

03
Vol. I

Cadernos de Pesquisa

eISSN 2595-5330

A brief analysis of the first Brazilian Public Hearing on Human Rights and Business



CENTRO DE
DIREITOS HUMANOS
E EMPRESAS



FORDFOUNDATION

Cover: editing and typesetting by Gabriel Lima Miranda Gonçalves Fagundes

Cadernos de Pesquisa - Homa

Vol. 01 (July 2018)

Juiz de Fora: Homa, 2018. Biannual.

Law - Journals

eISSN: 2595-5330

Universidade Federal de Juiz de Fora

Rua José Lourenço Kelmer, s/n – Campus Universitário

Bairro São Pedro – CEP: 36036-900 – Juiz de Fora – MG

CNPJ: 21.195.755/0001-69

ROLAND, Manoela C., MANSOLDO., Felipe F., SENRA, Laura M., FERREIRA, Lívia F. A brief analysis of the first Brazilian Public Hearing on Human Rights and Business. In. Cadernos de Pesquisa Homa, Vol. 1, No. 3, 2018.

COORDINATION

Ph.D. Professor Manoela Carneiro Roland

AUTHORS

Felipe Fayer Mansoldo

Laura Monteiro Senra

Lívia Fazolatto Ferreira

Manoela Carneiro Roland

TYPESETTING

Gabriel Lima Miranda Gonçalves Fagundes

TRANSLATION

Davi Marcenes Cunha

INTRODUCTION

Two years after the Fundão dam failure in Minas Gerais, an environmental crime that left 19 dead and a trail of destruction all along the course of the river Rio Doce, affecting several communities on the banks of the basin, little progress has been made in repairing the victims and holding the offenders accountable.

Aiming at gathering the most diverse sectors of society involved in some way with the disaster, it was held in the city of Vitória, Espírito Santo, the second seminar hold annually since the burst of the Fundão Dam, the *Seminário de Balanço de 2 Anos do Rompimento da Barragem de Fundão*. The event was organized by several institutions, among research groups, such as the Organon (UFES) and the Homa (UFJF); Government agencies, such as the Public Defender's Office of Espírito Santo and the Federal Public Ministry; and civil society movements, such as the Movement of People Affected by Dams (MAB).

Several presentations sought to resume the chronology of the environmental crime, indicating the affected localities and opening space, to the greatest extent possible, for the strong reports of people who still suffer the consequences of the crime to this date. The initiatives taken so far by public agencies to fully repair the damage and the challenges to be overcome were discussed by researchers and authorities present. At the end of the seminar, a document was produced, called the *Rio Doce Charter*¹, which highlighted the current scenario of violation of rights by business and by the State, and made propositions that could help transform the current reality.

In this context, one day after the seminar, fulfilling its institutional function of defense of social interests, the Federal Attorney's Office for Citizens' Rights (PFDC), of the Federal Prosecution Service, held the *1st Brazilian Public Hearing on Human Rights and Business*, seeking to provide a space for the manifestation of the most diverse sectors that are inserted, in some way, in the theme, as well as jointly building a panorama on what is being produced and discussed in the Brazilian context on the relationship between the business performance and the consequent violations of Human Rights caused by them.

¹The full letter is available at: <https://contatoseminariode.wixsite.com/balanco2anos/single-post/2017/11/08/Leia-a-CARTA-DO-RIO-DOCE-elaborada-ao-final-do-Semin%C3%A1rio>

In order to analyze the public hearing held by the PFDC, this work is structured, first of all, as a brief theoretical approach on the institute, highlighting its foundations, objectives and the possibilities of action on the part of the Prosecution Service; it also briefly exposes the difficulties faced in order to prevent it from being deviated from its objective, especially when it comes to hearings on the subject of Human Rights and Business.

In a second moment, the event was briefly reported, highlighting the chosen format and some emblematic speeches, which reported cases of violation of rights perpetrated by various economic sectors throughout the Brazilian territory, raising fundamental points for the rethinking of the theme.

Finally, we highlight the importance of initiatives such as this to enrich the debate on the issue of Human Rights and Business in the Brazilian context, which is marked by a logic of profound asymmetry between those who suffer Human Rights violations and the entities responsible for them. That is the result from the absence of strong state action, corporate capture in various fields, and the elaboration of regulatory frameworks marked by voluntarism, which weakens the debate and is not capable of effectively holding violators liable.

PUBLIC HEARING: FUNDAMENTALS, OBJECTIVE AND CONTRADICTIONS WITH THE REALITY

The public hearing was thought of as a mechanism that makes it possible to implement the participatory democratic regime, since it gives citizens the prerogative of demonstration directly on certain socially relevant issues. It is possible to notice that this form of participation generates greater legitimacy to the decisions of the Public Administration, since the dialog being built this way means an open channel without intermediation with the population, giving the impression that the agendas are being debated in a more transparent and democratic manner.

They can be carried out on the initiative of the Prosecution Service, as an entity responsible for protecting the democratic regime and the public interest. In its sphere of action, it functions as a kind of "social interlocutor" (CÉSAR, 2011, P. 361), mobilizing

society around a certain issue and gathering information so that it can guide its actions in a more forceful manner.²

The format of the public hearing can be used both to establish a collective dialogue between the Government and society, with the purpose of discussing and seeking alternatives to issues of social interest; as well as an instrument for gathering information on certain issues, which may also result in the issuance of proposals.

It is important to emphasize, however, that despite being an "interpretative and concrete vector of public interest" (CABRAL, 2006, p. 205), the possible conclusions of the meeting do not have binding force, and do not prevent public agents from deliberating against the proposed referrals. When this happens, it is necessary to have a greater argumentative burden to justify their choice for the decision contrary to what was concluded as beneficial to society itself.

In relation to the format of a public hearing, it is noted that it is not predetermined in the legislation, however, in order for it to achieve the objective for which it was thought, which is full social participation, it is important to take some precautions, such as: the creation of a space that provides equality of speech to all participants, the establishment of rules that ensure the effective manifestation of those interested, the availability of prior and wide publicity about the event, and also the choice dates, schedules and places that enable the presence of a larger number of people.

Furthermore, it is important that the demands brought by the population really influence the decisions that will be taken from the hearing. It is inadmissible, contrary to the institute's own purposes, that public agents arrive at the hearing with pre-established decisions.

Contrasting everything that was previously presented to the public hearings held, usually in the start-up phase and with the active participation of the companies, the discrepancy between theory and practice can be observed, in view of the fact that the objective of these events is, most of the time, only the fulfillment of a protocol,

²This action is established in the Lei Orgânica do Ministério Público, article 27, sole paragraph, item II: Art. 27. Cabe ao Ministério Público exercer a defesa dos direitos assegurados nas Constituições Federal e Estadual, sempre que se cuidar de garantir-lhe o respeito: Parágrafo único. No exercício das atribuições a que se refere este artigo, cabe ao Ministério Público, entre outras providências: IV - promover audiências públicas e emitir relatórios, anual ou especiais, e recomendações dirigidas aos órgãos e entidades mencionadas no caput deste artigo, requisitando ao destinatário sua divulgação adequada e imediata, assim como resposta por escrito."

indicating that the business activity was presented and discussed with the affected. However, they are not guaranteed real conditions of manifestation and influence on the decision making.

From the reports of the affected people who have participated in these spaces in different contexts, is it possible to note a pattern of functioning that prevents real popular participation and effective debate. This "space for dialogue", in fact, is captured by economic interests and serves only to fulfill a formality, being an artifice used by the Government and companies to legitimize their actions, under the false justification that the decision making took into account the demands of society.

The public hearing on Human Rights and Business portrayed, which did not concern a specific case, but sought to outline a scope on the subject in the Brazilian context, was thought out and structured so that this type of capture would not occur, but rather that there would be an exhibition of different ideas, promoting a space in which all participants would be given the same conditions of speech. It is important to point out that the most diverse fronts were invited to the debate, such as the people affected by several enterprises spread throughout Brazil, the academy, researchers, civil society organizations, members of the Government and also sectors linked to business activity, the latter chose not to attend, as was announced during the event.

FIRST BRAZILIAN PUBLIC HEARING ON HUMAN RIGHTS AND BUSINESS

The public hearing on Human Rights and Business held on November 8, 2017, at the Federal University of Espírito Santo (UFES), and organized by the Working Group on Human Rights and Business of the Federal Attorney's Office for Citizens' Rights, which is part of the Federal Prosecution Service, was an important event to show what has been being discussed in Brazil regarding the theme, to expose the many cases of violations that happen all over the territory and be a place for sharing knowledge that might be useful in the formation of new parameters for a national public police on the theme.

In the morning, the hearing had the formation of roundtables so that some guests could make brief presentations with their thoughts, studies and contributions to the theme. Among the guests there were affected people, who reported the repeated violations of Human Rights perpetrated by business of different sectors in

Brazil and the harsh reality that communities were exposed to, and also about the handling of each case by companies and the government.

Among the speeches during the morning that contributed a lot for the enrichment of the debate on the theme, we can highlight the one of Mr. Paulo Guaresqui, Administrative Chief Prosecutor of the Federal Prosecution Service of Espírito Santo, who mentioned some cases of violation that have taken place in Brazil, and shows that the guiding principles proposed by UN are very far from being observed by companies.

As a member of the Movement of People affected by Dans (MAB), Yuri Paulino pointed out the similar logic of action among companies, which produces Human Rights violations in a systematic way. Moreover, through MAB's monitoring work throughout Brazil, he demonstrated that this pattern of project does not translate into improvement in living conditions of affected populations, but only environmental and labor exploitation.

The AHOMAR member, Alexandre Anderson, a fisherman affected in the Baía de Guanabara bay, denounced the precarious state of the inspection agencies and stressed the importance of the pressures exerted by civil society and associations in relation to the abuses of companies, showing that resistance and the creation of support networks are essential in this struggle.

Noêmia Magalhães, affected by the enterprise at Porto do Açu, spoke of the relevance of this type of event, contrasting it with the public hearings that she participated in her community, which proved to be a mere formality, the decisions having already been made because, in addition to being allocated to places that were difficult to access, they occurred at times when most of the community was working. Finally, she reported the threats and difficulties that she faced where she lives.

Still in relation to the speeches of affected people, Cosme Vitor, from the Associação de Favelas de São José dos Campos, an association of the slums, exposed the reality of criminalization of the slum dwellers and the invasion suffered by the communities in favor of the construction of new enterprises, causing forced relocations that produces conflicts between the communities.

On the subject of slave labor, Jorge Ferreira dos Santos, of Articulação dos Empregados of Minas Gerais, a joint articulation of rural employees, presented alarming data on the use of a high contingent of slave-like labor on coffee farms in his state, highlighting the connivance of the Government with this reality for the lack of

inspection and effective punishment, as well as the negotiation with companies by means of signing TAC's without the participation of those who suffer the ills.

Vanessa Rosa Santos, who was affected by the Anglo American in Conceição do Mato Dentro, reported the massacre suffered and the loss of her community's identity, with the contamination of the soil and all available drinking water, remaining at the mercy of the gallons provided by the company. In addition, she denounced the threats suffered by her family as a result of an action she prosecuted and won, regarding the cancellation of a public hearing organized by the company for lack of proper publicity for those affected to be able to participate.

Also within this theme, Rosalva Gomes, of the Movimento Interestadual de Mulheres em Imperatriz, an Interstate social movement of women, spoke about the way in which those affected were treated in a public hearing promoted in the community by the Prosecution Service, making it difficult for the lawyer who acted on behalf of those affected and leaders of local associations to enter the event.

Magno Manuel, a member of the quilombola community located in the municipality of Ipojuca, Recife, also participated. He emphasized the change in the city's profile since the company started its activities in the region, showing an increase in prostitution and displacement to the slums due to the expulsion of residents from their homes and an increase in crime.

As a contribution of sectors of the Government, the public defender of Espírito Santo, Mr. Rafael Delfino, addressed the issue of criminalization of social movements, which generates their stigmatization in face of society. Mr. Rafael Feijó, lawyer at BNDES, mentioned the importance of creating public policies on this issue and the action of external agents who can oversee the business performance. There was also the speech of the representative of the Ministry of the Economy, Denise Velasco, who brought reports on the use of OECD guidelines by the agency to promote a dialogue between those affected and companies outside the judicial sphere.

As a representative of the Global Justice, Raphaela Lopes pointed out the need for binding rules in detriment of voluntary rules (such as the UN Guiding Principles) on the subject and raised the need for primordial observance of the centrality of the victim's suffering. She raised the discussions on the National Human Rights Plan (PNDH3), as an achievement of civil society, since it was built based on in-depth discussions and aiming at the effective accountability of transnational corporations for rights violations.

The public defender of the Government, Mr. João Mariano presented the importance of the members of the justice system going to the places and getting closer to those affected and social movements, internalizing the debates and being careful when dealing with relevant issues such as human rights violations by companies, potentializing the notion of affected to a maximum degree.

Closing the first part of the speeches, Professor Manoela Roland, from Homa/UFJF, highlighted the importance of creating normative frameworks on Human Rights and Transnational Corporations, as well as the field of dispute regarding the elaboration of public policies in this field. She also argued that it is necessary to seek effective mechanisms for rebuilding the relationship of imbalance between companies and the States where they are situated, i.e., it is necessary to prioritize the formulation of a policy that is effective, transparent, popular and that has the participation of the society, as well as the construction of international treaties to be incorporated that reflect the protection of Human Rights against business.

The afternoon was intended primarily for open demonstrations by the participants of the audience who registered during the morning and wanted to present their point of view and experience on the subject.

Among these speeches there was one of a fisherwoman, Eliane, from São Mateus, who put on the agenda the change of life due to the contamination of the waters of the Rio Doce river with the burst of the dam, as well as the discrimination suffered by women in face of the parameters of redress proposed by the Renova Foundation.

Gabriel Strautman, from PACS, mentioned the importance of enlarging these audiences within the communities that suffer these effects and the need for denouncing the corporate capture of the states by corporations.

Silvia Lafayete, a fisherwoman from São Miguel, gave a moving speech of the drama of those affected in the context of the Rio Doce Basin and called for help for her people.

José, a fisherman from Maria Ortiz, told that he was called by the entities to give his opinion about the formation of the questionnaire, but the opinions were not taken into account.

As a representative of the CUT, a trade union center, of Espírito Santo, Nildo denounced the "coup government", referring to Michel Temer's government, that aggravates this scenario of violations.

And Leticia, from MAB, emphasized that the reparations became a major win for companies that operate freely causing human rights violations and setting the reparations without the participation of the affected.

Luiz Antônio gave his testimony, as an indigenous from the village of Comboios, in Aracruz, lamenting the fact that his people are constantly considered lazy, when, in fact, they are guardians of nature and that already knew that man's ambition would generate the reported tragedies.

Gonzalo Berron, of the Friederich Ebert Foundation, raised the question about the existence of a systemic pattern of violations by companies and the false solutions based on the involvement of those entities in the solution processes. He also emphasized that those events with the participation of various institutions toward the same objective give the affected populations hope.

At the end of the event, a final presentation was held with the participation of Tchenna Maso, representing MAB, who showed the importance of seeking means of action after the end of the hearing.

Mr. André Steling, a member of the Prosecution Service of Minas Gerais, MPMG, spoke about the need for joint construction with various actors, as well as criticizing the impartiality of the judiciary, which uses this as a shield to often stop acting, unlike the Prosecution Service, which must always be on the side of those affected. Finally, he defended the need for out-of-court mechanisms for a faster resolution in this area.

Professor Tatiana Ribeiro, member of GEPISA/UFOP, presented the lawsuit proposed by Rio Doce as a subject of rights and the similar cases that occurred and were successful; she also emphasized the expectation in the formulation of binding rules and the importance of thinking about alternatives to the system.

Professor Sérgio Negri, from UFJF, in turn, exposed the direct relationship between mining and underdevelopment, which generates a structure that feeds on income concentration, precarious work and an exclusive economic circuit, having in its logic an unequal distribution. He also argued that the affected person is a subject of law as an abstraction, and that it would be difficult to fight for law in political rather than legal terms, so it would be important to fight so that the Rio Doce, as a subject of law, would not be a mere abstraction either.

Julia Neiva, a member of the Business and Human Rights Resource Centre, highlighted the need for resistance both nationally and internationally and brought to

light once again the setbacks that are being experienced in Brazil, especially with respect to human rights protection frameworks.

Closing the event, Mr. Marlon Weichert, a member of the Federal Attorney's Office for Citizens' Rights, mentioned the importance of seeking binding regulatory frameworks, since the ones of voluntary character are, in fact, a step backwards. He also pointed out that the greater the symmetry of power, the greater the possibility of accountability for human rights violations and noted that initiatives on the fringes of civil society participation should be disregarded, referring to the construction of National Plans of Action, which are being done "top-down" rather than "bottom-up".

It is important to point out that some guests chose not to attend the event, not integrating the debate. Among the absentees, mentioned by Mr. Marlon Weichert during the public hearing, there are several institutions representing business and government agencies, such as: BNF Bovespa, CNA (National Confederation of Agriculture and Livestock), Brazilian National Confederation of Industry, FIESP, Office of the President's Chief of Staff, FUNAI, IBAMA, Ministry of Foreign Affairs, Ministry of Mines and Energy, Ministry of the Environment, Ministry of Human Rights, Securities and Exchange Commission of Brazil, and the Legislative Houses of the Government and of the State of Espírito Santo.

CONCLUSION

The 1st Brazilian Public Hearing on Human Rights and Business was an important event, since it allowed the interlocution between different actors involved in the issue, such as the people affected by companies throughout Brazil, representatives of public agencies, civil society organizations and members of the academy engaged with the agenda.

The format in which the event was built should be highlighted, in the sense of allowing those affected by the most varied enterprises in Brazil to have space to expose the violation scenario in which they live, promoting an enrichment of the debate and an interesting change in the structure in which public hearings are normally conducted in a context of human rights violations by companies in concrete cases. In addition, it allowed the representatives of the government who attended to have a closer contact with harsh realities, as well as to obtain greater subsidies for the understanding of the field of debate on Human Rights and Business in the country.

The absence of some entities linked to the government and, especially, of sectors related to business activity was significant to ratify the posture that has been adopted by them when called to dialogue with actors who confront their ways of acting in spaces that are not captured by companies. By choosing not to participate in an event that brought the voice of the man and woman affected, representatives of the government and the business sector demonstrate that they do not feel comfortable in being part of an environment that provides this format of debate, preferring to continue with their actions based on the use of institutional means that act to benefit themselves.

Also worth mentioning the opportune moment chosen for the audience, which took place one day after the seminar on the burst of the Fundão dam, contextualizing the debate from the largest environmental crime in the country; as well as the choice of location, a public university, which should be a space for the construction of critical knowledge and production of knowledge focused on the reality, therefore, should be open to such discussions, enabling the participation and involvement of the academic community.

It is clear that the choice of this issue by the Federal Prosecution Service is timely, given the context of discussion at the UN on the construction of a binding treaty capable of establishing accountability parameters for transnational corporations that violate Human Rights, in addition to the initiatives underway to implement National Action Plans by several countries, guided by the logic of John Ruggie's Guiding Principles.

Through the way the event was conducted, it was possible to notice the flaws of the activity model adopted by corporations, according to which they themselves establish their performance parameters that, in the name of "development", violate Human Rights, being considered these inevitable costs of the process, which should therefore be minimized and not protected. The explanation of this form of operation demonstrates the pressing need to establish binding normative frameworks that can bring the proper responsibility for violations, as well as the strengthening of the State and an effective space for the participation of affected individuals about the enterprises that will occupy their territories.

BIBLIOGRAPHICAL REFERENCES

CABRAL, Antonio. Os efeitos processuais da audiência pública. In: Revista de Direito do Estado, Rio de Janeiro, No. 2, p. 199-213, 2006.

CÉSAR, João Batista Martins. A audiência pública como instrumento de efetivação dos direitos sociais. In: Revista do Mestrado em Direito UCB, Brasília, v. 5, No. 2, p. 356-384, 2011.

FLORES, Joaquim Herrera. A (Re)Invenção dos Direitos Humanos. Florianópolis: Fundação Boiteux, 2009.

MIGUEL, Luis Felipe. Consenso e Conflito na Teoria Democrática: Para Além do "Agonismo". Lua Nova, São Paulo, 92:13-43, 2014. Available at: <<http://www.scielo.br/pdf/ln/n92/a02n92.pdf>>. Accessed 15 Nov., 2017.

RAJAGOPAL, Balakrishnan. El derecho internacional desde abajo: el desarrollo, los movimientos sociales y la resistencia del Tercer Mundo. Bogotá: ILSA, 2005.

ROLAND, Manoela Carneiro et al. Direitos Humanos e Empresas: o Estado da Arte do Direito Brasileiro. Juiz de Fora: Editar Editora, 2016.

ZUBIZARRETA, Juan Hernández. Las Empresas Transnacionales Frente A Los Derechos Humanos: Historia De Una Asimetría Normativa: De la responsabilidad social corporativa a las redes contrahegemónicas transnacionales. Bilbao: Hegoa, 2009.



CENTRO DE
DIREITOS HUMANOS
E EMPRESAS



FORDFOUNDATION

homacdhe.com