIQUEIRA JUNIOR, 1997, p.54). Therefore, this author considered arbitration as a “new democratic instrument of Justice, placed at the disposal of the courts”.

The proceedings before a magistrate judge tend to be time-consuming and costly. Arbitration is an alternative way for litigants who seek speed and economy (FRANGETTO, 2006). In addition to these reasons, which greatly contribute to the traditional choice of arbitration, there is also the absence of solemn standards at the trial; the possibility of judging by equity or freely choosing the legal standard to be applied by the arbitrators; the expected neutrality of the arbitrators. Finally, the great ability of arbitrators, because they are renowned experts. There is then the need to address the main advantages with more detail.

3.1. Water Arbitration – more quickly

When it comes to water resources, which are finite natural assets, the time-consuming nature of resolving conflict tends to be worse than the aggression itself, since the situation could be aggravated until the demand reaches, in some instances, the last stages of Justice, and a judgement being reached. It is undeniable that arbitration is able to overcome this obstacle, which is created by the State in the organization of their bureaucratic machine, thus achieving this more quickly.

Using water arbitration can include a choice of a faster procedure for settling the dispute, without the principle of the adversarial and equality procedure in the proceedings before the judges being deleted. During this procedural choice, the parties may reduce deadlines and even suppress some acts that are, depending on each case, unnecessary for that demand. Another favorable factor in a demand before arbitrators is that these individuals will have more time to consider the case, since they do not operate in several processes, or those of a different nature, at the same time.

The jurists are often faced with litigation that can last over thirty years, which can represent an average duration of 12 years per demand, while for arbitration, this period is closer to 14 months, meaning that any repair of damage and possibility of minimizing its effects remains in the hands of solutions through arbitration (LIMA, 2010).

3.2. Water Arbitration – less solemnity

Generally, arbitration hearings are less solemn than processes that occur before magistrate judges. A differentiating factor is the use of the principles of concentration and orality, especially the latter (ZEPEDA, 1987). Within the principle of orality, the parties may have a greater chance of defending themselves, being able to go personally to the arbitrators for clarification of any controversial points.

For example, this is true for the Water Tribunal of the plain of Valencia, which attributes its millennial effect in resolving disputes efficiently on water resources in the region of the River Turia to the principle of orality, which triggers several others, aiming to quickly achieve a solution to the case (FAIRÉN-GUILLÉN, 1988; OLIVEIRA, 2008). It is true that it is not possible to completely transpose a foreign model for Brazil simply for it being effective for this society. It is important that successful experiences are analyzed and adapted to the Brazilian judicial system, so that it is possible that greater protection is given to the existing water resources in Brazil.

During the creation of the procedure that will be used by the Arbitration Chamber, the Brazilian Basin Committees could review the favorable characteristics of the Valencia Tribunal, taking advantage of the less solemn procedures that are traditionally used in Tribunals. Regard this, we recommend that information technology and the principle of orality be adopted for most of the stages of the process by the Arbitration Chamber.

3.3. Water Arbitration – more freedom to include considerations of fairness and equity

This section looks at the possibility of the arbitrators being able to decide the cause by the free choice of the legal standard to be applied, in other words, within the available legal sources, or even to opt for equity. Thus, it opens a huge range of possibilities, with the greatest protection of water resources always being the most important. The best of any laws to be applied, with respect to the Brazilian legal system, must put the judges in a comfortable situation in the pursuit of justice (PUGLIESE; SALAMA, 2008).

Regarding fairness, as referred to by Ascensão (1997, p.191) as “*a formal decision criteria of individual cases, because it does not elevate or even need to elevate rule-making. Equity gives solutions for cases in view of the peculiar characteristics of such*”. It does not consider itself a source of law for missing the material criterion, appearing only as an additional alternative for dispute resolution. It can also be understood as a way to prevent the judge from committing injustice, as if it were a resource for the magistrate (VENOSA, 1999).

With the use of fairness by the arbitrators, for example, it is possible to get an individual analysis of the case, and when applying the law to the concrete case, the arbitrators may prevent injustices that are committed by the literal application of the law. They would have flexibility in the application of the standard, always having the protection of natural resources as a guide, but being compatible and appropriate with the occurrence.

It is worth mentioning that, because it is considered to diffuse rights, and also due to the right to an ecologically balanced environment (constitutionally recognized in Article

225), in case of normative conflicts, the most protective standard should be applied for this important and common right (FIGUEIRÓ; COLAU, 2014).

3.4. Water Arbitration - arbitrators neutrality

Based on the fact that judges are completely unrelated parties, and these same parties choose them, we arrive at the impartiality of the arbitrators at the time of the decision, with greater certainty of Justice in the decision (LEMES, 2001; LAGARDE, 2001).

Joined to this fact is the required confidentiality and presence in arbitration demands by virtue of choice and the specialization of the judge that provides greater advantages to the parties, which is unlike the traditional judicial system, governed by the principle of publicity. In this sense, Lima (2010) stated that confidentiality constitutes a powerful control factor present in the arbitration proceedings, which is in accordance with the nature of the conflict submitted.

When addressing “where” and “about what”, confidentiality fits into arbitration. Baptista (2012, p. 206) considered that this matter can present exceptions. The first exception happens when States are involved and “*confidentiality must be set aside to guarantee the transparency obligation or publicity of the acts committed by public administration, which is compulsory in most modern democratic regimes*”. The second happens when complying the sentence, one of the parties is obliged to resort to the judiciary power, where at least one part of the arbitration procedures will be taken to the judicial process. In this case, when the court reaches a decision regarding the confidentiality of the investigations, the arbitration information will be available to third parties.

Likewise, the relativity of advertising during the arbitration procedure does not harm democracy or citizens’ access to information set out during the procedure, since it is not subject to the restrictions imposed by the well-known “secret justice”, leaving concerned parties to agree on the absolute confidentiality. Thus, by not opposing the involved parties, access may be provided regarding the analyzed case.

3.5. Water Arbitration - greater specialization of arbiters

The specialization of the judges constitutes the final benefit of the water arbitration and perhaps the most important of them, which is because when choosing the arbitrators, the parties will make this choice based on who is more knowledgeable on that specific issue, with the aim of receiving a more appropriate and reasoned decision to the question under review.

It is known that within the environmental study an interdisciplinary effort involving all professionals into a cohesive work is needed in order to reach satisfactory results. Moreover, it is for this reason that, when arbitrators to resolve certain problems (such as watercourse pollution, or even deforestation of riparian vegetation), it takes more than mere experts offering their opinions. Expert judges are required who can interpret the reports presented, and thus be assured of information referring to the damage to the water resource, and therefore reach a fair decision.

Arbitrator training does not necessarily need to be legal. It can include lawyers from among the members of Water Arbitration Collegiate, but it must have experts from many other areas, as was the case in the innovative Water Tribunal of Florianópolis, whose judges were law professors, lawyers, environmental activists and chemical engineers (CAUBET, 1994). This measure gave this “Water Tribunal” another appearance, one that was more concerned with evaluating the damage to water resources, with very substantial decisions on technical detail, thereby creating greater value. Another example lies with the Syndics of the Valencia Water Tribunal, who are full community members of the landowners in the region under the jurisdiction of the Water Tribunal (FAIRÉN-GUILLÉN, 1988; OLIVEIRA, 2008).

In order to understand the complexity of the relationships in the affected environments and their specific variables, access is required to expert knowledge so that a proper and sufficient decision can be reached, which is the crucial point for the existence of specialized arbitrators in the protection of the environmental (LIMA, 2010).

This direct involvement of experts in conflict resolution, as occurred in both cases (Florianópolis and Valencia), means the active popular participation in the resolution of conflicts passes from an individual discussion to issue of a collective nature (SALES, 2007).

According to Bonavides (2003, p. 57), democracy “*is the process of participation of the governed in the formation of government will*” and therefore participatory democracy enables the participation and intervention of the governed in power, as is the case in point, for civil society members (experts referees) acting as judges in the Arbitration Court.

With the Arbitral Tribunal as another means of conflict resolution, it opens another choice for society beyond state jurisdiction. Members from society will become more than mere spectators and have a hand in their own solutions, while respecting the principle of popular participation.

4. Proposal justification

After presenting the reasons that led us to the choice of method, we move to the proposal justification, which is having water as a valuable asset for all; the environment is understood as being a fundamental human right; the right for all to have their disputes resolved, as a fundamental right. These are substantiated justifications, based on the Brazilian Federal Constitution, in devices that receive the “status” of mandatory standards, in other words, standards that prevail over all others, even constitutional ones.

4.1. Water as a “valuable” resource for all

The first justification for using an alternative method lies with the scarce supply of this natural resource. This might incur the mistake of thinking that because Brazil possesses a large proportion of the world’s fresh water, there would not be any need to manage water resources well, or even to impose sanctions on those who pollute it.

Water is an economic growth factor for a country, and can even be the pivot of conflicts (HELLER, 2015). The Law 9,433/97 definitely excludes the possibility of there

being private domains of water, as does Decree 24.643/34, in Article 1, section I, stating that water is a public domain (MACHADO, 2002).

Since all waters are in the public domain, individuals do not have the right to pollute, usurp, remove or deplete a water source, which is among other actions aimed at ensuring the free use of this natural resource. From the moment that the collective holds this good, it creates conduct standards for all in order to seek its rational use, which obviously implies the application of penalties in any case of violation.

This can possibly be considered a breakthrough publication of water resources in Brazil, but unfortunately it has failed to deter individuals from acts that violate natural resources. It has failed to fully protect these since there are still examples of the dumping of sewage, oil and other harmful substances; the issue of solid waste that pollutes the groundwater in the form of percolated liquids; the agrochemicals that naturally arrive to watercourses; among many other problems that increasingly decrease the availability of good quality water for people.

When the use of water arbitration becomes legally possible, this natural resource shall be more effectively protected, which will provide a greater availability of good quality water for all. From the moment that a complaint occurs before the arbitration, with respect to its process and procedures, through their arbitrators, the law shall be quickly applied to the concrete case, preserving even more all this valuable asset held by the Brazilian State.

4.2. Environment – a fundamental human right

In addition to water resources passing into the public domain and thereby becoming a public good of common use, the 1988 Federal Constitution considers the environment as a fundamental human right that is directly connected to the constitutional principle of the fundamental human right, namely, the right to life. In being part of the fundamental human rights, as a result mainly of international treaties ratified by the Brazilian State, it wins a “status” of “*jus cogens*”, which means standards that prevail over all others.

If the environmental standards that deal with water resources are immutable clauses, it is possible to consider the great relevance of environmental legislation, and during an eventual confrontation with “inferior” legal standards, these overlap the others (MARUM, 2002). When it comes to a possible confrontation, referring to the confrontation of important environmental laws, notably those involving water resources with all the others, such as the procedure or even with the arbitration law (Law 9,307/96, altered in parts by Law 13,129/2015), in which Article 1, imposes arbitration only “to settle disputes concerning available property rights”, stating that litigation involving environmental resources in succinct analysis are excluded from this method of resolving conflicts.

Whether or not arbitration can exist, in the case of unavailable rights, is closely related to the fact that there may be, during the course of arbitration, a transaction. Simply because they are unavailable rights, a transaction is not appropriate, but it needs some caution when it absolutely considers the water resources as unavailable rights (LIMA, 2010). The Brazilian Supreme Court, during the constitutional statement regarding Ar-

bitration Lawⁱ, considered that in certain cases a matter of public interest can be derived by the private interest in environmental matters.

To find out whether it is an unavailable right or not will depend greatly on what legal relationship was formed involving the water resources (OLIVEIRA *et al.*, 2015). For example, it might deal with a dispute between neighbors on the misuse of water, which has resulted in scarcity for one of them. On the other hand, it is essential that an unavailable right not be involved in any form of transaction, which is an issue of watercourse contamination. This can happen, for example, in the form of spilling toxic substances over tolerable levels, causing: death to fish and the restriction of using a particular watercourse; the removal of riparian vegetation, thus harming the water quality; and any action that diffuses rights.

The Water Tribunal of Valencia has, in its more than thousands years of existence, already faced problems such as these and reached some useful solutions. In the case of a violation of the universal rights of an ecologically balanced environment, it does not include any form of transaction, or rather, the only way to reach an “agreement” is that the defendant accepts the sanction provided by Law, in other words, applying the standard. In other issues involving people, where one individual seeks an indemnity by water deprivation, contamination of private wells, among others, a transaction is appropriate in order to arrive at a solution quickly (FAIRÉN-GUILLÉN, 1988; OLIVEIRA, 2008).

Bridging the case for Brazil, and since fundamental rights are sovereign over all other rights, and the arbitration law is an ordinary law and consequently inferior to constitutional laws, there is a possibility of using arbitration for water resources, which removes the limitation of Article 1 of the arbitration law.

From the moment when a legal basis is found for arbitration in case of water resources, any discussion regarding the licit or illicit demanded object may be rebutted. It is only required to be based on a hierarchy of legal standards, in which the constitutional standard overlaps the ordinary. Moreover, even there is a confrontation between the water laws and arbitration, the environmental should prevail, due to its characteristic as an imperative norm (CANOTILHO; LEITE, 2012).

When discussing environmental protection, which is essential to people’s lives, there is no way to hold on to concepts and pre-established limitations with the scope of preventing the use of efficient defense methods. During the arbitration process, an agreement cannot be reached where the environment is concerned. It is very important to separate the topics to be discussed, because not everything that involves the environment refers to unavailable rights (FRANGETTO, 2006). For example, a dispute between two farmers for the use of a watercourse: one using an excessive amount of natural resource to the detriment of his neighbor. The nature of this demand it is up to prior conciliation, and even before any decision made by the arbitrators, the parties can reach a consensus.

The same consensus cannot occur regarding other implications regarding water resources, such as the issue of surface water or groundwater contamination. Due to the fact that having good quality water for various uses is in the interests of all, a transaction, such as granting the polluter a pollution quota it is no longer appropriate that. In most cases, we are faced with unavailable rights when it affects an undetermined number of

people, then the only possibility of agreement is through the recognition of the violation by the defendant, and the application of the legal penalty provided by law to this person, whether by a legal or private person.

It is certain that some issues involving criminal liability cannot be brought to the Arbitration Court. These issues will continue to be resolved through the judicial system, in which there is the application of the Environmental Criminal Law along with their own legal procedures.

Even with the exclusion of the criminal responsibility by the Arbitration Court for water resources, it is still presented as an innovative and efficient method for solving issues that involve administrative and civil obligation. For example, it is possible to observe this in the case of discovering that someone is polluting a watercourse and that pollution will make it conceivable to implement administrative measures with the scope to recover, suspend the granting, among many others. Allied to these sanctions, the "Water Court" will be able to identify the people who were harmed and establish the compensation value owing to those people. The speed of this performance will define the arbitration tribunal's action to water resources, because a larger number of issues will be solved through simplified and timely procedures.

4.3. Fundamental human right: the access to justice.

It is a fundamental right that people have access to Justice (RIBEIRO, 2008), through a court established by law, with one obligation being that every person defend and preserve the environment for present and future generations.

While access to justice is a right held by everyone (AYALA; LEITE, 2014), such justice can also be reached through arbitration, simply by making minor changes to some legal provisions so people can avail themselves of another legal mechanism to protect water resources. With this, there will be greater community participation in conflict resolution, especially in a participatory way by some community members, belonging to a particular river basin, to actively assist in the solution of any conflict, even with a judge having been appointed.

With this new form of access to justice, enabled through arbitration, and with the active community participation, the new proposed model will provide reliability, similarly as what occurred with the Water Tribunal of Valencia (FAIRÉN-GUILLÉN, 1988; OLIVEIRA, 2008). Therefore, it will serve as a contribution to overcoming the distrust that the current justice model presents, which is mainly due to the distance of the Judicial Power.

Implementing the arbitration tribunals in Basins Committees would be in line with the precautionary principle. Since, even by not imagining the damage it can cause (the result of a traditional lawsuit such as the public civil action), it would represent a choice towards a much more efficient method and, above all, increase the speed in which conflicts are resolved, thereby avoiding potential damage to that water resource.

5. Final considerations

Arbitration, as it exists today, is currently laid out in a special law (9,307/97), and can only be used for eligible equity rights, and in principle cannot be used to resolve environmental conflicts. While it is expected that the Judicial Power can manifest and resolve all the cases submitted to it, not to mention the thousands that were not even submitted, there will be an even greater degradation of natural resources. This is not legal inflection, namely the exhaustive nature contained in the Arbitration Act, which should prevent the possibility of faster solutions, and possibly more settled ones. An expansion of the arbitration law, as well as its interpretation, should take place, there should also be an adaptation of all legislation on water resources, mainly the NMRP and related legislation. This must happen in order to resolve thousands of conflicts involving the misuse, large-scale pollution, alterations of water use, in short, all problems involving this natural resource, which is vital to man, in every way.

How to solve, in Brazil, this legal restriction in relation to the object (Article 1 of Law 9.307/96), originated from an infra-constitutional norm, which wants to overlap a fundamental right such as the constitutionally protected environment? This can no longer occur, and arbitration must be brought to the water resources. There is no more time for talking regarding the bureaucratic and protective Brazilian judicial machine when people's lives are at stake, which is seen to be the case currently. Simply saying that a method as effective and expeditious as arbitration cannot be used for unavailable rights (environment) is assuming the destruction of the Brazilian judicial system.

The objective of this study is not to detract from the State Power over its own jurisdiction by creating a parallel Justice, such as one Exception Court, which is prohibited by the Federal Constitution. The main purpose is to propose the use of another method of conflict resolution. The Judicial Power faces a huge crisis, but it has its positive points as well as the important role played by the environmental prosecutor's office in defending the diffuse rights, as usually occurs with the use of the Civil Survey procedure that often ends with the Conduct Adjustment Terms (TAC). Referring to TACs and Terms of Commitment (TC) concluded between environmental agencies, entrepreneurs and even the public prosecutor, as well as environmental transactions, Antunes (2003) points out the trend in environmental agencies and prosecutors to avoid legal solutions to environmental cases.

The concomitant use of these two methods is ideal, depending on the placement of the legitimized that defend water resources. It is very likely that if the proposal here presented is adopted, in future, arbitration will be adopted for the majority of cases, based on the efficiency that will be seen by the whole society and also based on international experiences.

In order to make it effectively possible to install of the Water Arbitration Tribunals in the Basin Committees, it is necessary to promote some legal provision changes (Article 1 of the Arbitration Law and Article 38 of the NMRP), despite the National Water Resources Policy having already empowered the committees to resolve existing conflicts within the watershed. However, as previously pointed out, Article 38 of Law 9,433/97

must be interpreted in a more extensive way, amplifying the administrative jurisdiction for the purpose of assigning the Committee a more jurisdictional power. In other words, so that their decisions regarding standards violations were more binding, acting like an enforcement, and being able to be executed wherever there is compliance with the determination given with the arbitration report. Another issue is the competence to resolve disputes involving civil responsibility that rests on the possibility that people can sue with the scope of seeking damage compensation. For this to happen, altering device 38 of the NMRP is required, especially the part that limits the activities of the committees to mere administrative bodies.

Given these changes, based mainly on environmental legal standards “jus cogens”, recognized as a fundamental right in all constitutional and infra-constitutional principles, as well as the fundamental right to justice access, there will be the possibility of disputes being solved within a Basin Committee, through arbitration judgments, and along with this, it is possible to achieve greater water resource protection as well as that for persons linked to it.

Note

i Understanding signed in judgment feature in Foreign Judgments approval process (STF SE 5.206-Espanha (AgRg), rel. Min. Sepúlveda Pertence, j. em 12.12.2001. Disponível em: <http://www.sbdp.org.br/arquivos/material/1066_1066_SE-AgR_5.pdf_PARTE_4.pdf>. Acesso em: 29 out. 2015).

References

- AITH, F.M.A.; ROTHBARTH, R. O estatuto jurídico das águas no Brasil. *Estudos Avançados*, São Paulo, v. 29, n. 84, p. 163-177, Ago. 2015.
- ANTUNES, P.B. Conciliação, arbitragem e meio ambiente. Conciliação, arbitragem e meio ambiente. *Jornal do Commercio*, 26 nov. 2003. Disponível em <http://www.egov.ufsc.br/portal/sites/default/files/anexos/26739-26741-1-PB.pdf>. Acesso em: 29 out. 2015.
- ASCENÇÃO, J.O. O direito – introdução e teoria geral. 10.ed. Almedina, Coimbra, 1997.
- AYALA, P.A.; LEITE, J.R.M. Dano ambiental: do individual ao coletivo extrapatrimonial. Teoria e prática. 6^ªed., São Paulo, Revista dos Tribunais, 2014.
- BAPTISTA, L.O. Confidencialidade na Arbitragem. In: LOUSA, N.F. et al. V Congresso do Centro de Arbitragem Comercial. 1.ed., Coimbra: Almedina, 2012, v.1, p. 197-208.
- BONAVIDES, P. Teoria constitucional da democracia participativa: por um direito constitucional de luta e resistência, por uma nova hermenêutica, por uma repolitização da legitimidade. 2.ed. São Paulo: Malheiros, 2003.
- BORBA, N.Z.; BAYER, D.A. A água como bem jurídico econômico. *TerCi - Temiminós Revista Científica*, v.05, n.01, jan./jun. 2015.

- CANOTILHO, J.J.G.; LEITE, J.R.M. Direito constitucional ambiental brasileiro. 5^oed. rev., São Paulo, Saraiva, 2012.
- CAUBET, C.G. O Tribunal da Água. Casos e Descasos. Florianópolis: Imprensa Universitária da UFSC, 1994
- COSTA, M.R.; BORBA, A.L.S.; OLIVEIRA, J. L.; PEREIRA, H. R. O.; FRANÇA, A. F A proteção das águas: recurso natural limitado. In: XVI Congresso Brasileiro de Águas Subterrâneas, 31 de agosto a 03 de setembro de 2010, São Luís – MA, Brasil.
- FAIRÉN-GUILLÉN, V. El Tribunal de las aguas valenciana y su proceso, 2.ed., Valencia: Ed. Caja de Ahorros de Valencia, 1988.
- FIGUEIRA JUNIOR, J.D. Manual da Arbitragem. São Paulo: Revista dos Tribunais, 1997.
- FREITAS, V.P. A constituição federal e a efetividade das normas ambientais. 2.ed., Revista dos Tribunais, São Paulo, 2002.
- FIGUEIRÓ, F.S.; COLAU, S.G. Competência legislativa ambiental e aplicação da norma mais restritiva como forma de resolução de conflitos: uma análise crítica. Veredas do Direito, Belo Horizonte, v.11, n.21, p.255-280, Janeiro/junho de 2014.
- FRANGETTO, F.W. Arbitragem ambiental: solução de conflitos (r)estrita ao âmbito (inter)nacional? São Paulo, Milenium, 2006.
- HELLER, L. A crise no abastecimento de água: como se mostraria diferente se observada através da lente do direito humano à água? Cad. Saúde Pública, Rio de Janeiro, 31(3):447-449, mar, 2015.
- JORDÃO, B.Q.; MORAES, D.S.L. Degradação de recursos hídricos e seus efeitos sobre a saúde humana. Revista Saúde Pública, vol.36, n.3. São Paulo, Jun. 2002.
- LAGARDE, X. Droit processuel et modes alternatifs de règlement des litiges. Revue de l'Arbitrage, n.3, jul./set. 2001, p.423-449.
- LEMES, S.M.F. Árbitro - princípios da independência e da imparcialidade. LTr, São Paulo, 2001.
- LIMA, Bernardo. A arbitrabilidade do dano ambiental. Atlas, São Paulo, 2010.
- MACHADO, J.A.L. Recursos Hídricos - direito brasileiro e internacional. 1.ed. São Paulo: Malheiros Editores, 2002.
- MARUM, J.A.O. Meio ambiente e direitos humanos. Revista de Direito Ambiental, São Paulo, n.28, out./dez. 2002, p.117-138.
- NETTO, O.C. A abundância de água no Brasil é uma ilusão. Folha do Meio Ambiente Cultura Viva, Brasília, v. 12, n. 124, p. 9-10, mar. 2002.
- OLIVEIRA, C.M. Tribunais de recursos hídricos: abordagem sobre o tribunal da água de Florianópolis o tribunal da água de Valência e a possibilidade de implantação no Brasil. Revista de Direito Internacional, Econômico e Tributário, v. 03, 2008, p. 107-142.
- OLIVEIRA, C.M.; ZANQUIM JR, J.W.; GRANADO, K. A arbitragem como alternativa para a solução de conflitos ambientais no Brasil. Revista VITAS – Visões Transdisciplinares sobre Ambiente e Sociedade, Ano V, Nº 11, setembro de 2015.

- OLIVEIRA, G.C.S. Perfil socioeconômico e potencialidades para a captação de água da chuva na microrregião do Alto Capibaibe, PE. Disponível em: <https://www.ufpe.br/posgeografia/images/dissertao%20gergia%20cristina.pdf>. Acesso em 04 nov. 2015.
- PUGLIESE, A.C.F.; SALAMA, B.M. A economia da arbitragem: escolha racional e geração de valor. *Revista de Direito GV*, vol.4, nº1, São Paulo, Jan./Jun., 2008.
- REBOUÇAS, A.C. Proteção dos recursos hídricos. *Revista de Direito Ambiental*, São Paulo, n.32, out./dez 2003, p. 34-67.
- RIBEIRO, L. A emenda constitucional 45 e a questão do acesso à justiça. *Revista de Direito GV*, vol.4, n.2. São Paulo, 2008.
- SALES, L.M.M. *Mediação de conflitos, família, escola e comunidade*. Florianópolis: Conceito Editorial, 2007.
- SILVA, J.A. *Direito ambiental constitucional*. 3.ed. Malheiros, São Paulo, 2000.
- TUNDISI, J.G. Recursos hídricos no futuro: problemas e soluções. *Estudos Avançados*, 22 (63), 2008.
- VALADÃO, M.A.O. A (In)compatibilidade da privatização dos recursos hídricos com o direito fundamental humano de acesso à água. *Revista de Direito Brasileira - RDB*, v. 4, n. 3, jan./abr 2013, p. 261-283.
- VENOSA, S.S. *Direito civil: teoria geral - introdução ao direito romano*. 5.ed. Atlas, São Paulo, 1999.
- YARSHELL, FL. A reforma do Judiciário e a promessa de “duração razoável do processo”. *Revista do Advogado*, São Paulo, ano XXIV, n.75, abril 2004, p.28-33.
- ZEPEDA, J.A. Contribución al desarrollo de las bases para la reforma de la legislación procesal civil de los países latinoamericanos. *Revista de Processo*, São Paulo, v.46, 1987, p.106-151.

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THE ARBITRAL TRIBUNAL AS AN ALTERNATIVE LEGAL INSTRUMENT FOR SOLVING WATER CONFLICTS IN BRAZIL

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Abstract: Historically water has been and remains a key factor for our development. The State, through its Judicial Power, assuming the environment custody, has released several legal measures for its protection and repair. However, due to the overflowed system, the absence of public policies and the time consuming nature of the judicial process, such actions are ineffective or insufficient in the face of daily needs. It is imperative that the Judiciary adopt alternative work methods, aiming its relief and greater effectiveness in terms of emergency, preventive and reparatory guardianship. We encounter in National Water Resources Policy in Article 38, II, an agreement for Basins Committees to use arbitration in administrative channels on water conflicts. Thus, the creation of a Water Arbitration Tribunal, with extrajudicial action parallel with indicated judicial measures, would effectively contribute to the prevention/minimization of environmental damage and the consequent indiscriminate viable access to the natural resource.

Keywords: Right to water. Equality. Conflict Resolution

Resumo: A água ao longo da história constituiu-se e se mantém num fator essencial ao seu desenvolvimento. O Estado por meio do Poder Judiciário assumindo a tutela do meio ambiente disponibilizou diversas medidas judiciais para sua proteção e reparação. Contudo, devido ao asoeramento do sistema, ausência de políticas públicas e a morosidade judiciária, referidas ações se mostram ineficazes ou insuficientes frente às necessidades cotidianas. Surge imperiosa a adoção de métodos alternativos à atuação do Poder Judiciário visando seu desafogo e maior eficácia nas tutelas emergenciais, preventivas e reparadoras. Encontramos Política Nacional de Recursos Hídricos em seu artigo 38, II, a atribuição aos Comitês de Bacias para o uso da arbitragem nas vias administrativas nos conflitos hídricos. Assim, a criação de um Tribunal Arbitral da Água com atuação extrajudicial paralelamente às medidas judiciais apontadas efetivamente contribuiria para a prevenção/minimização dos danos ambientais e consequente viabilização indiscriminada ao acesso do recurso natural.

Palavras-Chave: Direito à água. Igualdade. Solução de conflitos.

Resumen: Históricamente el agua se constituyó y se mantiene como un factor esencial de desarrollo. El Estado disponibilizó diversas medidas judiciales para protección y reparación. Con todo, debido a la soberbia del sistema, ausencia de políticas públicas y la demora judicial, tales acciones se muestran ineficaces o insuficientes en frente a las necesidades diarias. Aparece como necesaria la adición de métodos alternativos a la actuación del Judiciario queriendo alcanzar su desahogo y obtener mayores resultados en los casos emergenciales, preventivos y reparadores. Encontramos en política nacional de Recursos hídricos en su artículo 38, II, la atribución a los Comités de Bacias para el uso de arbitraje en la vías administrativas en los conflictos hídricos. Así, la creación de un Tribunal Arbitrario del Agua con actuación extrajudicial paralelamente a las medidas judiciales apuntadas efectivamente contribuiría para la prevención/minimización de los daños ambientales y consecuente viabilización indiscriminada al acceso del recurso natural.

Palabras-Clave: Derecho al agua. Igualdad. Resolución de conflictos
