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**COMPLIANCE  
AND SUSTAINABILITY**

**BRAZILIAN AND  
PORTUGUESE PERSPECTIVES**

**ORGANISERS**  
**ALEXANDRA ARAGÃO · GRACE LADEIRA GARBACCIO**

**2020**

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# III

## SPECIAL PART

SECTOR COMPLIANCE:  
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TOURISM AND MINING

## 5.

### **MARIANA AND BRUMADINHO WHY DID COMPLIANCE PRACTICES NOT PREVENT THOSE TRAGEDIES?**

GABRIEL LIMA FERNANDES

*Abstract:* Civically concerned about the environmental and human consequences of the tragedies of Mariana and Brumadinho, both succeeded in the Brazilian state of Minas Gerais, this inquiry intends to foment the necessary discussion about the role of Compliance in protecting the environment and safeguarding the dignity of the human person. In order to do so, some factual aspects about the tragedies in question will be elucidated, the historical and juridical contours of Compliance in Brazil will be briefly discussed, it will be asked — without, however, seeking to answer it — why it [the Compliance] did not prevent the occurrence of those tragedies, and from that inquiry it will be tried to demonstrate why this tool can — or better, should — be important in preserving the environment and in defense of Human Rights.

*Keywords:* compliance; environment; dignity of human person; human rights

## 1. Introduction

It seems no coincidence that the Seminar “Compliance and Sustainability — Brazilian and Portuguese Perspective”, whose speakers’ presentations gave rise to the elaboration of this rich collective work, took place at the Faculty of Law of the University of Coimbra just two weeks after the occurrence of the Brumadinho tragedy.

At that time, although dismay over the tragedy was general and still dominated all the participants in the event — including those who, as a result of the tragedy, could not even participate in it — the disastrous extent, from an environmental and especially a human point of view, of this tragedy could not even be imagined. It was known that the implications were immense because the numbers of the dead, the injured, and the homeless were already known as the number of missing persons was reduced daily. What was not yet known — and, to some extent, is still not known — was the amount of biodiversity suppressed, the extent of the infection of the watershed, the number of people indirectly deprived of livelihoods by river contamination and the number of victims poorly assisted — not to mention unassisted — by the state and the responsible company. Nor was it supposed that as of today<sup>1</sup>, after more than six months, 22 people would remain missing<sup>2</sup>, probably buried under the deadly toxic tailings mud that mining companies still insist on producing.

It was revealed, after the dismay in response to Mariana and the verified repetition in Brumadinho, that a scenario of total environmental and human unsustainability means the

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<sup>1</sup> 12/07/2019.

<sup>2</sup> Available in: <[http://www.vale.com/brasil/PT/aboutvale/servicos-para-comunidade/minas-gerais/atualizacoes\\_brumadinho/Paginas/listagem-pessoas-sem-contato.aspx](http://www.vale.com/brasil/PT/aboutvale/servicos-para-comunidade/minas-gerais/atualizacoes_brumadinho/Paginas/listagem-pessoas-sem-contato.aspx)>. Access on: 07/12/2019.

non-extinction of deposits of liquid tailings from wet mineral extraction, not only because the conditions of the existence of future generations that will live directly or indirectly in the region where the tragedies occurred have been compromised but also, and mainly, because the living conditions of the present generations that live or lived there have been completely degraded.

It was convenient to ask the other speakers and listeners — and likewise the readers of this communication — what is the place of compliance in preventing tragedies such as those of Mariana and Brumadinho and, consequently, the ecological<sup>3</sup> and human damage witnessed in them.

In a seemingly dissonant voice — although, it should be said, (in)opportunistically unsettling — in relation to most other utterances, it was not sought, and still is not sought, to demonize productive activity in general because the voice recognizes the important role of such activity in socioeconomic provision owing to the generation of jobs and income. Nor does it encourage the expiatory movement owing to which mining has been suffering as a result of the social furore observed after the inconceivable chaotic repetition of Mariana in Brumadinho.

It was sought, as it is still sought, to understand why the compliance practices of the mining company directly responsible for monitoring and maintaining the broken tailings dam in Brumadinho and partially responsible for that in Mariana — which is, enlighteningly, one of the Brazilian

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<sup>3</sup> Alexandra ARAGÃO. *A renovação ecológica do Direito do Ambiente: Sumários desenvolvidos. Ano lectivo 2017/2018*. Coimbra: FDUC, 2017. 6-7. The author reveals the distinction between environmental damage and ecological damage in linking them to the direct or indirect affect of the human being, while these are linked to the degradation of the environmental elements themselves, not mattering, for verification, in the allocation of human elements.

companies that invests the most in this self-regulatory tool — were unable to prevent these tragedies. This inquiry further endeavours to try to demonstrate that this tool can — and should — in addition to playing an important role in corporate safeguarding, play a fundamental role in environmental preservation and the protection of human rights.

## 2. **Mariana and Brumadinho: ecological damage and human damage**

The disruption of the Fundão dam in Mariana was separated by just over three years from the disruption of the B1 dam of the Córrego do Feijão mine in Brumadinho, both located in the Brazilian state of Minas Gerais and established to store liquid tailings from part of the intense mineral exploration carried out in those locations.

On November 5, 2015, Brazil and the world watched, dumbfounded, the largest Brazilian environmental tragedy and one of the largest in the world. One of the three tailings dams that served the iron ore extraction complex operated by Samarco, a binational company owned by Brazilian mining company Vale and Anglo-Australian company BHP Billiton, broke down, releasing more than 60 million cubic metres of impounded material.

The Mariana sub-districts of Bento Rodrigues and Paracatu de Baixo immediately disappeared under the toxic tailings mud that was carried for kilometres along the Doce River and its tributaries until it reached the mouth of the river in the state of Espírito Santo and then entered the sea<sup>4</sup>. The tailings are estimated to have contaminated more than 392 km<sup>2</sup> of marine areas, impacted approximately 680 km of river

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<sup>4</sup> Cristina SERRA. *Tragédia em Mariana: a história do maior desastre ambiental do Brasil*. Rio de Janeiro: Editora Record, 2018. 13.

courses, threatened 11 fish species and contaminated 1,200 ha of forests in addition to causing serious damage to a colony of abrolhos<sup>5</sup> located approximately 250 km out to sea from the mouth of the Doce River.

The ecological damage, although very significant, was not the only damage witnessed in Mariana. What also marked that tragedy as a human misfortune was the record of 19 deaths, 207 houses buried and 630 people left homeless, apart from the incalculable and unspeakable damage of the ostensible precarization of much of the Doce River watershed, which supplies subsistence for the populations of more than 200 municipalities of Minas Gerais and Espírito Santo.

With even less certain proportions from an environmental point of view, due to its contemporaneity, the second tragedy, on January 25, 2019, is certainly one of the largest — if not the largest — human drama in Brazilian history. The B1 dam of tailings from the Córrego do Feijão mine, controlled in this case exclusively by the mining company Vale, broke and poured into the lives of the Brumadinho inhabitants, as well as many employees of the mining company, 12 million cubic metres of toxic mud that, reaching a speed of over 80 km/h, destroyed much of that mining town.

On the day after the incident, in addition to 34 deaths and 81 people left homeless, 287 people were recorded as missing. With the progress of the tiresome searches — which endure to this day — the number of missing persons has decreased, but, unfortunately, the number of deaths has increased, reaching a total of 165. In addition, 138 people were left homeless.

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<sup>5</sup> News posted on 11/22/2015, on the G1 news portal, available in: <<http://g1.globo.com/espírito-santo/noticia/2015/11/lama-de-barragem-da-samarco-chega-ao-mar-no-es.html>>. Access on: 07/05/19. And on the electronic platform of the newspaper *O Globo*, on 02/22/2019, available in: <<https://oglobo.globo.com/sociedade/ciencia/rejeitos-de-mariana-atingiram-corais-de-abrolhos-na-bahia-aponta-estudo-da-uerj-23471276>>. Access on: 07/05/2019.

If these numbers were not enough to characterize a tremendous degeneration of life, especially from the emotional point of view, for those who inhabit or inhabited that region, the loss of the Paraopeba River was announced in a study carried out by the NGO SOS Mata Atlântica Foundation. This river, which supplied several municipalities of Minas Gerais and provided livelihoods to many riverside communities, was struck by the toxic tailings sludge and became totally unfit and unavailable for human use<sup>6</sup>.

In both events, there were serious violations of the environment, notably with regard to the desired balance and quality, but also serious violations of human rights due to the manifest degradation of the dignity of the people directly or indirectly affected. As much as the irreversible loss of biodiversity and the difficult remediation of river contamination, the lives and disappearances of loved ones, and the forced displacement of people from their homes, are materially irreparable damage<sup>7</sup>.

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<sup>6</sup> A study carried out by the NGO SOS Mata Atlântica Foundation concluded that “the Paraopeba River has lost its status as an important source of public supply and multiple uses of water due to the transport and disposal of about 14 tons of ore tailings from the disruption of dam B1 of the Córrego do Feijão Complex, owned by Vale, located in the rural area of Brumadinho, in the headland region of the Paraopeba basin, an important formator of the São Francisco River basin. Unparalleled environmental damage in the country and around the world has made the waters of the Paraopeba River unfit and unavailable for use within a 305-kilometer stretch, which has been of terrible and bad quality — thus in violation of the standards set by current legislation”. *Observando rios: O retrato da qualidade da água na bacia do rio Paraopeba após o rompimento da barragem Córrego do Feijão — Minas Gerais*. SOS Mata Atlântica, fev. 2019.

<sup>7</sup> Commenting on the role of the European Court of Human Rights in safeguarding the environment, from an extensive interpretation of the right to private and family life and domicile, Alexandra Aragão sees a double dimension in the term domicile. If on the one hand it denotes the physical sense of housing, namely, the house, on the other it denotes

This environmental and human damage cannot be seen, after the moments of public consternation, as a mere “legacy” of productive activity, or as the consummation of acceptable risks of necessary growth. In fact, it is devastating, its legal indemnity consequences cannot be incorporated into production costs and forgotten until there is a new repetition of the same chaos.

### 3. Compliance in Brazil

Apart from any intention of exhausting the aspects that outline compliance in Brazil, in part because there are much more capable voices in this collective work for such an outline, this communication will be restricted to presenting some aspects that are considered relevant for its purpose.

According to the “Guide — Compliance Programs — Guidelines on the structuring and benefits of adopting

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a spiritual sense, notably, the home. In the author’s words: “The domicile allows us to freely develop activities that are usually consummated in the intimacy of the house-home. First of all, we refer to personal activities related to the satisfaction of basic requirements such as food, hygiene, rest, reproduction, safety and care. But we also refer to activities for the realization of human aspirations, such as the development of intersubjective relations and interspecies relations, through communication and conviviality between people and animals; scientific production and assimilation, knowledge transfer and education; the creation, expression or artistic and literary enjoyment, and other spiritual activities, such as reflection, meditation or liturgical worship”. Alexandra ARAGÃO. “Conteúdo e âmbito do direito ambiental do domicílio, em diálogo com a jurisprudência (o direito ao respeito pelo ambiente associado à proteção do domicílio na Convenção Europeia dos Direitos Humanos)”, in Paulo Pinto de ALBUQUERQUE, org. *Comentário da Convenção Europeia dos Direitos do Homem e dos Protocolos Adicionais*. No prelo. Lisboa: Editora Universidade Católica, 2019. 6-7. It should be noted, therefore, that, no matter how laudable and determined the attempt to make reparation for human damage related to the degeneration of one’s home, the cultural and emotional aspects involved are irreparable.



competitive compliance programs”<sup>8</sup>, issued by the Administrative Council for Economic Defense (CADE) in 2016, the only Brazilian official document (at least regarding the adoption of the anglicist nomenclature) that expressly states what compliance is and what it is for, this tool is embodied in “a set of internal measures that prevent or minimize the risk of breach of the laws arising from activity by an economic agent and any partners or collaborators” with the primary objective of persuading people to “do the right thing”.

It is, therefore, a mechanism of self-regulation, characterized by the adoption of practices aimed at the implementation of an integrity programme, usually adopted within the scope of business activities to achieve a substantial change in corporate culture. There is, however, current discussion of the healthy adoption of the same practices in the context of public activities<sup>9</sup> to serve as a valuable instrument for preventing corruption.

Concerns about “doing the right thing” may come from a voluntary ethical commitment and moral awareness of business, or even governmental activities, but it is common for good compliance practices to emerge from a move to avoid administrative, civil and criminal accountability, monetary expenditure and economic devaluation as a result of these. This is what happened in Brazil.

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<sup>8</sup> CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA — CADE. *Guia — Programas de Compliance — Orientações sobre estruturação e benefícios da adoção dos programas de compliance concorrencial*. 2016. 9. Available in: <[http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias\\_do\\_Cade/guia-compliance-versao-oficial.pdf](http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/guia-compliance-versao-oficial.pdf)>. Access on: 07/16/2019.

<sup>9</sup> For a better overview of the subject, Cf. Cláudio Carneiro Bezerra Pinto COELHO. “*Compliance* na administração pública: uma necessidade para o Brasil”, *RDFG — Revista de Direito da Faculdade Guanambi* 3/1 (jul/dez 2016) 75-95. Available in: <<http://revistas.faculdadeguanambi.edu.br/index.php/Revistadedireito/article/download/103/21/>>. Access on: 07/16/2019.

Compliance practices gained special prominence with the massive accountability of companies and entrepreneurs, previously unheard-of in Brazil, mainly for crimes of active corruption, which occurred in the midst of the so-called Lava Jato Operation beginning in 2014.

Although Law 12.846/13 (anti-corruption law) had already provided, in 2013, in art. 7, item VIII, that compliance — or, rather, to be faithful to the legal provision, “internal integrity procedures” — was one of the aspects to be taken into consideration in the application of administrative sanctions in response to acts of corruption provided for in the same law, the effective adoption by companies started only when the companies saw their peers embarrassed by the scope of the abovementioned operation and when, in 2015, Provisional Measure n° 703 was issued, which temporarily changed the law in question mainly in terms of the leniency agreement.

This Provisional Measure, which expired in May 2016, stated that leniency, that is, tolerance of unlawful acts perpetrated by companies to the detriment of the public exchequer, could be agreed upon with the competent bodies if the companies committed themselves, cumulatively with other measures, to the implementation or improvement of internal integrity mechanisms<sup>10</sup>.

It was in the wake of these legislative benefits — whether the expired special leniency regime or the still existing

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<sup>10</sup> Art. 16. The Union, the States, the Federal District and the Municipalities may, within the scope of their competences, through their internal control organs, individually or in conjunction with the Public Prosecution Service or the Public Attorney, celebrate leniency agreement with the legal entities responsible for the acts and facts investigated and provided for in this Law that effectively collaborate with the investigations and the administrative process, so that this collaboration results in:

(...)

iv - the commitment of the legal entity in the implementation or improvement of internal integrity mechanisms.

attenuator of administrative sanctions — and the vague fear of liability that compliance gained ground in the exercise of corporate governance in Brazil. Bear in mind, however, that it is recognized, regardless of the reasons for setting up the mechanism, that it is of great value in overturning corruption schemes and in avoiding the incidence of similar new acts.

With regard to the object of this inquiry, it is important to clarify that, interestingly, the mining company Vale is one of the companies that invests the most in integrity programmes, especially after the first tragedy, in Mariana, due mainly to the severe losses of value in the financial market, the requirement of foreign investors and the presumed liabilities that it will suffer when investigations and legal proceedings reach their outcomes. The effort to implement compliance in that company was not able to prevent that tragedy from occurring, nor was it able to prevent the recurrence of chaos three years later in Brumadinho. Was the company's effort to implement compliance, therefore, a facade<sup>11</sup>, aimed at improving its image with society and investors and/or to avoid eventual legal sanctions?

The next topic addresses, generally and not exclusively in Brazil, the environmental development of compliance, how it is compatible with the logic of human rights protection and how, as a tool that seems to be focused only on normative concertation, it can — and should — prevent environmental and human tragedies similar to those of Mariana and Brumadinho.

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<sup>11</sup> CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA — CADE. *Guia — Programas de Compliance — Orientações sobre estruturação e benefícios da adoção dos programas de compliance concorrencial*. 2016. 15. Available in: <[http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias\\_do\\_Cade/guia-compliance-versao-oficial.pdf](http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guia-compliance-versao-oficial.pdf)>. Access on: 07/16/2019.

#### 4. Compliance, the environment and human rights

Compliance is apparently linked only to normative concertation because most references to it, especially the most conservative ones, restrict it to the adequacy of productive activities with formally established rules, especially the law, in order to avoid corporate liability. This good governance tool is and may, or rather should, mean more.

It is, in fact, a mechanism that, in order to be socially and environmentally useful — which is understood as a function to be fulfilled by any person, whether simple (individual) or collective (company) — and to be characterized as a true change in organizational culture, rather than being imposed by law and generally by norms, and beneficial to business, must be informed by values essential to human subsistence and the safeguarding of the natural die<sup>12</sup> and focused primarily on the good of society.

This perspective has already seemed to advance, albeit not satisfactorily, in the environmental field, unfolding this self-regulation tool in what is known as environmental compliance. Even if, to some extent, adopted to avoid liability for environmental and ecological damage and even to acquit business activity in cases of environmental tragedy, this aspect of compliance is also informed by the ethics of sustainable development<sup>13</sup>, especially because, with it, the axioms of

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<sup>12</sup> For Dominique Bourg, the natural die is all that exists independently of human existence. “(...) *ce qui advient spontanément à l’existence — le donné naturel — (...)*”. Dominique BOURG. *Une nouvelle terre: pour une autre relation au monde*. Paris: Éditions Desclée de Brouwer, 2018. Epub reader. s/n. Safeguarding the natural die because, like human beings, they have dignity in themselves that guarantees their proper autonomous protection, regardless of their indispensability to human existence.

<sup>13</sup> Sustainable development, beyond being an international principle of environmental law, axiologically consecrated in the Stockholm Dec-

prevention and precaution have been consecrated.

A longed-for — and urgent — human compliance is thought to be able to succeed in the same way. While the principles of prevention and precaution link compliance practices with the logic of *a priori* protection of the environment — and not *a posteriori*, as before<sup>14</sup> — the dignity of the human person, as the guiding axiomatic *prius*<sup>15</sup> of all anthropic action, must link productive activities to safeguard the fundamental rights to which all persons are entitled, namely, human rights.

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laration of 1972 and literally in the Brundtland Report “Our Common Future” of 1987, is the central objective of the logic of environmental protection, striving to meet the needs of the present without compromising the environmental conditions required to meet the needs of future generations. This ethics has been incorporated by a number of national legal orders, for example, the Brazilian and Portuguese Constitutions, in articles 225, Caput and 66º-2/81º-a), respectively.

<sup>14</sup> Nicolas de SADELEER. “Comentários sobre o status no Direito Internacional de três princípios ambientais”, in Marcelo Dias VARELLA / Ana Flávia BARROS-PLATIAU, org. *Proteção Internacional do Meio Ambiente*. Brasília: Unitar, UNICEUB e UnB, 2009. 59. In this study, the author refers to a three-phase evolution of the logic of environmental protection. At first, it was concerned with the repair of environmental damage. Then, given the irreparability of certain characteristics of the environment, care was taken to safeguard the environment in advance, and the principle of prevention was founded. More recently, the precautionary principle emerged, aimed at protecting the environment in advance when science is unable to be certain about the environmental risks of human activities.

<sup>15</sup> “(...) the principle of dignity, responding to the desires of all those who see their rights violated, and seeking to secure people’s vital needs and to preserve all facets of human life from degradation, instrumentalization and submission, stands as a true *prius*. axiomatic, as an indestructible, indefinable, even unspeakable assumption of the legal system”. Mário Reis MARQUES. “A dignidade humana como *prius* axiomático”. in Manuel da Costa ANDRADE / Maria João ANTUNES / Susana Aires SOUSA. *Estudos em Homenagem ao Prof. Doutor Jorge de Figueiredo Dias*. vol. 4. Coimbra: Coimbra Editora, 2010. 566.

This can be done, as opportunely proposed in another study<sup>16</sup>, for example, with the immediate densification<sup>17</sup> of the precautionary principle with the values that inform the dignity of the human person, avoiding the tyranny of scientific certainty<sup>18</sup> to allow, before the occurrence of tragedies such as those of Mariana and Brumadinho, the suppression of basic rights such as housing, work, income, territorial and cultural identities and life itself in a material sense.

Compliance would thus be constrained by making the figures of productive activities adopt measures when there is the slightest risk — even if uncertain — of the degeneration of these rights and to truly consider alternatives aimed at preventing — and not only minimizing or repairing — such derogation.

## 5. Concluding questions and notes

Regarding the question of why the compliance practices of one of the companies that invests the most in such programmes were unable to prevent the ecological and human damage

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<sup>16</sup> The idea of the immediate densification of the precautionary principle with the values that inform the dignity of the human person was defended in a paper entitled “Precautionary Principle: A Legal-Environmental Principle of Human Rights?” presented in the Faculty of Law of the University of Coimbra with the purpose of accomplishing evaluation in the Environmental Law discipline, taught by Prof<sup>ª</sup>. Dr<sup>ª</sup>. Alexandra Araújo.

<sup>17</sup> Immediate densification was mentioned because the precautionary principle, like the general logic of environmental protection, is already informed, immediately, by the values of the dignity of the human person, since the anthropocentric conception that the environment deserves protection only because it is indispensable to the subsistence of the human being is dominant — although increasingly less so.

<sup>18</sup> Reference to the tyranny of the majority in John Stuart MILL. *Sobre a Liberdade/A sujeição das mulheres*. São Paulo: Penguin, 2017. 74-78, which, like the tyranny of certainty, carries enormously damaging value if it does not respect minority rights.

verified in Mariana and inadmissibly repeated in Brumadinho, the inability of this essay to answer it is re-affirmed.

It is asserted that, abstractly, compliance is a well-intentioned mechanism that deserves full recognition but that its good purpose cannot obscure its possible practical defects and, therefore, for its improvement, it must be able to withstand critical inspection.

However, a general criticism of the bad practices of compliance, or the so-called facade of compliance, parodies the proverb that “It is not enough for Caesar’s wife to seem honest; she must be honest” in the sense that, under environmental, human and even corporate safeguards, it is not enough for companies to appear honest; they must be ethically committed to law enforcement, private and public anti-corruption practices, sustainable development and human rights.

Finally, the question is whether, in view of the consequences of tragedies such as those mentioned, it is appropriate to deploy compliance towards a greater humanization of the tool, as briefly advocated in the previous section, enabling it to find its place in efforts to protect human rights and contribute to the prevention of not only severe environmental degradation but also irreparable and irreconcilable human suffering.

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