

ISSN 2526-0774

Vol. IV
Jan - Dec 2020

Section: **Cadernos de Pesquisa Homa**

Not Peer-Reviewed.

Received: 19.11.2020

Accepted: 19.11.2020

Published: 20.11.2020

Coordination

Manoela Carneiro Roland

Research Line**Coordination**

Felipe Fayer Mansoldo

Researchers

Fernanda Avila Guimarães Silva

João Luís Lobo Monteiro de Castro

José Medeiros de Almeida Duque

Natanael Santos da Costa

Translation

Davi Marcenes Cunha

COMMENTS ON BILL 2.788/2019 ON THE NATIONAL POLICY ON THE RIGHTS OF POPULATIONS AFFECTED BY DAMS

COMENTÁRIOS SOBRE O PL 2.788/2019 SOBRE A POLÍTICA NACIONAL DE DIREITOS DAS POPULAÇÕES ATINGIDAS POR BARRAGENS

Homa - Human Rights and Business Centre

ABSTRACT

The paper analyzes Bill 2.788/2019, under way in the Federal Senate, which aims to establish a national policy on the rights of the populations affected by dams. It presents the tension between development and human rights, manifested in the clashes between such enterprises and the surrounding communities. It highlights the history of organization and struggle of people affected by dams in grassroots movements. It registers the evolution of national legal on the subject and highlights the absence of a legal normative framework that institutes rights to the affected populations, which forces them to establish direct negotiations with the enterprises themselves, in flagrant imbalance of forces. It comments on the provisions contained in the current version of the Bill, with additions to the original text, and discusses possibilities for improving the text, highlighting the importance of overcoming the current model to ensure effective protection of the Human Rights of those communities.

KEYWORDS

Human Rights and Business. Bill 2.788/2019. Affected. Dams. Mining

RESUMO

O artigo analisa o Projeto de Lei 2.788/2019, em tramitação no Senado Federal, que tem por objetivo instituir uma política nacional de direitos das populações atingidas por barragens. Apresenta a tensão entre desenvolvimento e direitos humanos, manifesta nos embates entre tais empreendimentos e as comunidades do entorno. Destaca o histórico de organização e luta das pessoas atingidas por barragens em movimentos de base. Registra a evolução das normas jurídicas nacionais sobre a temática e salienta a ausência de um marco normativo legal que institua direitos às populações atingidas, o que as obriga a estabelecer negociações diretas com os próprios empreendimentos, em flagrante desequilíbrio de forças. Faz comentários aos dispositivos contidos na atual versão do Projeto de Lei, com os acréscimos ao texto original, e discute possibilidades de aperfeiçoamento ao texto, destacando a importância de superarmos o modelo vigente para assegurar uma efetiva proteção aos Direitos Humanos daquelas comunidades.

PALAVRAS-CHAVE

Direitos Humanos e Empresas. PL 2.788/2019. Atingidos. Barragens. Mineração.

1. INTRODUCTION

The construction of large dams in Brazil has always represented an emblematic example of the tension between development and human rights (SANTOS; CHAÚÍ, 2013). Those megastructures have many compositions and functions, and can be used for the storage and production of energy,

for retention of water to supply the population and agricultural production, and for retaining water and mitigate floods, besides being used for retaining temporary tailings from the industrial and mining activity.

The large government infrastructure projects of the 20th century were based on the search for an energy source that would take advantage of Brazil's hydroelectric potential, as well as the exploitation of underground mineral resources (with the consequent generation of waste inherent to the activity). However, this option came with significant social and environmental damage. The privatization of companies in the electricity and mineral sectors, which occurred during the 1990s, followed by poor supervision of enterprises by the government, aggravated this situation.

Thus, the populations affected by dams in Brazil live in a scenario of violations, which has worsened in the current context of threats to democracy¹. The recurrent cases of criminalization of human rights defenders, a regular basis in Latin America, make it difficult to organize and engage communities.

In scenarios of socio-environmental disasters, such as the environmental crimes that took place in Mariana and Brumadinho, acknowledging the "affected" is part of an excruciating part of the process that reproduces the inequalities of gender, race and class existing in society². Add to this the brutal disparity of forces between small rural and/or traditional communities and massive companies in the hydroelectric or mining sectors, whose economic interests converge with the development discourse headed by the large corporations and approved by the Government.

This predominant development discourse exacerbates social conflicts, as the people affected are seen as obstacles to economic growth, subverting the protective logic regarding the most vulnerable people and that should guide the State's actions.

The lack of a specific national legislation defining the concept of affected makes this acknowledgment more difficult. At the State level, although there are experiences in instituting policies to recognize the rights of populations affected by dams via decree³, changes in government often compromise their maintenance.

This causes the communities to engage in unequal negotiations with enterprises, so that the conjuncture and correlation of local forces end up defining the final result of these "agreements", with serious damages and flagrant violations of the isonomy among the affected people.

For all these reasons there is an urgent need for a legal framework capable of instituting a national policy of rights for the populations affected by dams. In this sense, the objective of this work, born from a constant interlocution with the Movement of the People Affected by Dams, which made

¹ See the report of the Inter-American Commission on Human Rights on the "Criminalization of the Work of Human Rights Defenders", which shows that in Latin America the criminalization of the activities of Human Rights defenders on the rights of the communities that live in territories of interest for the implementation of those megaprojects and exploitation of natural resources such as the mining, hydroelectric and forests is frequent. (OAS, 2015, p. 33).

² In this sense, there are studies such as the Preliminary Report on the Situation of Women Affected by the Rio Doce Disaster in the state of Espírito Santo (DPES, 2018), which pointed out as problems, in summary: The increase in cases of domestic violence against women in the region affected by the disaster, the generic treatment provided by the TTAC in relation to reparation programs, the exclusion from the matrix of damages typical labor activities of women, the registration carried out by a family group and the election of a person in charge of the family nucleus ("head of the family") in a collective meeting, the non-existence of dialogue tables composed entirely of women, and the lack of integration of the structures of the government for the protection of women.

³ In Rio Grande do Sul, the State Decree No. 51.595/2014, signed by governor Tarso Genro, established the State Policy of the Affected by Hydroelectric Enterprises, but it was revoked by Decree 54.852/2019, signed by Governor Eduardo Leite.

us realize the importance of the subject, is to make an analysis of the text of Bill 2.788/2019, already approved by the Chamber of Deputies and now is pending in the Federal Senate.

This project is part of the context of post-disaster legislative improvement and meets the old demand of social movements in relation to the issue. Thus, we will make a brief record of the historical process of struggles for the rights of affected populations that precedes the development of the project, managed within the framework of the External Commission of the Chamber of Deputies on the Brumadinho disaster.

2. THE HISTORY AND IMPORTANCE OF THE FIGHT FOR THE RIGHTS OF PEOPLE AFFECTED BY DAMS

The legal analyses on a certain bill usually sticks to the terms of the proposition itself, giving little space to its antecedents and foundations, which are seen in the struggles fought within civil society. The approach that is sought here is part of the understanding that human rights are conquered from the social relations of subordinate and emerging groups, which "through legal institutionalization and cultural incidence, pursue and achieve spaces that enhance their autonomy and self-esteem" (GALLARDO, 2014).

It is essential to situate the discussion by investigating historical facts that have made the expression "affected" a symbol of the struggle for rights in face of large corporations. The term came to designate a collective identity of resistance (SANTOS, 2015), gaining greater notoriety with the creation and consolidation of the Movement of People affected by Dams. Today it has been popularized and is widely spread in the political sphere, in social struggles, and in academic literature.

In this sense, it can be affirmed that the major socio-environmental disasters that occurred at the end of 2015, with the burst of the Fundão dam, owned by Samarco Mineração S.A., in Mariana/MG and at the beginning of 2019, with the burst of the Mina Córrego do Feijão dam, owned by Vale S.A., in Brumadinho/MG, attracted the attention of the press and political actors in relation to the situation of social vulnerability of the people living around these structures.

However, the struggle for the rights of the populations affected by dams in Brazil is not recent and is not restricted to ore tailings dams. Its origins date back to the Brazilian option for hydroelectric power generation at the beginning of the 20th century⁴.

At that time, the right to compensation for loss of land was granted exclusively to those who held the title deed, under the terms of Decree-Law 3365/41, which came into force in Vargas government, and establishes expropriation for public utility and public need. This excluded a good part of the occupants of the lands, such as the squatters, tenants, sharecroppers, riverine dwellers, fishermen, traditional peoples and communities.

According to Marina Reche Felipe, until the 1960s there were no major inquiries about the dictates of the Decree Law by the affected populations (FELIPE, 2016, p. 78). However, it is quite possible that such inquiries existed, but were restricted to the space where the dam was located,

⁴ In our analysis, we will make a cut aimed at specific fights that were triggered from the installation of the dams and their importance in the consolidation of the term "affected" as a symbol of resistance. It is worth noting, however, that the first Brazilian hydroelectric dams were built still in the 19th century (the Usina de Marmelos power plant, the first large in South America, is located in Juiz de Fora). For an analysis of the history of dam construction motivated by the hydroelectric expansion in Brazil and its relationship with the geopolitical context of the Cold War, in line with the North American interest in maintaining its influence in Latin America, see OLIVEIRA (2018).

given the restricted scope of the claims of people which were totally invisible given the social structures.

These enterprises intensified during the period of the military dictatorship⁵, with several constructions of large plants, resulting in the forced removal of several rural, fishing, indigenous, quilombola and traditional communities that were in the locations where the large projects were installed.

The construction of the Itaipu Hydroelectric Power Plant, whose dam was built between 1975 and 1982, caused the expropriation of 42 thousand people from an area of 780 km² of Brazilian land (and 570 km² of Paraguayan land), which led to the formation of an organized resistance movement⁶, entitled "Justice and Land" (FELIPE, 2016, p. 78-79), composed of expropriated farmers who sought support in churches and grassroots communities (RIBEIRO, 2006).

The struggles were amplified with the participation of regional, union, and religious leaders, linked to the Federation of Workers in Agriculture of the State of Paraná, the Pastoral Land Commission (CPT), and the Pontifical Commission for Justice and Peace (CPJP). This was followed by an intense popular mobilization aimed at obtaining an increase in compensation for the loss of land (RIBEIRO, 2006).

However, some groups affected by the construction of the plant did not even have the possibility to discuss some kind of compensation or repair. The Avá-guarani⁷, or Ñhandeva indigenous people, located in the western region of the state of Paraná, were expelled from their traditional land. The current military dictatorship contributed to the invisibilization of the struggles that took place during the period, given the rigid control it had in relation to public demonstrations against its acts (ALCÂNTARA *et. al.*, 2019).

Historic and sacred places for that indigenous people, like the Salto de Sete Quedas, cemeteries and archeological sites were flooded for the formation of the Power Plant Lake. The cultural perception of the indigenous people in relation to the territory was disregarded, understood not as *res* appropriate by private property, but as "a space of existence upon which significant human (and extra-human) relationships took place dynamically" (ALCÂNTARA *et. al.*, 2019).

The symbolic dimensions of land use and recognition of indigenous peoples and traditional rural communities had no place in the economic development plans at the time, revealing a common pattern of human rights violations. Based on this model, several hydroelectric plant construction projects were developed in various regions of the country. Likewise, such plans contemplated mining activity⁸.

⁵During this period several hydroelectric power plants were built, including the Itaipu Plant (whose dam for a long time was considered the largest in the world, only surpassed by the construction of the Three Gorges Plant in China, inaugurated in 2012). But it must be stressed that development plans were already common in previous governments, including hydroelectric power generation as a priority, especially in the Vargas, Dutra and Juscelino Kubitschek governments. The latter's government created the Ministry of Mines and Energy (1960), incorporating old administrative structures as well as the hydroelectric plants of Furnas and Três Marias, the latter by the state company Cemig (OLIVEIRA, 2018).

⁶ The construction of the power plant is the starting point of civil society organization in various social movements, like the Landless Workers' Movement (VANESKI FILHO, 2012) and the first organized mobilizations of affected people, which will later serve as inspiration for the creation of the Movement of People Affected by Dams.

⁷ Data of the report " Avá-Guarani: a construção de Itaipu e os direitos territoriais", developed by members and servants of the Federal Prosecution Service.

⁸ As an example, we can mention the Grande Carajás Program (PCG), whose installation of the infrastructure for its cultivation began in 1978, (COELHO, 2015) left marks and conflicts that can still be seen today in the region.

It was also during the military dictatorship that the Uruguay Project was born, which provided for the construction of 25 hydroelectric dams in the Vale do Rio Uruguai, by the Centrais Elétricas do Sul do Brasil (Eletrosul). However, unlike what happened in Itaipu, soon after the publication of the results of the review of studies on the Project there was intense social mobilization, organized through a meeting of small producers from the three southern states of the country, representatives of the Pastoral Land Commission of Santa Catarina and Rio Grande do Sul, Catholic and Lutheran pastoral and religious agents, sociologists and agronomists of the Foundation of Upper Uruguay for Research and Higher Education (REIS, 2008).

According to Maria José Reis (2008), "the anticipated negative reaction of local populations to the first two plants of the Uruguay Project - Machadinho HPP and Itá HPP - both on the Rio Uruguai, between Santa Catarina and Rio Grande do Sul, ended up interfering with the company's own traditional mode of operation. Eletrosul designated in its documents as "affected" the population to be moved from the areas destined to the installation of the future hydroelectric plants (SANTOS, 2015). The term was appropriated by the communities, which turned it into a symbol of recognition and struggle.

It was from the organization of these affected families that the Regional Commission of People Affected by Dams (CRAB) emerged, the result of several meetings begun at the end of 1979, which would later undergo several internal restructuring and expansion. In March 1985, four regional commissions began to coordinate what is now called the "Movement of People Affected by Dams"⁹ (REIS, 2008).

This popular organization had great results, such as the alteration of the axis of the Machadinho dam, aiming at preserving the land of the Terra Indígena Ligeiro (FELIPE, 2016, p. 83), as well as the Agreement of Itá in 1987, by which the affected populations obtained from Eletrosul three possible alternatives as a form of compensation for the implementation of the plants: "fair financial compensation for land and improvements, land for land in the region, and collective resettlement" (FELIPE, 2016, p. 85). Also, in 1986, the Brazilian environmental legislation was changed through the adoption of Resolution 001 of Conama, which now stipulates the obligation of Environmental Impact Studies (EIA) and Environmental Impact Reports (RIMA) for large enterprises (FELIPE, 2016, p. 82).

The redemocratization allowed the affected populations to reach more achievements, such as a fair constitutional redress in cases of expropriation (art. 5, XXIV, CRFB). In the normative plan, the constitutional mention of the requirement, as a law, of the prior environmental impact study for the installation of a work or activity potentially causing significant environmental degradation (art. 225, IV, CRFB), as well as the provision of the right to housing, later included in art. 6 of CRFB through Constitutional Amendment 26/2000¹⁰.

⁹ The official creation of the Movement of People Affected by Dams took place in March 1991, in the context of the I National Congress of People Affected by Dams, preceded by national meetings that had the objective of consolidating a national organization that could confront the plans for the construction of large dams (MAB, 2020).

¹⁰ The stipulation of the right to housing is important because it allows the normative construction of the principle of non removal, developed in the UN Comments No. 4 and 7 on Economic, Social and Cultural Rights. It is the requirement that in disputes related to housing the procedure cannot leave people homeless or vulnerable regarding human rights (SANTOS; LUFT; MEDEIROS, 2016).

However, the privatizations of a large part of the energy sector and of Companhia Vale do Rio Doce¹¹, carried out in the 1990s, changed the scope of conflicts between enterprises and populations. The new reality imposed a multiplicity of scenarios. If before the State was the central element to which the affected populations directed their demands, today several private companies, each with its own code of conduct and mode of operation, started operating the dams.

In 2000, an increase in information asymmetry and risk for the population increased, since strategic data from the corporate point of view, concerning the safety of dams, tend to be confidential, being common practice the self-monitoring, with the hiring of consulting companies by the corporations themselves responsible for the structures¹².

The absence of a normative framework on the rights of people affected has allowed companies belonging to the same business group to adopt differentiated treatment in relation to those affected from different locations (MAB, 2013). This problem is still present today.

Based on denunciations made by social movements, in 2007 the former Council for the Defense of the Rights of the Human Person (CDDPH, now the National Council for Human Rights - CNDH) constituted the Special Commission "Affected by Dams". The Final Report of the Commission highlighted several human rights violations through the methodology of case studies¹³ (CDDPH, 2010).

As recurrent practices, violations of access to information may be mentioned, manifest in the omission or simple refusal to provide relevant data to interested persons, lack of legal or technical advice to populations, provision of contradictory or false information, precarious and insufficient environmental studies, restrictive and inadequate definition of the concept of affected, omission of socio-economic and cultural specificities of affected populations, as well as in face of vulnerable groups and gaps or poor application of rules, despite formal recognition by the State of economic, social, cultural and environmental rights (CDDPH, 2010). Shortly before the CDDPH plenary session approved the respective report, Federal Decree 7,342 was also issued in 2010, which established the socioeconomic registry of those affected by hydroelectric projects.

Thus, it can be noted that the institutional treatment given to the affected populations has oscillated over the years, and the achievements are recognized as the result of enormous pressure exerted by social movements (CDDPH, 2010). In brief, we move forward from a time when the term affected was used by the enterprises to designate who should be compensated for the loss of property ownership to a true resignification of the term, which came to symbolize a unifying element of the struggles of civil society and the denunciation of human rights violations¹⁴.

¹¹ According to Luiz Jardim Wanderley, Máira Sertã Mansur and Raquel Giffoni Pinto, the company Companhia Vale do Rio Doce was responsible for about 300 geotechnical structures of that type in 2009 (WANDERLEY; MANSUR; PINTO, 2016).

¹² It should be noted that, in the specific case of mining activities, the cycle of commodities price appreciation that occurred in the period generated a significant increase in research requirements to the DPNM, as well as mining concessions and mining permits executed by the Ministry of Mines and Energy, which led to the expansion of the limits of appropriation, control and dispute for the Brazilian subsoil (GONÇALVES; MILANEZ; WANDERLEY, 2018).

¹³ The CDDPH (current CNDH) carried out studies and missions in 2007 in the localities near the Acauã dams, in the state of Paraíba; the Aimorés hydroelectric exploitation, on the Rio Doce river, between the states of Minas Gerais and Espírito Santo; the Canabrava hydroelectric plant, in the state of Goiás; Emboque Small Hydroelectric Plant, in Raül Soares, Minas Gerais; Foz do Chapecó Hydroelectric Plant, between the states of Santa Catarina and Rio Grande do Sul; Fumaça Small Hydroelectric Plant, on the Gualaxo do Sul River, between the municipalities of Mariana and Diogo de Vasconcelos, in Minas Gerais; Tucuruí Hydroelectric Plant, in Pará (CDDPH, 2010).

¹⁴ An example of this is found both at the national level, with the name chosen by the Movement of People Affected by Dams (MAB), and in international level, such as the name chosen by the International Articulation of People Affected by Vale (AIAAV).

As Carlos Vainer highlights, if in the beginning we had a *territorial-patrimonialist* conception in relation to those affected by large hydroelectric projects (which restricted the scope of the term to those who owned the property title), this concept was changing to also cover the flooded (hydro conception), which at the time appeared in the language of the World Bank¹⁵ as involuntary resettlement (VAINER, 2008). These conceptions proved to be insufficient and, progressively, the concept came to include people who suffered physical displacement (which includes that resulting from the loss of productive space) and economic displacement (which refers to the interruption of economic activities, regardless of the physical-territorial aspect) (VAINER, 2008).

At the international level, the World Commission on Dams, an independent body composed of experts from governments, companies and members of civil society, constituted with the support of the World Bank to study the reality of populations affected by such ventures between 1997 and 2000, produced a Final Report in which attention is given to the "displacement of livelihoods," considered here the deprivation of access to essential resources to traditional means of life (such as subsistence agriculture, fishing and vegetal extraction) caused by flooding of land and the alteration of the ecosystem of rivers. There is growing concern about the symbolic dimension, especially relevant when dealing with the rights of indigenous peoples and traditional communities.

However, although Decree 7,342/2010 sought to establish general parameters on the concept of affected to the licensed enterprises as of 2011 onwards, conferring elements for the action of the government and the agencies and institutions of Justice in case of non-compliance, Brazilian legislation has not advanced since then.

This fact did not go unnoticed by the United Nations Working Group on Business and Human Rights, in a visit to Brazil soon after the rupture of the Fundão dam in Mariana/MG. The group welcomed the possibility of establishing a state policy on people affected by dams and other development projects in Minas Gerais, the site of the disaster, following the example of what had been established in Rio Grande do Sul by decree (UN, 2016). However, such policies had no progress or simply suffered setbacks (which is the case of the state decree 51.495/2014, revoked last year).

At the national level, there is still no legal framework on the issue, which leaves the affected populations at the mercy of negotiations directly with the companies. Several attempts have been made to establish it, but the agenda has not advanced in Congress¹⁶.

With the rupture of the Mina Corrego de Feijão Dam, owned by Vale, in the Paraopeba River basin, in Brumadinho/MG, the discussion of the subject was once again highlighted. Recently there was the approval of Bill 550/2019¹⁷ in a remote plenary session by the Federal Senate. This project, however, makes changes in the National Dam Safety Law (Law 12,334/2010), as well as makes civil, administrative and criminal sanctions more rigid in case of non-compliance. It is a necessary improvement in the rules of accountability¹⁸, but it is not confused with the institution of a policy of

¹⁵ Provisions contained in documents of international organizations, such as the World Commission on Dams, constituted with the support of the World Bank, influence and serve as an instrument of pressure for the adequacy of internal legislations.

¹⁶ See Bill 1.486/2007, which dealt with the obligation of social assistance to the affected populations, as well as Bill No. 29/2015, appended to Bill 2.788/2019.

¹⁷ This project is, until the date of publication of this text, in the process of presidential sanction.

¹⁸ But perhaps insufficient. For a critical approach to the changes in the National Dam Safety Act, see MILANEZ and WANDERLEY (2020).

rights for the populations affected. This regulation is sought by Bill 2.788/2019, which is now under analysis.

3. CONSIDERATIONS ON BILL 2.788/2019 ON THE NATIONAL POLICY ON THE RIGHTS OF AFFECTED POPULATIONS

Bill 2.788/2019, elaborated by several federal deputies, "institutes the National Policy on the Rights of Populations Affected by Dams". Already approved by the Chamber of Deputies, it is currently in progress in the Federal Senate, with Senator Leila Barros (PSB-DF) as rapporteur. This proposal for legislative change is part of the post-disaster context of Fundão (2015) and Mina Córrego do Feijão (2019) dams, and is the result of the work of the External Commission of the Chamber of Deputies on the disaster of Brumadinho¹⁹, but preceded, as we have seen, by decades of popular mobilization.

The proposal has clear merits, since it establishes a legal concept of affected populations, disciplining their rights, as well as obligations to the entrepreneur responsible for the dam, who must bear the costs of specific programs aimed at such populations. It is a proposal that largely meets the wishes of the Movement of People Affected by Dams (2013), constituting an important instrument in the defense of the affected populations. There is, however, room for complementation and improvement.

The §1, item II of Article 1 of Bill 2,788 brings an important expansion of the scope of the future law, bearing in mind that its focus is to establish rights for the populations affected by the construction, operation or deactivation of dams, regardless of the dimensions of the undertaking (BRAZIL, 2019). It would not make sense, therefore, to abide to the limiting criteria set forth in the National Dam Safety Law (Law 12,334/2010). Issues present in that law, such as the height of the massif, the total capacity of the reservoir, the type of waste it contains and the classification of the dams by categories of damage cannot prevent the recognition as affected populations of communities affected by the installation of the structures, regardless of their dimensions.

Also worthy of note is the mention made by §2 of art. 1 of Bill 2,788 on the applicability of the provisions of the future law to the environmental licensing of dams and to emergency cases resulting from leaks or ruptures of these structures, whether occurring or imminent (BRAZIL, 2019). However, more emphatic wording may be needed to indicate the applicability of the law to "all stages of environmental licensing," making the approval of the prior license conditional on local consultation with the affected populations.

Regarding the scope of its provisions, it would be important to have a provision that explicitly does not exclude rights and guarantees expressed or arising from the regime and principles adopted by the Constitution or by other laws, as well as international treaties to which Brazil might be a member state, in a formulation similar to §2 of art. 5 of the Brazilian Constitution.

In turn, article 2 of Bill 2,788 represents a great achievement, since finally the concept of "populations affected by dams" becomes part of an ordinary law. Currently the only normative definition of "affected" is found in Decree 7,342/2010, signed by former president Luiz Inácio Lula da

¹⁹ Other bills resulting from the Commission's work are pending in Congress, such as bill 2.787/2019, which typifies the crime of ecocide and bill 2.790/2019, which incorporates the prevention of disasters induced by human action to Law 12.608/2012 (Statute of Protection and Civil Defense).

Silva, which instituted the obligation of a socioeconomic registry to identify, qualify and publicly register the population affected by electricity generation projects.

However, the decree is a fragile enactment, subject to revocation by the Executive Branch itself. Proof of this was the recent revocation of its articles 3 and 4, determined by Decree 10.087/2019, already in the government of Jair Bolsonaro. These revoked dispositions established the Interministerial Committee of the Socioeconomic Registration, collective body linked to the Ministry of Mines and Energy, which represented a weakening of the social participation in this area (MAB, 2019).

The recent ruptures of mining tailings dam also demonstrate the need to expand the scope of the provisions of that decree, since in such a decree the mandatory registration reaches only hydroelectric dam projects. It is therefore considered a positive point that Congress has sought to define this concept through the law.

The head provision of Article 2 defines populations affected by dams as "all those subject to one or more of the following impacts caused by the construction, operation, deactivation or rupture of dams", which are listed in the respective items (BRAZIL, 2019). However, there is no mention of planning stage of the projects, at which point popular participation could avoid a big part of the human rights violations, often verified in the execution stage.

The items of art. 2 seek to contemplate both the situation of those who lose ownership or possession of property, as well as those who are adversely affected by the devaluation of real estate as a result of the location near or downstream of these structures. They also reach the person affected by the loss of productive capacity of the land and natural elements of the landscape that generate income, directly or indirectly, as well as the remaining part of property partially affected, which affects the income, subsistence or way of life of the populations. They also seek to cover people who lose the product or areas of fishing activity or natural resource management, communities that suffer prolonged interruption or alteration of water quality that damages the supply, lose sources of income and work, suffer a change in habits, as well as losses or reductions in their economic activities and negative social, cultural and psychological effects due to the removal or evacuation in emergency situations. The reality of indigenous populations and traditional communities that have changed their way of life, as well as populations that have interrupted access to urban areas and rural communities and suffer "other possible impacts, indicated at the discretion of the licensing environmental agency" (BRAZIL, 2019).

It is a broad definition, reaching not only the physically displaced and the economically displaced, but all those who suffer alterations in their way of life. However, in item VIII, explicit mention should be made of quilombola communities, victims of frequent human rights violations in the implementation of dams, as attested by the Report of the former CDDPH (2010). In relation to indigenous peoples and quilombola and traditional communities, it is also necessary to ensure the right to free, prior, informed, and good faith consultation, as prescribed in ILO Convention 169, as well as the right to consent or not to the undertaking, whenever there is a risk to the fundamental rights of those peoples (SOUZA FILHO *et. al.*, 2019).

There is also a lack of definition, in item V, about the time that could characterize a "prolonged interruption" of the water supply. This indetermination opens room for questioning, and it is essential

to consider that the text aims to cover any reduction in the flow that compromises the supply or the quality of the water offered to those populations.

Also, the sole paragraph of Article 2 highlights the applicability of the provision to populations affected by dams "existing in the region at the time of environmental licensing of the dam or emergency due to leakage or rupture of the structure, occurred or imminent" (BRAZIL, 2019). This provision was not included in the initial project, having been included by amendment. This inclusion was not positive.

In disasters of major proportions, as in the case of the rupture of the Fundão dam, several localities were affected²⁰, not limited to the dam region. It is necessary a delimitation that prevents restrictive interpretations, reaching all and any territory affected in similar cases.

Article 3 of Bill 2.788/2019 establishes a list of rights of affected populations, which will be established "according to what has been agreed in the process of informed and negotiated participation of the Program on the Rights of Populations Affected by Dams (PDPAB) in the specific case" (BRAZIL, 2019). The provision must be interpreted in joint with art. 6, which prescribes the creation of a national collective body, of a consultative and deliberative nature, which will have the function of monitoring and inspecting the National Policy on the Rights of Populations Affected by Dams (PNAB) and with art. 7, which prescribes the establishment of a Local Committee of the National Policy on People Affected by Dams, "of tripartite composition and provisional character, responsible for monitoring, inspecting and evaluating the PDPAB in each concrete case" (BRAZIL, 2019).

It is clear from the structure of the text that this Committee will have great importance, since it will be directly responsible for ensuring the informed participation of the population affected in each specific case, and will also manifest itself before the body responsible for the dam's environmental licensing process, although of non-binding character (sole paragraph of art. 7 of the Bill). The deliberations of the collective bodies will have the participation, with the right to a voice, of members of the Federal Prosecution Service and the Public Defender's Office (art. 8 of the Bill). The project does not, however, detail the composition of this Committee, nor of the federal agency, leaving the regulation for a later moment.

The legislator's option for the tripartite composition model (representatives of the Government, entrepreneurs and representatives of civil society, indicated by the social movements of those affected by dams) reinforces the dynamics of the *multistakeholders*, present in the UN Guiding Principles on Business and Human Rights²¹. There are several problems resulting from this option, which may provide a capture of the deliberative instances by the enterprises.

Considering that the Program for the Rights of Populations Affected by Dams will be established in each concrete case through negotiations with the enterprises, to be approved by this Committee, and, according to art. 8 of Bill 2.788/2019, it will be implemented "at the expense of the entrepreneur" (BRAZIL, 2019), there is a risk that the representatives of the business sector will seek to empty the content of the respective programs with the objective of reducing costs. The tripartite

²⁰ The toxic sludge of tailings traveled more than 600 km. to its estuary, located in Vila de Regência (Regência Augusta), in the city of Linhares/ES (MILANEZ and LOSEKANN, 2016).

²¹ An in-depth discussion on the issue of multistakeholders can be found in the work of David BILCHITZ (2013) on Guiding Principles. In Brazil, the Decree 9571/2018 that intended to establish national guidelines on "Business and Human Rights" is also tributary of this trend, as we have already had the opportunity to expose (HOMA, 2018).

composition, in practice, allows the entrepreneur to occupy the two poles of the same negotiation, which makes it unbalanced.

The items of Art. 3 establish a nonexhaustive list of rights to the affected populations that may be included in the respective Programs. It is worth mentioning item V, which brings the essential provision of independent technical advice, of a multidisciplinary nature, to be chosen by the affected communities to guide them in the process of participation and funded by the entrepreneur, without their interference. Studies related to the case of the rupture of the Fundão dam demonstrate the importance of these advisory services (SOUZA and CARNEIRO, 2019). As this is a central point for the achievement of the rights of the affected populations, it would be important that this right is not subject to the need for pactuation, figuring as a prerequisite for the implementation of the enterprise.

This list prescribes redress by means of replacement, in accordance with § 1 of art. 3 of the Bill, collective resettlement as a priority option (which should be interpreted restrictively, so as not to hurt the free determination of indigenous peoples, quilombola and traditional communities in relation to their way of life and the symbolic dimension that concerns the lands they occupy), the free and informed option in relation to the alternatives of reparation (which will only be assured through a mechanism such as technical assistance, that allows for the elimination of asymmetry of information between those responsible for the enterprise and the communities), the preferential collective negotiation regarding the forms of reparation and the parameters for the elaboration of a matrix of damages, as well as the stages of planning and the chronogram of resettlement and elaboration of housing projects (BRAZIL, 2019). The wording of item IV with the term "priority" gives room for the use of a strategy widely used by the enterprises, which is individual negotiation (FELIPE, 2016, p. 84), which could represent a step backwards.

The items bring the provision of emergency assistance in the event of accidents or disasters, aiming at ensuring the maintenance of living standards of families and individuals in conditions at least equivalent to those before. In view of what was learned from the Fundão Dam case, it would be important to avoid that the aid was paid only to a "family leader", which generated significant distortions in relation to the situation of affected women (DPES, 2018). One way to improve this would be to make it explicit in the text that this aid would be due to any person who contributed to the family income.

The extensive list of items also prescribes for fair cash compensation and, except in the event of disasters, prior compensation that includes property values and improvements, lost profits and monetary resources that ensure the restoration of conditions equivalent to the previous ones (BRAZIL, 2019). It also mentions reparation for moral, individual and collective damages resulting from the inconvenience suffered, rural resettlement or urban resettlement, through self-management processes, housing conditions similar to the previous ones in terms of dimensions and quality of the building and suitable for groups of people in vulnerable situations, presence of spaces of sociability and collective living in the case of resettlement projects, bookkeeping and registration or granting of the right to use the properties arising from resettlement within a maximum period of 12 months, as well as containing provisions regarding popular participation in resettlement projects, plans for economic and social recovery, development and access to information, with express

provision for public consultation of the list of persons and organizations registered for reparation measures (BRAZIL, 2019).

This public consultation, prescribed in Clause XVIII of Art. 3 of the Bill, deserves highlighting. The legal regulation of the registration is fundamental, as exemplified by the burst of the Fundão dam, whose socioeconomic registration carried out by the Renova Foundation is the object of strong criticism, given its non-participatory and not very transparent methodology (TASSE, 2020). According to Andrea Zhouri, many problems arise from the fact that the registry was established in a Transaction and Conduct Adjustment Term that reduced the disaster's classification as a case of environmental conflict, restricting it "to the sphere of negotiation between interested parties" (ZHOURI *et. al.*, 2018).

Paragraphs 1 and 2 of art. 3 are important when establishing guidelines for reparation, which seek to contemplate the experiences and specificities of groups, communities, families and individuals, allowing for replacement, indemnification, equivalent compensation or social composition (BRAZIL, 2019). This reparation will be guided by the principle of the centrality of the victim's suffering, which requires the consideration and participation of such people as central points in the legal discussion on reparation and in the formulation of victimization prevention mechanisms to prevent new harmful events from happening (TRINDADE, 2003; SENRA, 2016). This is an essential provision for effective reparation.

Among the possibilities not mentioned by the Bill, there is a lack of a provision that expressly contemplates the peculiar situation of indigenous peoples, quilombola and traditional communities, which have the right to prior, free and informed consultation in accordance with ILO Convention 169.

An old proposal of the Movement of People Affected by Dams could also be discussed, which deals with the constitution of a specific reparatory fund called *Conta PNAB*, destined to finance the rights policy. According to this logic, a reference price for social investment would be set at the auction of the enterprise, with the management of the Fund being of responsibility of the PNAB Local Committee (MAB, 2013). This is a viable alternative that would increase the protagonism of the affected people in the reparation and could be discussed by Congress.

In turn, art. 4 of the Bill reinforces the right of populations affected by dams that exploit the land in a family economy, as landowner, landlord or tenant, or that have a bond of dependency on the land for their physical and cultural reproduction, to reparation for material losses, compensation for compulsory displacement resulting from resettlement, and compensation for immaterial losses, in order to reconstitute their livelihoods (BRAZIL, 2019).

The mention made by Art. 5 of the Bill to specific programs that are aimed at the most vulnerable population (women, the elderly, children, people with disabilities, indigenous peoples, traditional communities, construction workers, fishermen and fishing activities, etc.), domestic and livestock animals, as well as the impacts in the area of health, environmental sanitation, housing and education of the Municipalities that will receive the construction workers or those affected by a leak or rupture of the dam, as well as the communities receiving resettlement or relocation of the families affected (BRAZIL, 2019) is considered positive.

Finally, art. 10 of the Bill revokes paragraphs 1, 2 and 3 of the Consolidation of Labor Laws (CLT), concerning the assessment of off-balance sheet damages by the court. This is also a positive change, since the provisions were included in that law through the 2017 Labor Reform and promote undue limitations to the effective reparation of the offended workers. Considering the victims of the

Mina Córrego de Feijão dam burst, in Brumadinho/MG, in fact the compensation parameters related to the reparation cannot be linked to the worker's contractual salary, under penalty of serious violations and distortions.

Therefore, in general lines, in spite of the possible improvements and suggestions of writing, Bill 2.788/2019 attends in good part to the demands of popular movements, constituting an advance in normative terms. In case it is approved and becomes law, it has the potential to serve as an important instrument in the realization of Human Rights.

REFERÊNCIAS BIBLIOGRÁFICAS | REFERENCES | REFERENCIAS

ALCÂNTARA, Gustavo Kenner; OMOTO, João Akira; ARAÚJO JÚNIOR, Julio José; RAMOS, Luciana Maria de Moura (org.). **Avá-Guarani: a construção de Itaipu e os direitos territoriais**. Brasília: ESMPU, 2019.

BRASIL. Câmara dos Deputados. **Projeto de Lei 2.788/2019**. Institui a Política Nacional de Direitos das Populações Atingidas por Barragens, e dá outras providências. Available at: https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=1744723&filename=PL+2788/2019. Accessed Sep 8, 2020.

BRASIL. Senado Federal. **Projeto de Lei 2.788/2019**. Instituiu a Política Nacional de Direitos das Populações Atingidas por Barragens (PAB); prevê o Programa de Direitos das Populações Atingidas por Barragens (PDPAB); estabelece regras de responsabilidade social do empreendedor; revoga dispositivos da Consolidação das Leis do Trabalho (CLT), aprovada pelo Decreto-Lei nº 5.452, de 1º de maio de 1943; e dá outras providências. Available at: <https://legis.senado.leg.br/sdleg-getter/documento?dm=7990532&ts=1594034461618&disposition=inline>. Accessed Sep 8, 2020.

COELHO, Tádzio Pereira. **Projeto Grande Carajás: trinta anos de desenvolvimento frustrado**. In: ZONTA, Márcio; TROCATE, Charles (Org.). *A questão mineral no Brasil – vol. 1*. Marabá/PA, Editorial iGuana, 2015, available at: <https://www.ufjf.br/poemas/files/2014/07/Coelho-2015-Projeto-Grandes-Caraj%C3%A1s.pdf>. Accessed Sep 22, 2020.

CONSELHO DE DEFESA DOS DIREITOS DA PESSOA HUMANA (CDDPH). **Relatório da Comissão especial "Atingidos por Barragens"**: Resoluções nº 26/06, 31/06, 01/07, 02/07, 05/07. Brasília, 2010, available at: <http://pfdc.pgr.mpf.br/temas-de-atuacao/populacao-atingida-pelas-barragens/atuacao-do-mpf/relatorio-final-cddph>. Accessed Ago 31, 2020.

DEFENSORIA PÚBLICA DO ESPÍRITO DO SANTO (DPES). **Relatório Preliminar sobre a Situação da Mulher Atingida pelo Desastre do Rio Doce no Estado do Espírito Santo**. Vitória, 2018.

FELIPE, Marina Reche. **Atingidos por barragens e as lutas pela regulamentação de direitos**. 2016. 126 f. Dissertação (Mestrado em Sociologia Política) – Programa de Pós-Graduação em Sociologia Política, Universidade Federal de Santa Catarina, Florianópolis, 2016.

GALLARDO, Helio. **Teoria crítica: matriz e possibilidade de direitos humanos**. Tradução de Patrícia Fernandes. 1ª ed. São Paulo: Editora Unesp, 2014.

GONÇALVES, Ricardo Junior de Assis Fernandes; MILANEZ, Bruno; WANDERLEY, Luiz Jardim. **Neoxtratativismo Liberal-Conservador: a Política Mineral e a Questão Agrária no Governo Temer**. *Revista OKARA: Geografia em debate*/Universidade Federal da Paraíba, v. 12, n. 2, p. 348-395, Available at: <https://periodicos.ufpb.br/ojs2/index.php/okara/article/view/41321>. Accessed Ago 31, 2020.

HOMA – Centro de Direitos Humanos e Empresas. **Reflexões sobre o Decreto 9571/2018 que estabelece Diretrizes Nacionais sobre empresas e Direitos Humanos**. In. *Cadernos de Pesquisa*

Homa, vol. 1, n. 7, 2018, Available at: <http://homacdhe.com/wp-content/uploads/2019/01/An%C3%A1lise-do-Decreto-9571-2018.pdf>. Accessed Ago 31, 2020.

MILANEZ, Bruno; LOSEKANN, Cristiana (Org.). **Desastre no Vale do Rio Doce: antecedentes, impactos e ações sobre a destruição**. Rio de Janeiro: Letra e Imagem, 2016.

MILANEZ, Bruno. WANDERLEY, Luiz Jardim. **O número de barragens sem estabilidade dobrou, “e daí?”: uma avaliação da (não) fiscalização e da nova Lei de (in)Segurança de Barragens**. In: Revista Versos – Textos para Discussão, vol. 4, n. 4, 2020, p. 1-14, available at: <https://www.ufjf.br/poemas/files/2017/07/Milanez-2020-O-n%C3%BAmero-de-barragens-sem-estabilidade-dobrou-Versos.pdf>. Accessed Oct 11, 2020.

MOVIMENTO DOS ATINGIDOS POR BARRAGENS (MAB). **PNAB: Política Nacional de Direitos das Populações Atingidas por Barragens** (Cartilha). 2013. Available at: http://www.mpsp.mp.br/portal/page/portal/documentacao_e_divulgacao/doc_biblioteca/bibli_servicos_produtos/BibliotecaDigital/BibDigitalLivros/TodosOsLivros/PNAB-Politica-Nacional-de-Direitos-das-Populacoes-Atingidas-por-Barragens.pdf. Accessed Sep 13, 2020.

_____. **I Congresso Nacional dos Atingidos por Barragens**. 03 jun. 2020. Available at: <https://mab.org.br/timeline/i-congresso-nacional-dos-atingidos-por-barragens/>. Accessed Sept. 13, 2020.

OEA. Comissão Interamericana de Direitos Humanos. **Criminalização de Defensoras e Defensores de Direitos Humanos: Criminalização do trabalho de defensoras e defensores de direitos humanos**. OEA/Ser. L/V/II.Doc. 49/15.31, 2015, ISBN 978-0-8270-6529-1, 2015, available at: <http://www.oas.org/pt/cidh/docs/pdf/criminalizacao2016.pdf>. Accessed Sept. 22, 2020.

OLIVEIRA, Nathalia Capellini Carvalho de. **A grande aceleração e a construção de barragens hidrelétricas no Brasil**. *Varia hist.* [online]. 2018, v. 34, n. 65, p. 315-346, Available at: <http://dx.doi.org/10.1590/0104-87752018000200003>. Accessed Sep 22, 2020.

ORGANIZAÇÃO DAS NAÇÕES UNIDAS (ONU). **Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Brazil**. Human Rights Council, A/HRC/32/45/Add.I, 2016, available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/45/Add.1. Accessed Sept, 2020.

REIS, Maria José. **A instalação de hidrelétricas no Vale do Rio Uruguai e a constituição de um campo social de conflitos**. *Ilha – Revista de Antropologia/Universidade Federal de Santa Catarina*. 2008, v. 10, nº 1, p. 27-50, available at: <https://doi.org/10.5007/2175-8034.2008v10n1p27>, Accessed Sept. 21, 2020.

RIBEIRO, Maria de Fátima Bento. **Itaipu, a Dança das Águas: histórias e memórias de 1966 a 1984**. 2016. 269 f. Tese (Doutorado em História) – Universidade Estadual de Campinas, Campinas/SP, 2006.

SANTOS, Mariana Corrêa dos. **O conceito de “atingido” por barragens – direitos humanos e cidadania**. *Revista Direito e Práxis*, Rio de Janeiro, v. 6, n. 11, p. 113-140, 2015.

SANTOS, Angela Moulin Simões Penalva; LUFT, Rosangela Marina; MEDEIROS, Mariana Gomes Peixoto. **Direito à Moradia: um direito social em construção no Brasil – a experiência do aluguel social no Rio de Janeiro**. *Revista Planejamento e Políticas Públicas/Instituto de Pesquisas Econômicas e Aplicadas*, 2016, n. 46, p. 217-242. Available at: http://repositorio.ipea.gov.br/bitstream/11058/6575/1/ppp_n46_direito_moradia.pdf. Accessed Sept. 21, 2020.

SANTOS, Boaventura de Sousa; CHAUI, Marilena. **Direitos humanos, democracia e desenvolvimento**. São Paulo: Cortez, 2013.

SENRA, Laura Monteiro. **O princípio da centralidade do sofrimento da vítima e seus reflexos na prestação jurisdicional brasileira**. 2016. 49 f. Monografia (Direito) – Universidade Federal de Juiz de Fora/MG, available at: <http://homacdhe.com/wp-content/uploads/2016/12/Monografia-Laura-Senra.pdf>. Accessed Aug. 20, 2020.

SOUZA, Tatiana Ribeiro de; CARNEIRO, Karine Gonçalves. **O direito das “pessoas atingidas” à assessoria técnica independente: o caso de Barra Longa (MG)**. *Revista Sapiência: Sociedade, Saberes e Práticas Educacionais/Universidade Estadual de Goiás, Goiânia*, v. 8, n.2, p. 187-209, 2019.

SOUZA FILHO, Carlos Frederico Marés de; SILVA, Liana Amin Lima da; OLIVEIRA, Rodrigo; MOTOKI, Carolina. GLASS, Verena (Org.). **Protocolos de consulta prévia e o direito à livre determinação**. São Paulo: Fundação Rosa Luxemburgo; CEPEDIS, 2019.

TASSE, Luciana. **“Gato e sapato”: a solução negociada e a pilhagem da bacia do rio Doce**. *Revista Eletrônica Direito e Sociedade/Universidade La Salle. Canoas/RS*, v. 8, n. 2, 2020, disponível em: <http://dx.doi.org/10.18316/redes.v8i2.6524>. Accessed May 21, 2020.

TRINDADE, Antônio Augusto Cançado. **Tratado de Direito Internacional dos Direitos Humanos. Porto Alegre**: Sergio Antonio Fabris Editor, 3 v., 2003.

VAINER, Carlos Bernardo. **Conceito de “atingido”: Uma revisão do debate**. In: ROTHMAN, Franklin Daniel. *Vidas Alagadas – Conflitos Socioambientais, Licenciamento e Barragens*. Viçosa, MG: Ed. UFV, 2008, p. 39-63.

VANESKI FILHO, Ener. **A construção da Usina de Itaipu e o surgimento de atores contra-hegemônicos**. *Revista Paradigma/Universidade de Ribeirão Preto*. 2012, XVII, n. 21, p. 205-217, Jan./Dec. 2012.

WANDERLEY, Luiz Jardim; MANSUR, Maíra Sertã; PINTO, Raquel Giffoni. **Avaliação dos antecedentes econômicos, sociais e institucionais do rompimento da barragem de rejeito da Samarco/VALE/BHP em Mariana (MG)**. In: MILANEZ, Bruno; LOSEKANN, Cristiana (Org.). *Desastre no Vale do Rio Doce: antecedentes, impactos e ações sobre a destruição*. Rio de Janeiro: Letra e Imagem, 2016.

ZHOURI, Andréa; OLIVEIRA, Raquel; ZUCARELLI, Marcos; VASCONCELOS, Max. **O desastre no rio Doce: entre as políticas de reparação e a gestão das afetações**. In.: ZHOURI, Andréa (Org.). *Mineração, Violências e Resistências: um campo aberto à produção de conhecimento no Brasil*: Editorial iGuana – ABA, 2018.