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## **THE RIGHT TO WATER AND PUBLIC HEALTH**

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## Introduction

The “Argument Section” for this edition of the *Journal of Health Law* deals with the **right to water and public health**. There are three papers, the first two analyze the water fluoridation, and the last, the management of water resources. As we will see, there is an Ariadne thread joining them: the subject of democracy, or politics as a mediator of social conflict through law and through itself.

### I. Water and health: fluoridation and the repeal of Brazilian Federal Law 6050/74

On their paper, *Zilbovicius, Aguiar and Narvai* analyze the justifications presented by the authors of two bills, a parliamentary initiative, both with the objective of repealing Brazilian Federal Law no. 6.050, of May 24 1974, that “establishes the fluoridation of water in supply systems when there is a water plant” providing that “the projects intended for the construction or enlargement of public water supply systems, where there is a water plant, must include provisions and plans for water fluoridation, in accordance with the requirements and for the purposes established in the regulations of this Law” (art. 1<sup>st</sup>, *caput*).

In a patient, exhaustive and technical manner, the authors demonstrate that the “justifications” of the bills at issue do not produce any kind of technical or scientific basis whatsoever. On the paper, a subtle contradiction: now, they state “it is highly recommendable that before presenting bills, the proponents learn about the subject”, now they say that “eventual failures [...] do not result from difficulties from technical scientific advise, but from positions [...], which motivations imply the occultation of underlying interests to the parliamentary initiative”. This lapse seems to come from the authors excessive elegance, extremely attached to the scientific spirit, summarized in Tacitus axiom *sine ira et studio*. Let’s say here, for irresistible, what remained just a suggestion to our spirit: the parliamentary initiatives submitted to the authors’ scrutiny fit perfectly in the current system, of *post-truth*, also because they brandish *ad terrorem* baseless arguments, but capable enough of instilling fear, to serve interests eager to remain concealed.

### II. The social issue of water fluoridation and the accomplishment of health rights

The second paper, by *Sousa, Pinheiro, Araújo and Araújo*, also deals with the issue of fluoridation, though analyzing it from the viewpoint not only of a mere obligation of the public authorities provided by the federal law, but also as a **subjective right** of the people, derived from their right to having access to water resources.

The Brazilian National Basic Sanitation Law (LNSB) – Law no. 11.445, of January 5 2007 – recognized the right of all the occupants of households to a **public**

**drinking water supply service** (art. 3<sup>th</sup>, III), that must be accomplished progressively and without setbacks (however respecting contingency situations), provided by the basic sanitation plan of every Municipality (art. 19, *caput*, II).

On the other hand, defining which parameters the water should comply with when intended for human consumption is, in constitutional terms, the role of the Brazilian National Health System (art. 200, VI, *in fine*), since water supplied by the **public water supply service**, forcefully, must comply with these national standards of potability (art. 9<sup>nd</sup>, III, *in fine*, of LNSB). And the current standards of potability – either Federal Law no. 6.050/1974, or the Brazilian Health Ministry Ordinance no. 2.914, of December 11 2011, that regulates the parameters of water potability – provide minimum rates of fluoride to consider water as potable, that is, as appropriate for human consumption.

The authors' analysis is deep and, also investigate minutely the right to health and its interpretation and the legal regime, either in the international or in the constitutional order, besides of demonstrating how the fluoridation technology is very efficient in the reduction of inequalities. One of the conclusions they reach is the **lack of efficacy**, this is, the public administration, which should provide the drinking water supply services, but do not make them available, or supplies water – themselves or through third parties – that is not potable, because of the absence of fluoridation.

Considering possible solutions, the authors, without denying the political aspect of the problem, understand that “judicialization as a measure for seeking the implementation of fluoridation can be well founded for the Brazilian context”.

### **III. Water Resources Law - legal trajectory, conflicts and social participation**

The third paper, authored by *Rocha, Khoury* and *Damasceno*, followed an interesting itinerary: pointed to the innovation represented by the new legal framework in the management of water resources and their various instruments, confirming that: “Each one of these instruments has its own purpose and reason of existing, working as the parts of a mechanism; it is not possible that one substitutes the other, and the whole functioning of this mechanism requires that all of them exist and fulfill their role.”<sup>1</sup>

They analyze and contextualize, especially in the reality of the semiarid region<sup>2</sup>, the performance (or non performance) of each one of these instruments. And soon arise the conflicts for the access to the water and the attempts of composition,

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<sup>1</sup>This quotation brought to our mind the famous lesson by *Canotilho*, that uses the metaphor of the hinge to clarify the relationship between Democratic State and State of Law. (CANOTILHO, José Joaquim Gomes. *Estado de Direito*. Lisboa: Editora Gradiva, 1999. p. 10-11).

<sup>2</sup>With support in *Malvezzi*, on a part that deserves highlighting, the authors demonstrate that the prefix “semi”, here, makes a great difference. MALVEZZI, R. *Semi-árido: uma visão holística*. Brasília: Confea, 2007.

either through law that does not achieve efficacy, or through economic power strength, or in the building of institutional spaces for negotiation.

The article, approaches with authority an extremely sensitive issue, at this point acquiring something of prophetic, because it anticipated serious recent conflicts on the subject of water resources management, like in Correntina, Bahia State: in face of the violence of the catchment of water by an agribusiness company that practically consumed all the available water, there was also a violent reaction of the population, followed by organized and pacific demonstrations.

The use of violence - either through the catchment of water beyond reasonable levels, denying a vital element for the remaining population, or because of the first reaction of this same population - generated a “suspension of the law”, or made clear its insufficiency to face a situation of life, with “the rights” of each party looking for the most diverse elements of efficacy (through the state repressive system, summoned to protect the act of delivery with appearance of law – law partially accomplished, incomplete –, or through political action, that mobilized the region’s population, in defense of the right to a dignified existence)<sup>3</sup>.

## Final considerations

On one hand, there is a parliament where proposals are submitted and re-submitted that, ultimately, damage public health, shamelessly using arguments that infuse fear, but lacking any truthful contents or, more technically, lacking scientific bases. Should technique and science overlap, in a re-edition of technocracy? Would there be the death of representative democracy, colonized by interest groups?

On the other hand, the existence of a right recognized and declared that does not meet efficacy, configuring a “non fulfilled promise” of access to public supply of drinking water (therefore, with appropriate fluoride levels). Should the law enter the bosom of public opinion, to become visible and efficient? Or there is a lack of repressive measures – in other words, the State violence – to repress the non-compliance with this right?

Finally, it is the suspension of law that leads the stronger to win in a conflict, because without the mediation of law, force prevails. Who must enforce the law:

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<sup>3</sup>On November 7, 2017, the federal government issued a proposal for a provisional measure to change creation law of the Brazilian National Water Agency (ANA) and LNSB. The proposal, still incipient and flawed by many technical problems, anticipated that, in situations of water shortage, in the federal river basins, the management of the entire water resources would be transferred to the Federal Government. Despite of the proposal being evidently unconstitutional, because intends to expropriate the states of the management of assets recognized to them by article 26 of the Brazilian Constitution of 1988, it demonstrates that the situation of the water crises and the conflicts derived, are leading to the proposition of new ways of guaranteeing the efficacy of water resources management instruments, in a quasi-recognition that the current ways, where collegiate bodies and consensus building prevail, at least in these situations, are of low efficacy.

the *logos* expressed by an authority, again through repression, or the construction of social places of consensus and legitimation? Or should it be both ways? But in what correlation?

For us, the answer is close to what *Agamben* enunciates, precisely when analyzing the extreme situations of the law: “Politics suffered a lasting eclipse because it became contaminated with the law, conceiving itself, in the best case, as constituent power (this is, violence that law imposes), when it is not simply negotiating with the law. Politics truly is, on the contrary, only the action that severs the connection between violence and the law”<sup>4</sup>.

Dear reader, it is difficult to present an introduction without becoming a spoiler. But, here, in anticipating some contents, our effort was just sharpening your curiosity, showing some of the challenges that the following articles pose.

## References

AGAMBEN, Giorgio. *Estado de exceção*. Tradução de Miguel Freitas da Costa. Lisboa: Editorial 70, 2010.

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<sup>4</sup> AGAMBEN, Giorgio. *Estado de exceção*. Tradução de Miguel Freitas da Costa. Lisboa: Editorial 70, 2010. p. 132.

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