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International water resources law and sovereignty: old and new antinomies

Direito internacional de águas e soberania: velhas e novas antinomias

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Abstract

The antinomies between law and sovereignty are not new discussions: they go back to the very formation of the State. Modern international law, based on a solid humanitarian approach, recognizes the existence of supranational legal goods, which do not respect borders, such as the right to water. The human and universal right to access to water, instrumentalized by the fundamental principles of international water law, as well as by the objectives of sustainable development proposed by the UN, through the premises of the Agenda 2030, acting as international legal platforms, have resulted in propositions capable of starting a novel discussion about relations between States and transboundary waters. Watercourses in transboundary river basins ignore the borders of States, which is why they demand the construction of management models that are frequently inviable when it comes to effectiveness, especially due to the complexity of bureaucratic norms and procedures established by the States that share those basins. This, inexorably, justifies revisiting the sense of sovereignty in a contemporary context. The objective of this article is to start a reflection on the existing antinomies between international water law and the sovereignty of States as tensing factors that compromise water governance and, consequently, management in transboundary river basins. The research methodology was bibliographic and documentary, with a qualitative approach, using the doctrine and the specialized legislation on sovereignty and international water law.

Keywords: *International water law. Sovereignty. Transboundary river basins. Integrated Water Resources Management. Water governance.*

Resumo

As antinomias existentes entre o direito e a soberania não constituem discussões novas: remontam à própria formação do Estado. O direito internacional moderno, pautado por forte carga humanitária, reconhece a existência de bens jurídicos supranacionais, os quais não respeitam fronteiras, como o direito à água. O direito humano e universal ao acesso à água, instrumentalizado pelos fundamentos principiológicos do direito internacional de águas, como também pelos objetivos do desenvolvimento sustentável propostos pela ONU, por meio das premissas da Agenda 2030, enquanto plataformas jurídicas internacionais, resultaram por produzir proposições capazes de provocar uma novel discussão acerca das relações entre os Estados com as águas transfronteiriças. Os cursos de águas em bacias hidrográficas transfronteiriças desconhecem as fronteiras dos Estados, razão pela qual demandam a construção de modelos de gestão que, não raras vezes, encontram-se inviabilizados na seara da efetividade, especialmente em decorrência da complexidade de normas e procedimentos burocráticos estabelecidos pelos Estados que compartilham as suas bacias hidrográficas, o que, inexoravelmente, justifica a revisitação sobre o sentido de soberania no contexto contemporâneo. Assim, o objetivo deste artigo consiste em provocar uma reflexão sobre as antinomias existentes entre o direito internacional de águas e a soberania dos Estados, enquanto fatores de tensão comprometedores à governança hídrica e, consequentemente, à

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gestão nas bacias hidrográficas transfronteiriças. A metodologia de pesquisa empregada foi bibliográfica e documental, de natureza qualitativa, sendo utilizada a doutrina e a legislação especializada sobre soberania e direito internacional de águas.

Palavras-chave: *Direito internacional de águas. Soberania. Bacias hidrográficas transfronteiriças. Gestão integrada de recursos hídricos. Governança hídrica.*

1 Introduction

The dichotomy between law and sovereignty is not either a new or a peculiar discussion in this globalized world. From the earliest beginnings of the formation of the rule of law, as a sovereign authority recognized by international law, to the present day, the question is: Who guides who? Is it law that imposes limits and powers on sovereignty or is it sovereignty that imposes limits on law? Does power indeed emanate from the people as an expression of sovereignty? From these preliminary inquiries, many others can be thought of, however, as the purpose of this work lies on the analysis of the antinomy between international water law and sovereignty, it will be limited to this thematic spectrum, whose relevance is justified by the diffuse nature of the humanitarian legal good that is in dispute between both: transboundary waters.

The main purpose of international water law, as a set of norms and principles that regulates the relationship between States and waters, is to facilitate the universal humanitarian right to access to water and its distribution among people, in quantity and quality. So, what justifies the existence of international water law is the human and universal right to water. With the goal of achieving the (humanitarian) right to water, several treaties have been concluded and international conventions have taken place The main topic of these events has aimed to discuss the creation of principles and rules for regulating the relationship between States and water, in particular, water shared between States.

The progress of international water law, based on a number of principles, including international participation and cooperation, has led to the development of a new organizational model to guide States that share their river basins with other States through transboundary waters management, referred to as Integrated Transboundary Water Resources Management (ITWRM). This model represents the most democratic and modern outcome conceived until today in the system of transboundary river basins management. It demands a series of political, scientific, technical and operational conditions; it is supported by interdisciplinary knowledge of diverse areas of science. Among those conditions for the viability of ITWRM is water governance, as an expression of the principle of participation inherent in international water law. Thus, based on several international treaties, the ITWRM has become a mandatory issue of international political agendas, which is why it was listed as one of the sustainable development goals (6.5 SDG) established in the Agenda 2030, which was ratified and internalized by the programmatic policies of several States.

However, since shared waters represent the externalization of sovereignty with regard to strategic issues of national security and of geopolitical importance in the international scenario, the effectiveness of water governance, with the participation of society in transboundary waters management, as advocated by international water law, faces obstacles which seem insurmountable because of the extent of the bureaucratic hindrances established by the internal legal systems of States.

Dogmatically, the concept of sovereignty –as an expression of political and territorial independence of a State at internal and external levels– has oscillated throughout history, sometimes expanding the powers of the State, sometimes reducing them. In a contemporary context, it is undergoing new analyses, which arise from the crises of national States due to globalization and, especially, the scope of the universalization of human rights, whose dimensions also encompass the right to water.

In this humanitarian sense, and in a globalized world, it can be deemed that waters of basins that have a transboundary course cannot be subjected to the monopoly of governmental decisions of a single State

as an expression of its national sovereignty, since these waters represent a legal good worthy of protection due to its supranational and supra-individual essence.

Hierarchically, water is a legal right-holder, even superior to other first-generation human rights, for water represents a source of life in all of its forms and, without life, there is no human or ecological right susceptible to be protected. Therefore, because water represents an unassailable condition for the existence of animal or vegetable life, it precedes the existence of all other rights, including human rights. Hence, an eco-centric view is well justified, one which refutes national sovereignty as an expression of the legitimacy of States to violate rules of international water law and, consequently, to frustrate the human and universal right to water.

As previously pointed out, in order to develop an ITWRM, it is necessary to establish a model of effective water governance, one that is participatory. There is the crucial point of the present study: the new tensions between international water law and State sovereignty. Because water policies resulting from the sovereignty of States that share river basins with other States, not only frequently violate water law, but also become obstacles to the participation of society and, consequently, to water governance in these basins, impeding the integrated management of these waters.

This article aims to stimulate a reflection on the contemporary conflict between international water law and obstacles imposed by the sovereignty of States in relation to water governance in transboundary river basins.

For the purpose of this article, the first part analyzes some peculiarities about the meaning of State sovereignty in a contemporary context; in the second part, a brief approximation to international water law is presented with emphasis on the principles of protection, international cooperation and participation; the third part analyzes the importance of water governance in transboundary river basins as an expression of the principle of participation in Integrated Transboundary Water Resources Management (ITWRM).

Finally, considering the contents addressed, a conclusive analysis is made on the reappearance of old antinomies: on the one hand, international water law, endowed with a robust, juridical and principle-oriented framework and; on the other hand, the sovereignty of States in relation to the control of shared waters, the courses of which form transboundary river basins.

In order to validate this research, the inductive method was used through bibliographical and documentary reading of specialized doctrine and agreements on international waters. This is an exploratory and qualitative study that can provide further insights on the effects of State sovereignty on water management in transboundary river basins; capable of initiating the examination of a new object of research.

2 Reflections on the sense of sovereignty in the contemporary context

Sovereignty can be thought of as a legal-political fiction, whose dimension has always been present throughout the history of the formations of States, from absolutism to the present day: during absolutism, it was represented by the figure of an unlimited centralized authority, as a human being designated by God, being legitimized to ordain the “divine right on Earth”; in the course of the sixteenth century, as a consequence of the ruptures of colonialist structures that existed on several territories, sovereignty allowed the formation of independent States; at the end of the eighteenth century, it was reconfigured by the liberal prisms of the French Revolution; and extended to the present day, it turned to be elemental for the formation of the States.

Sovereignty –conceived as a necessary and indivisible power for the maintenance of the State– had Bodin as one of its most celebrated founders, who in 1576 wrote the Six Books of the Commonwealth, upholding sovereignty as an “intrinsic element of the State.”

For Canotilho (2003, p. 89), the State is endowed with qualities that distinguish it from other powers and organizations of power. He lists, in the first place, “sovereign power.” For the aforementioned professor of the University of Coimbra (2003, p. 90):

> Sovereignty, in general terms and in a modern sense, can be translated as a supreme power at internal level and as an independent power at international level. If we articulate both dimensions of the State, the internal constitutional dimension and the international dimension, we can identify its constituent elements: (1) political power to command; (2) which is addressed to national citizens (people = subjects and receivers of that sovereignty); (3) in a determined territory.

So, according to Canotilho's teachings, sovereignty is intrinsically linked to the political power to command, which has been legitimized by a political representative delegation elected by the people of a given territory, and it has national citizens as receivers.

Marcello Caetano (1970, v. I, p. 169), for his part, understands that sovereignty means supreme and independent political power: supreme, because "it is not limited by any other power at domestic level"; and independent, because "at international level, it does not have to abide by rules that are not voluntarily accepted and is on equal terms with the supreme powers of other nations."

In turn, Diz and Martins (2000, p. 638) discuss the meanings of the concept of sovereignty. They focus their attention on its classification, and state the following:

> Sovereignty can be divided into internal sovereignty and external sovereignty. From the point of view of internal sovereignty, it presents itself as a social juridical concept, that is to say, that a state organization is considered sovereign when its juridical order is endowed with imperativeness, superiority and supremacy, putting the state power over other powers. It is the predominance of state planning in a given territory, in relation to the population existing there, over any other kind of social order. As external sovereignty, sovereignty is presented as a capacity, as a power recognized by state organizations to impose its *ius imperius*, which is at the same level of other sovereign state organizations. It does not admit that other external manifestations of power influence directly or indirectly the elaboration of internal policies or in the decision-making process. It is, then, directly related to the idea of independence, to the capacity of self-determination of the State.

Also, Reale (2002, p. 127), discussing internal sovereignty as a platform for the organization of the State, asserts that sovereignty constitutes "a power to grow legal organization and to enforce the universality of decisions, in a territory, within the limits of the ethical ends of coexistence."

Nonetheless, in today's context, the meaning of sovereignty, both internal and external, guided by globalization and the dynamism of international relations, has developed a new style. It accompanies the crisis of the welfare state, allows the transformation of political and ideological platforms, materialized through the relativization of rights and obligations that arise from external political determinants. In this regard, according to Dantas (2009, p. 13):

> (…) the very notion of a State, with a national-territorial basis, handles a great impact with so many changes; and the role of statehood and Sovereignty, which have always been regarded as essentially linked notions, are confronted by new actors on the international scene who do not have the status of States or of being sovereign.

Globalization does not respect boundaries or limits, that is the reason why it has the capacity to influence the directions of the internal and external public policies of States, which represent the expression of their sovereignties. Granting severe criticism about globalization by accusing it of using states as instruments to achieve their economic objectives, Bauman (1999, 74) states:

> In the cabaret of globalization, the state goes through a striptease and by the end of the performance it is left with the bare necessities only: its power of repression. With its material basis destroyed, its sovereignty and independence annulled, its political class effaced, the nation-states become a simple security service for the mega companies… The new masters of the world have no need to govern directly. National governments are charged with the task of administering affairs on behalf of them.

In fact, globalization changed the world as well as the relations of sovereignty between states, since they now depend more on multiple external interests and events to promote socio-economic policies than on their own institutional forces.

In this sense, Ferrajoli (2002, p.28) describes modern sovereignty as a political fiction, since the essence of the expression is denied by different socio-political and legal realities, both at internal and international level, when he affirms that sovereignty "is visibly in decline due to the current political trends of the international community." The political demands of the international community are innumerous: economic development, security, human rights, environmental protection, and others. It can be considered that the policies of transboundary water resources management are included in the "current policies of the international community" given by Ferrajoli (2002), as the right to water constitutes a supra-national, diffuse, universal, and human right, for that reason, it is worthy of being protected by international law, which justifies a limitation of the sovereignty of States in transboundary basins.

The principle of permanent sovereignty of States over natural resources has been the subject of international agreements and is enshrined in Principle 21 of the Stockholm Convention as well as in Principle 2 of the Rio Declaration. They affirm that "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies." Defending the limitation of State sovereignty over the exploitation of shared natural resources when it deals with the principle of permanent sovereignty adopted by Principle 21 of the Stockholm Convention and Principle 2 of the Rio Declaration, Silva (2010, p. 106) asseverates:

> The scope of this principle is limited, on the one hand, to the international commitments made in multilateral, regional or bilateral treaties, as well as to the international customs, and, on the other hand, to a series of principles of international environmental law, such as the principle of prevention and precaution, which guide the actions of States and lay the foundations for international cooperation in environmental matters. It is also limited to the interdependence of shared ecosystems and natural resources. Thus, there are treaties that establish the allocation of resources, such as: a) the Convention on Biological Diversity, (b) the United Nations Convention on the Law of the Sea. In addition, there is an obligation to ensure that activities carried out within a jurisdiction or under a determined control do not harm the environment of other States or areas beyond national jurisdiction (cf. territory and cross-border pollution and common areas, common heritage of humanity and common concern).

The dogmatic concept of sovereignty in a juridical-theoretical sphere puts itself in a level of submission to law. In reality, however, and abstracting its pseudo-conceptual sense, sovereignty is always defying law, since the chief characteristic of sovereignty is the non-observance of boundaries of rules. On this subject, Ferrajoli (2002, p. 44) states that "(...) sovereignty is the absence of limits and rules, that is, it is the opposite of what law consists of. By virtue of that fact, the legal history of sovereignty is the history of an antinomy between two terms –law and sovereignty– logically incompatible and historically in conflict with each other.

In line with Ferrajoli's (2002), and understanding that the socio-political and juridical characteristics, as determinative elements, lead the sovereignty of each State, it is understood that the sense of sovereignty has become vulnerable by the processes of globalization and by the policies for the universalization of human rights, not substituted by them though, as the own efficacy of those processes depend on the respect and re-configuration of sovereignty, adapted to the economic and sociopolitical realities of each state, resulting in the reappearance of new tensions between law and sovereignty.

3 International water law as a limitation of State sovereignty

The distribution of water on the planet, even within the territory of several States, is uneven: there are regions with abundant water and others with scarcity, which directly influences their hydro-social and hydro-ecological models. Because of its essentiality for multiple uses, water has always been a cause of conflicts, wars, and cooperation among peoples.

According to the data of the United Nations Environment Programme (UNEP), released in 2003, the world has a total of 263 international river basins, that are shared by two or more countries, which concentrate approximately 40% of the world population; 145 countries have part of their territories in an international basin

and 21 are entirely inside of international basins, distributed as follows: 69 are in Europe, 59 in Africa, 57 in Asia, 40 in North America, and 38 in South America. Since a significant part of the world population depends on these water resources for the satisfaction of their vital needs and maintenance of the socioeconomic model, such a hydrographic scenario holds not only a mosaic of sociocultural and hydro-ecological values hidden from common perception, but also elements to understand the climatic and geopolitical construction of the contemporary world.

As a result of the concern of the international community with promoting the mitigation of international conflicts by shared waters, several international treaties were concluded that derived in the main sources of international water law therefrom.

Until the 1960s, the interests of countries in relation to transboundary waters were basically limited to regulating the relations of navigation and production of hydropower. Due to the European hydrography, the first international accord to deal with the sovereign relations of the States with the environment, including water, separated from the context of navigation and energy production, was the 1972 Stockholm Convention. After the Stockholm Convention, a number of other international treaties and conventions have been concluded addressing other issues related to the management of international river basins. In the 1992 Rio Convention, the question of waters and river basins was stressed, given the concern of the international community regarding the rational use of water as a consequence of the increasing demand due to increasing demographic density.

Notwithstanding the importance of the contributions made by the various international treaties and conventions in the formation of the principles of international water law as well as of programmatic guidelines on the rational use of water, the 1997 New York Framework Convention on the Law of Non-Navigational Uses of International Watercourses deserves special mention with reference to the management of international river basins and the relation of respect to rights of other neighboring States. The relevance of the aforementioned international normative document is justified not only by the endorsement of the principles of international water law created so far, but, above all, by the generation of a need to revisit the interpretation of the extension of “sovereignty” in the states that share basins.

Thus, the issue –which had hitherto been discussed in a generic, superficial and bureaucratic manner in the international diplomatic sphere, and limited, especially, to discussions held by environmentalists and professionals in the field of navigation and hydroelectricity– with the advent of the aforementioned Framework Convention, revealed the need for new hermeneutical guidelines regarding the extension of the concept of State sovereignty, especially its adjustment to the programmatic guidelines on water management in transboundary river basins.

Hence, based on several international instruments, the Integrated Transboundary Water Resources Management (ITWRM) has become a frequent theme in international political agendas, which is why it was listed as one of the objectives of sustainable development (6.5 SDG) in Agenda 2030, which has been ratified and internalized to the programmatic policies of several of countries.

The right to water is a universal human right and an expression of the principle of dignity of the human person. Water law constitutes a branch of law, a kind of environmental law, whose purpose is to make the right to water feasible. According to Pompeo (2006, p. 677), water law is a hybrid branch of legal theory because it contains both public and private law. In connection to this, this doctrinaire says that water law represents:

> The set of legal principles and norms that govern the domain, use, conservation and preservation of waters, as well as the defense against harmful consequences. At first, it was called Hydrological Law. The close linkage of the legal norms about water to the hydrological cycle, which practically ignores limits in its course, means that water law contains norms traditionally placed in both Private and Public Law.

For Granziera (2014, p.12) water law is “the set of legal principles and norms that govern the competences on, the domain, and the management of water, that aim to plan the uses, conservation and preservation, as well as its defense from harmful effects, whether occasioned by human action or not.”

Given the concepts of water law by specialized national doctrine, it can be esteemed that international water law is a branch of international environmental law, since it is conditioned to political and diplomatic negotiations between sovereign states as well as it is based on international environmental treaties and agreements. In this way, international water law is comprised of norms and principles borrowed from international environmental law, its main purpose is the diffusion of international water management policies, in order to steer States towards the formation of their own hydro-social, hydro-ecological and water management policies.

International Water Law, with many principles borrowed from international environmental law, seeks to focus on the principles of protection, international cooperation, and participation to achieve water governance, one of the vertices and requirements for ITWRM.

In this respect, the principle of protection must be highlighted. This principle was one of the starting points for establishing limits to the sovereignty of States, by directing them to take preventive measures to avoid the repercussion of the harmful effects of their activities on the territories of neighboring States.

Based on norms of international environmental law, the principle of protection is expressly set out in Principle 21 of the Stockholm Declaration of 1972, which proclaims as follows:

> States have, (…), the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

According to what is inferred from this principle, it establishes limitations to the sovereign power of States, making them responsible for watching over the activities that cause environmental impacts in their territories and to ensure that they do not compromise the environmental cleanliness of the neighboring states. In this sense, supporting a control on freedom or a relative freedom of States, derived from their sovereignty for the exploitation of natural resources, as a corollary of Principle 21 of the Stockholm Declaration, Machado (2014, 1.261) affirms:

> From this principle of the Stockholm Declaration, it can be induced that States have a relative freedom or a controlled freedom to exploit their natural resources. In this sense, it is understood that sovereignty creates for States obligations that are a corollary of their own rights.

However, while there is a formal recognition of the principle of State protection, it is not difficult to identify its lack of effectiveness in the contemporary international context. With regard to international watercourses, it is observed that there are continuous and blatant violations of the principle of protection, due to the negligence (or connivance) of the States and the lack of inspection of activities within their territories, the most emblematic cases are those of water contamination through agricultural pesticides and other heavy metals coming from agriculture and mining, respectively, and others that end up causing damage to the waters that flow to the downstream states.

Another principle of international environmental law worthy of note is the principle of international cooperation. This principle aims to develop joint strategies between States, through the transfer of material, technological and human resources of one State to protect the environment and human health of another more vulnerable, and is enshrined in Principle 14 of the Rio Convention, which states that “States should effectively co-operate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health.”

The importance of this principle in relation to water management is so significant that it is elemental to ITWRM because the transfer of financial and technological resources to solve problems in relation to the management of international waters is only possible through the shared –but differentiated– responsibility between developed and underdeveloped states. About this, Sarlet (2017, p. 226) states:

> Considering the diverse contributions to the degradation of the global environment, States have common but differentiated responsibilities. Developed countries recognize their responsibility in the international pursuit of sustainable development in view of the pressures exerted by their societies as for global environment and the technologies and financial resources they control.

Another trait of the principle of international cooperation is the reparation of transnational damages arising from harmful activities practiced within the territory of one State whose repercussion will cause environmental damage within the territory of another State, including the payment of compensations. On this subject, Principle 22 of the Stockholm Convention declares:

> States shall cooperate to develop further international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.

The principle of cooperation goes far beyond the responsibility of the State itself to avoid environmental damage arising from activities carried out within its territory which endanger the environment and human health in another State.

This principle also strengthens international solidarity, advocating the commitment to help other states when one is asked to do so; this reaffirms the trend and strengthening of international environmental law in defense of the environment as a diffuse and supranational legal good.

Lastly, it is necessary to discuss the principle of participation. As a constituent of democracy, the principle of participation offers citizens the opportunity to criticize and participate in public policy decision-making processes, demanding publicity, information and transparency in relation to the management of public affairs. Its importance in environmental matters was emphasized in Principle 10 of the Rio Declaration of 1992:

> Environmental issues are best handled with the suitable participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Backing the importance of the principle of participation as a basis for participatory democracy, Canotilho (2003, p. 288) writes:

> The democratic principle is not sympathetic to a static understanding of democracy. First and foremost, it is a process of transpersonal continuity, it cannot be reduced to any linkage of the political process to particular people. On the other hand, democracy is a dynamic process inherent in an open and active society, which offers citizens the possibility of full development and freedom of critical participation in the political process under conditions of economic, political and social equality (cfr. CRP, art. 9º/d).

The principle of participation is closely linked to water governance, which, because of its importance, will be better analyzed later. The principle of participation, as a basic principle of environmental law and also of water law, not only guides the formation of governance in basins management, but also establishes a democratic management guideline on the participation of government entities, social organizations and civil society, in order to develop water policies for solving problems in basins. In Brazil, this principle is materialized within the policy of management of water resources through the Hydrographic Basin Committees (CBH, in its Portuguese acronym), a platform in which the aforementioned characters identify, discuss and present proposals for solving problems related to water use of basins located in the national territory, as an expression of the sovereignty of the State over the waters that are within its territory.

Nonetheless, as a national norm, the principle of participation presents problems regarding effectiveness on the field of transboundary river basins, because they are conditioned to the hydro-diplomatic abilities of each country. According to the laws of all countries, borderline regions are considered areas of national security and, therefore, they are affirmatory limits of their territorial sovereignties. For that reason, the authorization of the central governments is required, through treaties or specific agreements, for the management of shared basins, which makes it very complex to establish a Hydrographic Basin Committee (CBH) in those areas. This happens in Brazil, where, in accordance with the unique paragraph of Art. 37 of bill 9.433 / 97,

"the constitution of River Basin Committees in rivers of the Union's domain shall be effected by an act of the President of the Republic." By way of illustration, in order to demonstrate the complexity of the formation of water governance in Brazilian transboundary basins, this matter is still regulated by Resolution Nº 5 of the National Water Resources Council (CNRH, in its Portuguese acronym), April 10, 2000, which frames a series of requirements, frequently impracticable, at regional level.

As it can be seen, the tangle of bureaucratic norms and procedures makes the Brazilian case peculiar, which may justify Brazil's intricacy of making integrated water resources management viable in the basins shared with other States.

Despite the robust international legal framework in relation to international water law, the effectiveness of the norms runs counter to the sovereign power of the states that share basins, resulting in immeasurable hydro-social and hydro-ecological problems. States are sovereign, not subjected to other states; they have the power and legitimacy to self-govern. Nevertheless, sovereignty cannot be interpreted as an unlimited power. It finds limitations established by law, especially by the principles and rules of international law. As emphasized by Bobbio (1997, p. 101), "every State exists alongside other states in a society of States", which conditions the legality of the governmental acts of a State as an expression of its external sovereignty, only when, and provided that, the rights of other sovereign States are respected. This paper presents the critical point of a new antinomy between law and sovereignty, particularly with regard to water governance in transboundary river basins as an element for the achievement of integrated transboundary water resources management, which will be analyzed in the next section.

4 Governance: the challenge for integrated transboundary water resources management

As an expression of the principle of participation in the design and execution of management policies, the concept of governance is complex, broad and dynamic. But, regardless of its interpretation, it necessarily requires a sociopolitical analysis, representing strategic orientations for both the private and public sector.

Governance has its origin in the studies of organizations, whether be it private, as corporate governance; or public, having as a range global governance and local governance. The first experiences related to the study of a governance model occurred within the private sector as a corporate policy aimed to accomplish corporate objectives. Later, especially after World War II, and after the crisis of distrust and lack of transparency in some of the rulers' decisions, governance was studied from legitimacy approach.

It should be noted that the phenomenon of globalization and the evolution of the mechanisms of communication through technological tools culminated in strengthening the instruments of the originally studied governance. The current technological context of dissemination of information by the media, equipped with the capacity to display a global panorama able of monitoring the decisions of the states, redesigned the creation of new forms of non-formal participation as to the development and implementation of public policies.

Specifically regarding the expansion of the term governance to the public sector, Mata Diz and Moura (2016, p.65) formulate that the word became "largely associated with other adjectives, not just corporate, being intensively used in international relations." In this area, they pay attention to governance models classified as global governance and local governance.

Regarding local governance, Mata Diz and Moura (2016, p. 68) argue that the local level consists, "first and foremost, of physical and juridical delimitation of such a model of interaction where it is most needed", and provides some reasons why this happens:

> (…) one: because most of the litigation of individuals, alone or in constituted groups, is absorbed by the local interest bias; two, in view of the greater proximity of local governance participants to the recipients of their results; three, considering that the local government is one of the actors of this relational paradigm and generally the most fragile from the economic point of view in the model of organization of the State this is a part of, especially in the actions taken by this, it is necessary to consider possible partnerships with the private sector and the third sector.

Indeed, local governance is the most important model from the point of view of localized social politics, because it is in the cities and towns where people actually live and experience all the problems arising from everyday realities, so it is in the participatory model of control in which democratic practices can in fact be verified.

However, in spite of the cleverness of this participation model, the achievement of local governance objectives is usually compromised by the limitations on participation of the receivers of the concerted measures, causing not only a void between rights and their effectiveness, but also a deficit of democratic legitimacy in its attainment.

With respect to the Integrated Transboundary Water Resources Management (ITWRM), governance appears as one of its conditions. Even with expansion of the concept of governance as a condition for ITWRM, governance demands the deliberation of multiple variables. As stressed by Villar (2015), the Group Water Partner (GWP) was primarily responsible for reinventing Integrated Water Resources Management (IWRM) and disseminating it internationally, it also obtained substantial support from international agencies of the United Nations system.

In view of the complexity of the issue, technical studies have proposed actions to foster good governance for water resources management. In this sense, CAP-NET / UNDP (2006, p.15) has built some guidelines, such as: a) the determination of the State's roles in relation to other actors and the regulation of the entitlements and responsibilities of users and water suppliers; b) building partnerships between government, business sector, community and voluntary organizations; c) the prescription in law of the governmental institutions and their respective competences; d) the search for ways to ensure the sustainable use of the resource; e) the analysis of the state of water resources; f) the installation of consortia of actors involved in the decision-making process, with representation from the sectors of society and with gender balance; g) the organization of water allocation and abstraction systems, wastewater disposal permits and databases; h) water resources management with a hydrographic care approach; i) organizational structures at basin and sub-basin level to enable decision-making at the lowest level possible; j) the development of IWRM plans based on a multi-sectoral approach in respect to stakeholder participation.

To understand the complexity of making the governance for the IWRM possible, it is necessary to know these guidelines, since they demand the combination of multiple political, scientific and technological factors; factors that are frequently impracticable to apply to the political, social and economic realities of states, especially in underdeveloped ones. As to shared river basins, concerning governance, such complexity increases on account of sovereignty, which makes the IWRM unfeasible without a hydro-diplomatic articulation for the execution of specific international treaties and agreements between States on transboundary river basins.

5 Conclusion

The sense of sovereignty has always been an important concept for law. In fact, sovereignty and law are two sides of the same coin. Although they are closely related, sovereignty is the denial of law, and law is the denial of sovereignty in a relationship of constant challenges. This tension between the two is due to their nature: sovereignty as a representation of power challenges the observation of rules; law, in turn, as a set of rules for social welfare, demands limits to sovereignty. From an axiological understanding of water, as a supranational legal good, it is possible to criticize the "absolute" sense of sovereignty, based on orthodox, rigid and insurmountable delimitations, and replaced it with a relativized, more "liquid", and concordant concept that contains the demands of society, as long as management policies respect constitutional values and international treaties with regard to international water law, which advocates a certain limitation on the sovereignty of States in transboundary river basins.

As an expression of international water law, the Integrated Transboundary Water Resources Management (IWRM) encounters obstacles that seem insurmountable in terms of effectiveness, because, besides

threatening state sovereignty in shared basins, it would also lead to reforms in the legal States to adjust it and avoid conflict with internal norms. In summary, in addition to sovereignty, transboundary problems stem from the way in which national and regional governance structures are organized and the rules that govern the management and use of those sorts of waters. As a consequence, the principles and legal framework of international water law suffer from a lack of effectiveness on real settings. The main strategies put into place to counteract that inefficacy are international agreements between the States that share those transboundary basins, the creation of bodies that make local water governance possible, and the promotion of joint management, which requires deep political articulation and hydro-diplomatic skills.

Despite the efforts of the international community, policies for the construction of a water governance, capable of facilitating management in transboundary river basins, are still slow and face constant hindrances in terms of effectiveness.

Although they are located in regions under the denomination of national security, it is understood that the best governance for a transboundary river basin is local, that is to say, organized by the local society in the borders of states, since those societies are the ones that experience and coexist with the daily problems resulting from the absence of management and regulation from central governments in relation to the uses of waters in such basins. Governance and ITWRM can either add more actors to democratize management based on the principles of protection, cooperation and participation, or serve disguised interests, through decision-making processes that claim to be participatory, yet stripped of those intentions. That entails an unrestricted transparency in their organizational model.

Lastly, it can be said that separating the idea of ITWRM from a utopian conceptualization –establishing how its practical application should be materialized and how a good governance is achieved, as expressions of international water law– is a challenge that requires more than the combination of technical, scientific, financial and hydro-diplomatic skills. This calls for the demonstration of the maturity and capacity of international law to remove the obstacles imposed by State sovereignty in transboundary river basins –through re-discussing old antinomies of law and sovereignty and examining new ones; antinomies that tend to be accentuated in the course of the 21st century for a simple and fundamental reason: water.

References

BAUMAN, Zygmound. **Globalização**: as consequências humanas. Tradução Marcus Penchel. Rio de Janeiro: Jorge Zahar, 1999.

BOBBIO, Norberto. **Estado, governo e sociedade**: para uma teoria geral da política. Tradução Marco Aurélio Nogueira. Rio de Janeiro: Paz e Terra, 1997.

BODIN, Jean. **Los seis livros de la Republica**. Tradução Pedro Brava Gala. 2. ed. Madrid: Tecnos, 1992. v. I.

BRASIL. Conselho Nacional de Recursos Hídricos - CNRH. Resolução nº 5, de 10 de abril de 2000. Diretrizes para a formação dos comitês de bacias hidrográficas. **Diário Oficial da União**, Poder Executivo, Brasília, DF, 11 abr. 2000.

BRASIL. Lei nº 9.433, de 8 de janeiro de 1997. Institui a Política Nacional de Recursos Hídricos. **Diário Oficial da União**, Poder Executivo, Brasília, DF, 9 jan. 1997.

CAETANO, Marcello. **Manual de ciência política e direito constitucional**. 6. ed. Lisboa: Coimbra: Almedina, 1970.

CANOTILHO, J. J. Gomes. **Direito constitucional e teoria da constituição**. Coimbra: Almedina, 2003.

CAP-NET, PNUD. Planejamento para a gestão integrada de recursos hídricos. **Manual de Capacitação e Guia Operacional**. Training Material CD, 2006.

DANTAS, Juliana Oliveira Jota. **A soberania nacional e a proteção ambiental internacional**. São Paulo: Verbatim, 2009.

FERRAJOLI, Luigi. **A soberania no mundo moderno**. São Paulo: Martins Fontes, 2002.

GLOBAL WATER PARTNERSHIP - GWP. **Manual para la gestión integrada de recursos hídricos en Cuencas**, 2009. Disponível em: https://www.rioc.org/IMG/pdf/RIOC_GWP_Manual_para_la_gestion_integrada.pdf. Acesso em: 26 jul. 2018.

GRANZIERA, Maria Luiza Machado. **Direito de águas**: disciplina jurídica das águas doces. São Paulo: Atlas, 2014.

INTERNATIONAL WATER LAW. **UN Convention on the Law of the Non-navigational Uses of International Watercourses [Convenção de Nova York]**. New York, 1997. Disponível em: http://www.internationalwaterlaw.org/documents/intldocs/watercourse_conv.html. Acesso em: 20 jun. 2018.

MACHADO, Paulo Affonso Leme. **Direito dos cursos de água internacionais**. São Paulo: Malheiros, 2009.

MACHADO, Paulo Affonso Leme. **Direito ambiental brasileiro**. São Paulo: Malheiros, 2014.

MATA DIZ, Jamile Bergamaschine; MARTINS, Thiago Penido. Por uma reinterpretação dos elementos do Estado a partir da criação e consolidação dos processos de integração regional. In: ENCONTRO NACIONAL DO CONPEDI, 14., 2015, Florianópolis. **Anais** […] Florianópolis: CONPEDI, 2015. Disponível em: https://www.conpedi.org.br/publicacoes/c178h0tg/p2qwwuu8/19Rek3fjGRjPe2cF.pdf. Acesso em: 13 abr. 2018.

MATA DIZ, Jamile Bergamaschine; MOURA, João Ricardo Fidalgo de. Apontamentos sobre o conceito de governança e sua adoção pela União Européia. *In*: MATA DIZ, Jamile Bergamaschine; SILVA, Alice Rocha da; TEIXEIRA, Anderson Vichinkeski (org.). **Integração, Estado e Governança**. Pará de Minas: Universidade de Itaúna, 2016. p. 62-82.

ORGANIZAÇÃO DAS NAÇÕES UNIDAS. **Agenda 2030** – Objetivos do Desenvolvimento Sustentável 2030. Disponível em: https://nacoesunidas.org/pos2015/ods6/. Acesso em: 04 ago. 2018.

ORGANIZAÇÃO DAS NAÇÕES UNIDAS. **Declaração da Conferência das Nações Unidas sobre Meio Ambiente Humano [Convenção de Estocolmo]**. Estocolmo, 1972. Disponível em: http://www.onu.org.br/rio20/img/2012/01/estocolmo1972.pdf. Acesso em: 05 maio 2018.

ORGANIZAÇÃO DAS NAÇÕES UNIDAS. **Declaração do Rio de Janeiro sobre Meio Ambiente e Desenvolvimento [Convenção do Rio de Janeiro]**. Rio de Janeiro, 1992. Disponível em: http://www.onu.org.br/rio20/img/2012/01/rio92.pdf. Acesso em: 5 mar. 2018.

ORGANIZAÇÃO DAS NAÇÕES UNIDAS. Programa das Nações Unidas para o Meio Ambiente. **Perspectivas del Medio Ambiente Mundial**. Genebra: GEO-3 Data Compendium, 2003.

POMPEO, Cid Tomanik. Águas doces no direito brasileiro. *In*: REBOUÇAS, Aldo da Cunha *et al*. (org.). **Águas doces no Brasil**: capital ecológico, uso e conservação. 3. ed. São Paulo: Escrituras, 2006. p. 677-717.

REALE, Miguel. **Teoria do direito e do estado**. São Paulo: Saraiva, 2002.

SARLET, Ingo Wolfgang. **Princípios do direito ambiental**. São Paulo: Saraiva, 2017.

SILVA, Solange Teles da. **O direito ambiental internacional**. Belo Horizonte: Del Rey, 2010.

VILLAR, Pilar Carolina. **Aquíferos transfronteiriços**: governança das águas e o aquífero Guarani. Curitiba: Juruá, 2015.

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