# Human Rights in the Lion's Den: Law, Politics, Policy and Witness Protection in Rio de Janeiro

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This article is a case study in which we want to put to the test the very notion that human rights can be improved by government policy. To achieve this goal we will examine the problematic relationship between human rights and public policy that emerged in the implementation of the Witness and Victims Protection Programme (PROVITA) in Rio de Janeiro between 2010 and 2011. We argue that only when we take a critical perspective of human rights discourse and use it to turn government institutions against themselves, can we ever make any serious advance in protecting human rights. We will put this theory to the test by analysing one case: the case of 'Daniel', which tested witness protection policies in Rio de Janeiro to its limits. Such limits are usually borderline places between statutes, administrative law, public policies, police institutions, NGOs and political parties. In the Brazilian context, they also revolve around a subtle and dangerous relationship between organised crime and government security forces. Emergency situations, as the study will illustrate, may go beyond political agreements, shortening negotiations, crossing borders between the legal and illegal, and expanding policy through an almost dialectic tension. There is very limited information about this kind of policy (witness protection), and this justifies the need for research and the analysis of case-related evidence.

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## Introduction

In this article we discuss the Programa de Proteção a Vítimas e Testemunhas Ameaçadas de Morte [Witness and Victims Protection Programme] (PROVITA) in Rio de Janeiro, and its implementation in public policy that was in place from 2010 to 2011, with a focus on the 'Daniel' case that tested decision makers to the limit and created the environment for new solutions.[1] Our objective is to analyse the close, risky and often contradictory relationship between the stark reality of having a widely corrupt police force that often acts as a human rights violator on the one hand, and a weakened human rights governmental structure built to deal with precisely those human rights violations on the other. This scenario is worsened by the circumstance that the very implementation of the PROVITA depends largely on the police.

This scenario would be sufficiently challenging by itself, as it puts to the test the manner of implementation—and effectiveness—of human rights as a public policy with the aim of protecting the rights to life and personal security of the person. However, in Brazil, one could add additional layers of contradictions leading to increased difficulties in the implementation of such human rights public policy. Legislation, for example, was not thought out in a systematic manner, which would have been more conducive to bridging some of the gaps arising from the coexistence of statutes with clashing rules and purposes—those established under a neoliberal state institutional framework,[2] sharing the space with some welfare oriented ones.[3] As a result of such non-systematic legislation, any public official attempting to implement the witness protection programme in line with a human rights public policy

[1] Information contained in this paper is in accordance to Brazilian Federal Statute N. 9.807/1999, therefore all confidential data will be treated accordingly. Names and places have been changed to make that possible.

[2] David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2007).

[3] Boaventura de Sousa Santos and César A Rodríguez-Garavito, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press 2005) 236.

would be faced with considerable constraints arising from legally established controls on governmental spending.[4] However essential those measures are,[5] the protection of life and security of the person should be strongly considered to permit some leeway to allow effective compliance with human rights legislation.[6]

These contradictions emerge strongly in the disparity between the lack of resources of government agencies in the Executive branch, and the broader federal legislative structure built by Brazilian Administrative Law and its Federal Constitution.[7] This lack is then, not only of financial resources, but also of *procedural* measures and *infra-legislative* guidance at the State and Municipal (local government) levels. We will be looking at these broader national challenges for the Brazilian Federation by focusing on how they emerged at the State level in Rio de Janeiro.

This article focuses on the Secretaria Estadual de Assistência Social e Direitos Humanos [State Secretary of Social Assistance and Human Rights] (SEASDH), and we hope our case study will highlight the need to improve SEASDH's infrastructure design,

[4] Take, for example, the 'Lei de Responsabilidade Fiscal' [the Fiscal Responsibility Act] (LFR)—which is formally known as the Complementary Statute No. 101 and the Federal Statute No. 8,666/1999, which establishes bidding and auction procedures for governmental contracts.

[5] To clarify, we are not arguing against measures for the protection of governmental financial health.

[6] The relevant human rights statute in this case is the Federal Statute No. 9,807 of 1999, which establishes rules for the implementation of PROVITA in Brazil. It is worth noting that Article 70 establishes quite resource demanding obligations on the state, in order to effectively protect threatened individuals and their families, such as putting in place home security strategies, including security gadgets; secure transfers to new places of residence, or to places of work; monthly financial allowances for subsistence needs when the person is prohibited from securing a livelihood through work; social, psychological and medical assistance; and support for any civil and administrative commitments.

[7] Here its perhaps interesting to note that, although Brazilian legislation generally follows the model of civil law systems, it is peculiar in terms of how administrative law is enacted: there is no 'code' of administrative law, as one would expect. Administrative law at state and local levels follows the Federal Statute No. 9,784/1999. To understand a bit more about this issue, see: Marçal Justen Filho, *Curso de direito administrativo* (Editora Revista dos Tribunais 2013).

administration and staff allocation for PROVITA and other protection programmes.

Our method is what one can call 'participatory observation'—following, for example, Jose Vargas,[8] where the observer is located inside the observed 'group' or community. Or, as we might say in this case, when the observer is 'caught' by an apparatus: a network of power relations determined by government bodies, police officers, NGOs, *realpolitik*, the media, and people threatened with death.[9] This method, which is directly applied by anthropologists in ethnographic studies, 'requires that researchers simultaneously observe and participate (as much as possible) in the social action they are attempting to document'.[10] At the same time, we concede the methodological contradiction of attempting to maintain enough intellectual distance from our object of study—as if that would enable us to undertake a critical analysis of it—and describing events in which we took part.

However, there seems to be no other way of addressing this issue. There is an insurmountable lack of information and scholarly debate on witness protection policies and programmes globally.[11] This is probably for the most obvious reasons: fear that giving out information on the programmes might expose the network of protection and put at risk the witnesses under protection. On the other hand, one might ask if this is perhaps not the reason for the lack of public engagement and improvement in budget and policies

[8] José Vargas, *Sociologia*, (1st edn, Porto Editora 2002) 119-20.

[9] Giorgio Agamben, *'What Is an Apparatus?' and Other Essays* (Stanford University Press 2009).

[10] Lynne Hume and Jane Mulcock, *Anthropologists in the Field: Cases in Participant Observation* (Columbia University Press 2004) vi.

[11] Any research on the topic will lead to the discovery of a few related and non-related studies about different programmes. Most of these studies focus on criminal justice issues, rather than human rights or public policy. See, for example: Scottish Office, *Towards a Just Conclusion: Vulnerable and Intimidated Witnesses in Scottish Criminal and Civil Cases* (Scottish Office 1998). For other examples, see Nicholas R Fyfe, Protecting Intimidated Witnesses (Ashgate 2001); and Mitch Morrissey and Steven R Siegel, 'Denver District Attorney's Office Witness Protection Program' (2015) Prosecutor, Journal of the National District Attorneys Association, 1 January 2015 <https://www.highbeam.com/doc/1G1-436332394.html> accessed 27 October 2016.

of these programmes.[12] Here we are looking to fill this gap in the academic debate by bringing forward a case study on the topic.

After all, the protection of people whose lives are threatened due to collaboration with the judicial system should be considered as one of the most basic and important roles of the state (or government). This statement is commonplace in international law—where it could be understood to arise from the International Covenant on Civil and Political Rights (ICCPR)—as it is in the Brazilian 1988 Federal Constitution (article 144). This notion is based, firstly, on a shared body of principles, according to which the protection of life and individual fundamental rights is supposed to be granted by member states.[13] Secondly, it derives from the very principle that proposes that 'public security' in Brazil, as well as individuals' physical safety, is a 'duty of the state, right and responsibility of all'.[14]

Nevertheless, the concept of protection may vary depending on the gravity, nature and objects of risk and protection—who or what is under threat—especially depending on the availability of public policy and resources of protection programmes. In Brazil, the federal Union, as well as most of the federate States, have several different ways of protecting people under threat: from simply monitoring witnesses' situations, to a change of identity and removal from their original place of residence in extremely serious situations. Although witness protection is considered an essential and integral policy, legislation and law making are hard to develop because they apply to several different federate political levels and public bodies and are frequently inadequate, as we will see further. But before we look at policy, police and the violation of human rights, we should perhaps say a little more about the theory behind our study.

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[12] Brazil is no exception in this case. There are very few studies on the topic. For an interesting study on PROVITA, see Cássia Maria Rosato, 'Subjetividades Ameaçadas: Mudança de Nome de Testemunhas Protegidas' (2013) Estudos de Psicologia<http://www.redalyc.org/articulo.oa?id=26128209012> accessed 27 October 2016.

[13] United Nations International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171, Art 7.

[14] Brasil Constituição Federal, Art. 144.

We are fully aware that human rights have been transformed from a rebellious and seditious discourse into a discourse for government and state legitimacy. As Costas Douzinas puts it: theory and action on human rights have been officially given to 'triumphalist journalists', 'bored diplomats' and 'wealthy international jurists'.[15] Following Conor Gearty, we agree that human rights and democracy are the 'two big ethical ideas to emerge victorious from the short twentieth century', and that they 'do not naturally fit together'.[16] Sometimes democratic ways of choosing representative government and their ways of investing money in public policies—through administrative law and bureaucratic procedure—'inevitably' clash with human rights, not only on the practical, but also on the theoretical level.[17] It is from these theoretical perspectives that we will put human rights practices to the test.

Our research therefore examines human rights from a critical perspective. Considering these difficulties—factual, administrative and legal—does it make a difference for the effectiveness of the implementation of PROVITA that those in charge of it were personally committed to the human rights cause and thus compelled to act within such a difficult environment in a near 'rebellious' manner?[18] In more general terms, is it relevant for the success of human rights public policies that 'human rights militants' join the bureaucratic machine of the government and, moved by a very peculiar and fragile political scenario, *short-circuit* them, and then make them turn, finally, in another direction, towards better human rights compliance? Is it then possible to make 'human rights' again a rebellious discourse (and practice)? Or does bureaucratic procedure—by the means of *realpolitik* and administrative law—always 'neutralise' human rights, turning them into fragile and low-

[15] Costas Douzinas, *The End of Human Rights: Critical Thought at the Turn of the Century* (Bloomsbury 2000) 7.

[16] CA Gearty, 'Spolis for which Victor? Human Rights within the Democratic State' in CA Gearty and Costas Douzinas (eds), *The Cambridge Companion to Human Rights Law* (Cambridge University Press 2012) 214-15.

[17] ibid 216.

[18] Douzinas 345.

cost policies in the same way a legal positivist interpretation of law tries to manage the 'language of Rights'?[19]

It seems that, when SEASDH took responsibility for PROVITA, it became clear that they did not have the infrastructure, staff and financial resources necessary to adequately handle human rights emergency cases. And it also became clear that it was impossible for the same team of people to handle all the bureaucratic procedures, the necessary political negotiation and the emergencies because they had become a new powerful player in the 'witness protection' game: the more cases they solved, the more cases would be sent to them. However, one case would make them challenge the whole bureaucracy by turning abstract hypothetical subjects of protection into a concrete, urgent, problem-solving request on an individual's behalf.

By creating a creative institutional space for challenging the context and the limitations (both in budget and personnel) that they were dealing with, SEASDH officers were able to plan and think of possible practices to solve those challenges—although, as we will see, those plans never really took off.

It might be the case that the implementation of human rights public policies, particularly those challenging ones such as PROVITA, must be pushed forward through windows of opportunities created by interested and committed officers willing to transform insurmountable problems into notable advances. This would amount to a method that departs from the constant and slow incremental process that notoriously permeates social policies in Brazil.

However, before we can put this assertion to the test, we will explain the context in which these challenges emerge. After that we will focus on the legal framework and institutional design of PROVITA, and finally, we will look at the case of 'Daniel' and how it re-shaped human rights policies.

[19] ibid.

## Rio de Janeiro 'Is not for Beginners': Political Parties, Administrative Law, Drugs, Guns, Militias and (Possibly) Human Rights

We begin with a brief contextual outline of Rio de Janeiro security and human rights policies. The state of Rio de Janeiro was—and still is in many ways—a place of extremes.[20] Not only a place where extreme poverty meets extreme wealth in a national context; it is also a place where a kind of globalised economics made it possible to buy drugs and weapons of war—either Russian, European or North American—on an extremely pervasive scale. During the 1990s, the combination of drug and gun dealing with extreme poverty turned Rio's many slums into places owned by criminal factions with highly technological warfare—AK-47, AR-15, grenade-launcher and anti-aircraft guns were commonplace in the teenage vocabulary in many slums.[21] That was a cause and, at the same time, a result of police and state corruption, which had become intertwined with drug and gun dealing activity.[22] In many cases, this state of affairs resulted in an even worse problem: the organisation of so called 'milicias', where police officers would lay 'siege' to entire communities, impose their own taxation and force votes for politicians of their choice, organising themselves as huge 'Mafias'.[23]

We are not going to present detailed data on this because it has already become commonplace for those familiar with the Brazilian and Latin American context. It is the case that what we are describing has become so well known that the stories of those who

[20] Zuenir Ventura, *Cidade partida* (Companhia das Letras 1994).

[21] Maria Alves and Philip Evanson, *Living in the Crossfire: Favela Residents, Drug Dealers, and Police Violence in Rio de Janeiro* (Temple University Press 2011).

[22] Diogo Azevedo Lyra, *Relatório Rio: Violência Policial E Insegurança Pública* (Justiça Global 2004). For an English translation, see <http://www.observatoriodeseguranca.org/files/rio_report1.pdf> accessed 7 November 2017.

[23] For a better understanding of the problem, see: 'Relatório Final da Comissão Parlamentar de Inquérito destinada a Investigar a Ação de Milícias no Âmbito do Estado do Rio de Janeiro' (Resolução No. 433/2008).

live these experiences are retold through fiction[24]—like Luiz Eduardo Soares' books,[25] Fernando Meirelles' *City of God* film and José Padilha's two major *Elite Squad* movies,[26] which are now (problematically) considered to be evidence of this present situation.[27] Instead we are going to focus on the institutional and political choices that made it possible for the witness protection programme (PROVITA) to become what it is now—including many choices made through accident, experience or 'necessity'.[28]

But one should note that the sources we use to explain the situation in Rio de Janeiro, this situation did not emerge immediately. It was the result of historical processes and cumulative factors that resulted in the growth of urban populations and the

[24] We are following here both the methods of Law and Film, and Law and Literature, developed in Critical Legal Studies since the 1970s; and also the visual culture scholars – such as Bauldrillard, Paul Virilo, MacLuhan, etc – who would claim that the 'real' is now (on postmodern conditions) completely determined by its relation to a 'hyper-reality'(which is constructed by fiction).

[25] For the intricate links between drug and weapons dealing, and police corruption, see: Luiz Eduardo Soares, André Batista, and Rodrigo Pimentel, *Elite Squad* (Weinstein Books 2008). For the following consequences of how that opened up the possibility for the organisation of so-called 'milicias', see: Luiz Eduardo Soares et al., *Elite da Tropa 2* (Nova Fronteira, n.d.).

[26] *Elite Squad* [DVD] (2007). The famous Captain Nascimento character says in *Elite Squad* that the police were 'badly trained and badly paid. And people like that should not go out in the streets carrying guns'.

[27] To understand the depth of the relationship between José Padilha's movies and the problematic contribution of police officers to make the films 'realistic', see: Marcus VAB de Matos, 'Direito e Estado de Exceção: Dispositivos, Arquétipos e Semelhanças nas Imagens de Tortura e Vigilância do Cinema Contemporâneo. (Dissertation, Universidade Federal do Rio de Janeiro, UFRJ 2011) <http://www.direito.ufrj.br/ppgd/index.php/dissertacoes/41-autor-marcus-vinicius-araujo-batista-de-matos-direito-e-estado-de-excecao-dispositivos-arquetipos-e-semelhancas-nas-imagens-de-tortura-e-vigilancia-do-cinema-contemporaneo> accessed 27 October 2016.

[28] According to Paula Kapp, 'by the end of November 2010, *militias* had control of 41.5 % of the 1,006 slums in Rio de Janeiro, compared with 55.9% controlled by drug factions, and 2.6% controlled by the State Government UPP—Pacifying Police Unit'. 'O Programa de Proteção a Vítimas e Testemunhas Ameaçadas—PROVITA: Indicativos de Análise na Perspectiva Dos Direitos Humanos' in *Cadernos de Direitos Humanos* (SEASDH 2011). For further information, see Núcleo de Pesquisas das Violências da Universidade Estadual do Rio de Janeiro—UERJ <http://www.ims.uerj.br/nupevi/> accessed 27 October 2016.

deepening of inequality.[29] These factors include the growth of the economy, the availability of welfare policies for the redistribution of income,[30] and, specifically, the ideas, ideologies and understanding of politicians and political parties of what the role of public security policies and police forces were in this context.[31]

Since the neoliberal reforms of the 1990s, federate states are faced with two major challenges in administrative law, which have affected the whole public administration. One is the Lei de Responsabilidade Fiscal [the Fiscal Responsibility Act] (LFR)—which is formally the Complementary Statute No. 101. The second is the Federal Statute No. 8,666/1999, which establishes bidding and auction procedures. They are both considered very effective in terms of establishing limits to government expenditure on personnel and supplies, but they both imposed very strict procedures and bureaucratic measures that slowed decision-making and policy implementation—especially when considering public security and human rights policies.

For our case, is important to say that the Fiscal Responsibility Statute (LRF) establishes that federate states cannot spend more than 60% of their revenue on personnel costs. That leaves little choice for federate state governments dealing with the need to hire personnel but to sign partnership contracts with companies or NGOs—who will, in the end, hire their own staff to work for that branch of public service, without causing an 'official' increase of government staff. This is despite the fact that public officers—which includes the whole police force (military and civil), firefighters, teachers, judicial analysts, judges and technical staff—in the executive secretariat was mostly composed of political supporters, and very few could be considered technicians or specialists in their own field.

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[29] Gilberto Freyre, *The Masters and the Slaves: A Study in the Development of Brazilian Civilization.* (University of California Press 1986).

[30] Carlos Lessa, *O Rio de Todos os Brasis: Uma Reflexão Em Busca de Auto-estima* (Editora Record 2001).

[31] Surprisingly enough, the amount of investment in the state and local level doesn't seem to change from one state to another in relation to the supposed difference in ideology between different political parties in the political scenario. In this sense, see Iris Gomes dos Santos et al., 'A Política de Segurança Pública No Brasil: Uma Análise Dos Gastos Estaduais (1999-2010)' (2015) 21(1) Opinião Pública 105.

That was the case in 2010 when, facing re-election, Governor Sergio Cabral, a member of the Partido do Movimento Democrático Brasileiro [Brazilian Democratic Movement Party] (PMDB), appointed a 'technician' to be the state secretary of human rights and social assistance, the head of SEASDH. In the government party coalition, SEASDH was supposed to be offered to a member of Partido dos Trabalhadores [Worker's Party] (PT) in Rio de Janeiro. However, due to the election rules, all party members who ran for election in parliament—at any level—had to leave their positions inside the executive branch. Therefore, Cabral chose Ricardo Henriques, a member of the PT who was not one of the names in the Rio de Janeiro party coalition. Henriques then risked making the political situation even more fragile by deciding to appoint Pedro Strozenberg as his undersecretary of human rights—who was then close to Marcelo Freixo (state MP, leader of the opposition to Cabral's government) from the Partido Socialismo e Liberdade [Socialism and Freedom Party] (PSOL), and also a well-known lawyer and head of an important human rights NGO. Strozenberg then chose very interesting cabinet personnel, mostly composed of university specialists or experienced technicians from NGOs—most of them experiencing their first time in 'government', and maybe naïve and amateur, as critics would put it. Inside this cabinet, he created the Superintendência de Defesa e Promoção de Direitos Humanos [Superintendence of Defence and Promotion of Human Rights] (SDPDH), an office responsible for dealing with the most serious violations of human rights and administering programmes to face a broad number of issues: witness, child and human rights activists protection programmes (including PROVITA); human trafficking and slavery; refugees; right to memory; torture; and the design of a new human rights state council and plan. As one of their first measures, they made propositions for research and monitoring of human rights data that had, so far, never been produced in Rio—one of those being Paula Kapp's article in the 'Human Rights Notes Project'.[32]

This strange, creative and interesting experience in SEASDH lasted only until the elections—almost six months. After being re-

[32] Kapp (n 28).

elected, Cabral dismissed Henriques and gave back the head of SEASDH for nomination by the PT. The party then appointed Rodrigo Neves, party leader in the state assembly, to SEASDH. Neves, who is both a historical friend and political rival of Marcelo Freixo, chose Antonio Carlos Biscaia—former MP and retired public prosecutor and national secretary of public security—as his undersecretary of human rights. As this was a considerably radical change, the dismissal of a great number of personnel was expected. Nevertheless, many technicians were retained and were given important roles in the structure of SEASDH during the Biscaia administration. And—most importantly for the objectives of this article—Biscaia maintained the structure of the Superintendence of Defence and Promotion of Human Rights (SDPDH) and appointed a public defender (or public lawyer)—a 'career state official'—to head it.[33] This was the condition necessary to sustain, develop and make several improvements to the SDPDH, as well as to its programmes and objectives.

In addition to the political differences at the party level, the complex management of human rights policies and particularly witness protection programmes also require an institutional collaboration between different governmental agencies of the three powers (executive, legislative and judiciary) and across the three levels of the federation. Implementing and developing protection programmes was, on the national level, the responsibility of the presidency of the republic, under the (now extinct) Secretaria de Direitos Humanos [Secretariat of Human Rights] (SDH), the Secretaria Nacional de Segurança Pública [National Secretariat of Public Security] (SENASP), the Força Nacional de Segurança [National Security Force], and its co-related government bodies on the federate state level.

In the state of Rio de Janeiro, public security and protection programmes were under the joint responsibility of the Secretaria de Segurança Pública [State Secretariat of Public Security] (SESEG), as

[33] This was Andrea Sepúlveda, one of the authors of this paper. Andrea has been in office since 14 March 2011, and is still there after the change of secretariat due to elections. She is now the head of the secretariat of human rights, as undersecretary of SEASDH.

well as the SEASDH. The first is responsible for commanding and selecting agents and officers to provide police and security measures to witness protection programmes, and the latter is to manage, coordinate, monitor and propose political decisions for life protection programmes.

Although the challenges of implementing human rights and witness protection programmes in these contexts are immense, and there are currently lots (hundreds) of necessary improvements still to be made to them, we want to take account of what has been done in the period of 2010–11. Underlying this attempt is an idea that, even though many of the improvements that are mentioned here are not in place anymore—either due to changes in the federal government or due to the economic crises that hit the state at time of writing—if only we can manage to register the lessons learned, these experiences can be valuable in the future.[34]

But to make sense of how a case changed the scenario that was presented before us, we should first take a look at the structure and functions of the Witness and Victims Protection Programme between 2010 and 2011, and only then, move on to analysing our case. To do that we will begin by observing the legal framework of PROVITA and then pointing to the inadequacy of the programme in dealing with emergencies.

[34] Here we are not being naïve about this: on the contrary, we are adopting a position that one could consider to be an strategic kind of 'optimism': if we can register these experiences and reflect on our own failures and (small and transitory) successes, perhaps the results of this effort will last.

For a similar use of the idea of *optimism*, see Costas Douzinas, 'Welcome to the Age of Resistance', (*Open Democracy*, 1 March 2014) <http://www.opendemocracy.net/can-europe-make-it/costas-douzinas/welcome-to-age-of-resistance> accessed 7 November 2016.

## The Witness and Victims Protection Programme (PROVITA) in Rio de Janeiro between 2010 and 2011 and the Proposition of a New 'Emergency Solve' Programme (SEAPPA)

There are three major federal acts that we have to bear in mind when addressing this issue, all of which share a common human rights approach to the protection of life and security of the person, and consequent interest in imposing a concern for the dignity of the human person on programmes that otherwise and elsewhere could be considered as merely pertaining to public security.

PROVITA was created by Federal Statute No. 9,807 on 13 July 1999, focusing on establishing protection to victims and witnesses who choose to 'voluntarily collaborate with police investigation or criminal procedure'.[35] Besides that, Enactment No. 3,518, from 20 June 2000, established rules, norms and procedures of security and secrecy to PROVITA and created the Protection Programme for Special Convicts (SPDE) for the protection of the indicted and convicted.[36] According to this enactment, the protection to people threatened with death would consist of a complex set group of programmes and policies, where PROVITA and SPDE would be joined by the Protection Programme for Children Threatened with Death (PPCAAM) and the Protection Programme for Human Rights Defenders (PPDDH). Also, we have to consider Enactment No. 4,671 from 10 April 2003, which approved the

[35] Brasil, LEI No. 9,807, 13 July 1999 <http://www.planalto.gov.br/ccivil_03/leis/L9807.htm> accessed 7 November 2016.

[36] SPDE is particularly important as it complements PROVITA. The first (although it only exists in the federal level) is responsible for the protection of people after they are convicted or arrested. PROVITA specifically rules out witnesses under those situations. See art 2, s 2 of LEI No. 9,807, 13 July 1999: 'Estão excluídos da proteção os indivíduos cuja personalidade ou conduta seja incompatível com as restrições de comportamento exigidas pelo programa, os condenados que estejam cumprindo pena e os indiciados ou acusados sob prisão cautelar em qualquer de suas modalidades. Tal exclusão não trará prejuízo a eventual prestação de medidas de preservação da integridade física desses indivíduos por parte dos órgãos de segurança pública.'

internal rules of the programme and determined the number of personnel and roles they had to develop for the protection programme to work properly inside the Secretariat of Human Rights. However, that only applied at the national level. The idea behind these statutes and regulations is that state government bodies should follow and become responsible for implementing their own protection programmes over the years. To do that, they could count on financial support from the union or the federal government.[37]

Rio de Janeiro was the first federate state to create its PROVITA,[38] by state Statute No. 3,168/1999. However, as in most federate states, the effective implementation of the programme was achieved by a series of 'administrative contractual agreements' (or partnerships) between three actors: first, at the federal level, the SDH/PR, which invested almost 80% of the financial resources required to keep the programme running, would make a contractual agreement with a federate state body (in Rio, during 2010–11, this was SEASDH); then, SEASDH would provide the additional 20% of financial support for the programme, and propose a similar agreement—however, with much more difficult regulations and strict legislation—to an NGO. In addition to these three levels of financial administration (that includes the federal level); the state has also organised itself into three different levels of implementation of the programme: the political, executive, and technical levels.

PROVITA's political decision-making is the responsibility of a deliberative council (Conselho Deliberativo do PROVITA—CONDEL), a multi-sectorial body composed of several public institutions, particularly from the administration of justice and the NGO under contractual agreement with the government. It is the task of the CONDEL to decide whether a victim or a witness of a

[37] Accoding to Paula Kapp, in 2010, 17 states had joined the National System of Protection: Acre, Amazonas, Bahia, Ceará, Distrito Federal, Espírito Santo, Goiás, Maranhão, Mato Grosso do Sul, Minas Gerais, Pará, Paraná, Pernambuco, Rio de Janeiro, Rio Grande do Sul, Santa Catarina e São Paulo. Witnesses who asked for protection, even in states that do not have PROVITA at the state level, would be supported by the federal programme. The only state that had a different programme was Rio Grande do Sul, which ran its own protection programme (Kapp (n 28) 4-5.

[38] ibid 14.

crime should enter the programme; this takes place during classified meetings into which not even the interested person is allowed. In addition, the CONDEL is mandated to make decisions on the improvement of the policy itself. The existence of this multi-institutional council is further justified by the need to establish a 'checks and balances' mechanism in which the rights of the person ought to be protected by each of the members, which are representatives of myriad institutions.

At the other end of the spectrum stands the NGO, whose main responsibility is to hire technical staff that will closely monitor the wellbeing and the needs of witnesses and victims. It is also worth noting that the NGOs engaged in the protection programmes are usually those dedicated to human rights activism, thus reinforcing the human rights character of the protection programme. The team of professionals hired by the organisation—usually a lawyer, a psychologist and a social worker—also undertakes the difficult task of continuously assessing the risk of threat to and the level of autonomy enjoyed by those under protection. This is of utmost importance, especially because people under threat ought to be given a chance to design an entirely new plan of life.

Finally, the state governmental human rights body closely monitors the regular execution of the programme by the NGO, both financially and technically. This includes demanding regular expenses reports in a quite complicated way—NGOs must, for example, declare how much they spend and present receipts under formal requisition, so that their commercial network of suppliers are not exposed to the whole bureaucratic process—and updates on the wellbeing of the programme's beneficiaries.

This tripartite system, as described above, has been developed mostly on a pragmatic basis. As one would expect, especially due to the complexities involved in protecting human lives, there have been and there continue to be myriad problems in the daily execution of PROVITA.

Despite its *de facto* existence, the CONDEL has only very recently been established in a formal manner—by State Executive Order No. 43,047, approved on 22 July 2011. In any case, it was not functioning properly, as the meetings were attended only by representatives of a few organs, namely (and usually) the SEASDH,

the Public Prosecutors Office, the Bar Association and the NGO. After its formal establishment, all other public organs have nominated representatives and the meetings have gained considerable momentum, with great benefits to the debate on the protection policy. There is no doubt, however, that the CONDEL is still in its infancy, as there is still room for improvement in both its functioning and its effectiveness.

Moreover, there are problems related to the timing of the inclusion of victims and witnesses in the programme, leading to the very unfortunate existence of a waiting list. It is of course unacceptable for a protection programme such as PROVITA that potentially threatened people are left waiting and remain in danger. Albeit unacceptable, this is explained by a number of factors. The procedure for entering in PROVITA starts with a request from a public prosecutor, the legal professional mandated by law to commence the criminal prosecution procedure. The regulation of PROVITA states that, apart from the existence of the death threat, the person needs to have been a witness or a non-fatal victim of a crime and this condition implies that he or she must contribute to securing a successful prosecution. Thus the public prosecutor, due to his or her legal mandate, is in a position to assess whether the witness or victim will be important for solving the crime. No person will therefore enter the programme without the request of such a professional.

With the request, the person is then referred, usually by SEASDH or the president of the CONDEL, to the team of technical professionals hired by the NGO, who will assess the social, psychological, and other conditions of the person and close family and the risk involved. They will then issue a technical opinion. A formal procedure is formed and taken to the CONDEL, where the procedure is handed to one of the members of the council, on a rolling basis, for voting. This member will then write his or her vote—favourable or not—and take it to the next meeting of the CONDEL, when all votes are taken. Only then is the person able to enter the programme, which, as one can conclude, may easily take two months.

The SEASDH's monitoring of administrative contracts with the federal government and the NGO is also has its difficulties. As

mentioned above, there are several rules designed to guarantee the appropriate application of public resources. Therefore, correctly executing the contracts is sometimes nothing short of a Herculean task and an entire team of agile and specialised financial administrators would ideally be necessary to prevent delays and ensure the regular application of resources. At the moment, such contracts endure over a long period, through various sectors of different organs and professionals who check their compatibility with several norms,[39] but who are not familiar with the particulars of the protection programmes and therefore do not understand the need for a flexible outlook when applying rules in extreme situations. It is thus absolutely necessary that legislation is reformed with the purpose of making extraordinary concessions for urgent situations such as those faced by prospective subjects of the protection programmes.

Delays in the application of resources and in the decision-making of the CONDEL have a deleterious impact on the efficiency of the entire system of protection, precisely because people under threat cannot wait for administrative procedures to take their due course. This is especially the case where there is an immediate vulnerability caused by recent threats.

It is self-evident that measures ought to be taken to prevent delays. It is common sense that a threatened person should not wait more than 15 days, which is a perfectly reasonable timespan for procedures to develop. However, even 15 days is too much time for someone who is threatened by a potential murderer, therefore there must be an emergency system in place that deals with such cases and provides a minimum level of protection even before a formal risk and compatibility assessment.

The 'Daniel' case is a dramatic example of how difficult it is to respond to the palpable risk of a threat and possibly imminent death with all such difficulties in place. There will be no references under

[39] Standard agreement, contract procedures and monitoring demands a thorough analysis from at least 10 people, including public officers from different government branches, and not counting among those the financial administrative staff from the NGO. Accordingly to State Resolution No. 217/2011, from the State Civil Secretariat, public officials may take up to 45 days to analyse that data.

this section of the paper: only testimony. This is a case where we, the authors of this article, will change our role with those of witnesses: we will only be able to report on what we have seen—such as in an ethnographical work. In addition, we will be putting to test not only the legal framework we have described, but also our theoretical assumptions on the topic.

## The 'Daniel' Case: On How Emergency and Necessity Shapes Human Rights Inside and Outside Legal Boundaries

Late on a Friday afternoon, the phone of SDPDH rang several times, as three different NGOs were calling with the same news: a well-known journalist and his family were going to be executed by a drug dealer in Babylon favela (slum)[40]—a territory almost completely controlled by 'Comando Vermelho' (Red Command), a dangerous drug-dealing faction. After contacting Daniel—our journalist—SEASDH officers decided that he might be included under the protection of PROVITA or PPDDH, and that they needed to take him to a safer place, where he and his family could wait for the security procedures to take their course. However, even facing death, Daniel refused to leave the slum with the police: he did not trust them and said he would only leave accompanied by specialised human rights personnel from SEASDH. So, as promised by recent agreements with SESEG, the human rights department contacted CORE for the first time since the agreement. This was a specialised police task unit that was then supposed to answer for all protection, guard and transportation of witnesses cases in Rio—a recent improvement to protection programmes at that time. That would have made the case easier—or not, as we will point out later—but reality is always harder than theory.[41]

[40] The name of the favela (slum) has been changed to protect all involved and abide by the rules of the programme.

[41] On CORE, see for example Governo do Rio de Janeiro, 'CORE Oferece Curso para Agentes do Comando Operações Táticas (COT) da Polícia Federal' <http://www.policiacivil.rj.gov.br/exibir.asp?id=15160> accessed 27 October 2016.

CORE had only a few light combat car units, which were being used in an operation in another city, and, due to rush hour traffic, could not be immediately counted on. Daniel kept calling, saying that he might not last for another hour. So SEASDH officers decided to act: they asked CORE for one 'trusted contact' within the local police station near the Babylon favela, and after making contact with Inspector Hananias, they went off with their own car to the police station. There, Inspector Hananias had already summoned his own task force from the civil police and had also requested support from the military police quarters nearby—which he, himself, did not seem to fully trust.

SEASDH officers kept waiting for CORE, and calling regularly, but traffic was too jammed. Daniel also kept calling, crying and begging to be rescued, with his family, from inside the favela. After half an hour had passed, SEASDH and Hananias asked the military police unit if they knew how to find the place inside the favela and how to get out. Without consulting their superiors—who would probably have called them off—SEASDH officers decided to take the risk and 'invade' the favela with the police. This happened at around 8 pm. It was agreed with the police that two cars from the military police with around 10 heavily armed soldiers would lead the way, alongside one car from the civil police—led by trusted Inspector Hananias—and that the SEASDH car should follow.

On the way, several armed drug dealers (with machine guns) were seen; however, not a single shot was fired. There were even motorcycles circling the rescue force from a distance, with armed riders. There was some delay due to the time it took for the cars to park because there are no roads inside the favela. In order to find the hiding place of Daniel and his family, a code was set—a red shirt hanging by the window. By the time the family was inside the SEASDH car, another car had dropped by: four men came out, three of them armed, and shook hands with the military police officers, whom they seemed to know very well, and started asking to ask questions. Inspector Hananias and his four fellow policemen from the civil police were visibly disturbed. Understanding that they were now under siege, SEASDH officers had to get out of their car and also shake hands with the armed men. Bizarrely, the men asked to go along with the task force back to the police station—which was very surprising, and the cars went back with the three rescued members

of the family and the gang members. In hindsight, one can see that the possible corrupt relationship between the drug dealers and the military police was probably the reason why nobody was shot—and if they had waited for CORE, an escalation to armed conflict would probably have taken place.

Daniel's statement on why he was being threatened took place in the police station. However, his story was inconsistent. Officers from SEASDH decided then to apply the regular witness safety procedure: send away the local police and take Daniel and his family, guarded by CORE, to a safer neighbourhood that CORE would also leave so that only SEASDH would know the safe place of the family. During that time, SEASDH personnel were trying to figure out how to host the family—who had no other relatives in the state—within the time necessary for them be inserted into one of the available protection programmes. A text was sent and presented in emergency terms to the head of SEASDH's financial department, asking for immediate money to hire a 'safe place' for at least two weeks, plus money for food—and that was all they got.

SEASDH officers decided that, having no other options, they would have to 'cheat' the system (and the market) by moving the family from place to place every five days, telling hotels and hostels that they were people being placed in some kind of social assistance programme and that—more seriously—all expenses would be paid in three days (when, in fact, they knew that it might take at least three months for the emergency money granted to be transferred in payment).

In the end, the case in itself did not lead to anything: the family did not want to join any protection programme, and also decided not to collaborate with any investigations. They decided to leave the state with what was left of their own resources. Before that, SEASDH officers attempted to obtain more information on the case and, in doing so, found out that there were serious issues involving political funding in the favela where Daniel was based. It involved

the direct intervention of drug dealers, local community leaders, politicians, and federal funding.[42]

However, the concrete and immediate threats dealt with made clear that there was an urgent need for financial resources for emergency measures. After that, the state government granted—first—R$ 20,000,00 (to be used every four months) to the SSDPDH protection programmes. That began to be used and requested on a regular basis—either by PROVITA, PPCAAM, PPDDH, and then during many other emergency situations where it seemed necessary to take someone to a safer place until legal measures were processed.

## Conclusions

This quite dramatic narrative shows how urgent changes were needed in the entire system of protection in the state of Rio de Janeiro, and, more generally, in Brazil. Firstly, it is clear that one cannot implement any protection programme without establishing a close relationship—based on trust and highly specialised personnel—with the security forces. Moreover, it is necessary that the different protection programmes be interconnected in an efficient manner. This would allow threatened people who are at the boundaries of two or more programmes to be easily included in one or another micro-system of protection. Finally, there must be an agile, exceptional, and extra-classified system of emergency protection.

The proposal for the creation of a state integrated system of protection in the government of the state of Rio de Janeiro (SEAPPA) responds precisely to these challenges and the need for the coordination of actions already in place. This becomes even clearer when one realises that the spine of all protection programmes is the protection of the human person and this is why it extends to witnesses and victims, as well as to children, adolescents, and human rights defenders. Integration is also essential for keeping together myriad public policy sectors—such as anti-impunity, social

[42] Unfortunately, we cannot give more detail on what happened in the local area afterwards, as this would possibly identify the people and the community involved in the case.

assistance, public security, and justice initiatives—towards one, more important, objective: the protection of the life and physical integrity of the human person. Several directions were studied and some have already been taken, towards this wider objective. It should be self-evident that the implementation of such a system would require wider investment of financial resources.

After the case under examination, a tool was devised to meet the need for emergency financial resources. This was done based on the interpretation of a statute that allowed a certain amount of money to be taken by public administrators, with more flexible rules of execution, for the purpose of meeting secret expenses. Although this was a considerable advance, it is still not satisfactory, as the resources are never sufficient for housing, for example, and the rules are still quite strict, ultimately preventing some (necessary) expenses from being met.

A very interesting idea was also developed, albeit not directly related to PROVITA. Within the Programme of Protection of Human Rights Defenders (PPDDH), a department of protection is to be created and specifically formed of police members specialising in devising protection mechanisms for threatened people. These police officers are to be volunteers, selected by a public procedure within the secretariat of public security. Once selected, they should be trained in human rights and receive special financial remuneration for developing such a specialised role. The administration of this department is to be directly linked to the human rights secretariat, something that will bring coherence to the system, under the principle of the mainstreaming of human rights. Despite having been created within PPDDH, as detailed above, once the system of protection is created, all programmes can easily benefit from the knowledge that will be developed within this department.

Finally, it should be mentioned that it is not mandatory that the protection programmes are developed through NGOs. There are indeed several problems in the implementation of such programmes via organisations of civil society, mainly related to monitoring difficulties. On the other hand, there are strong arguments for implementation by them, the main one being that, in Rio de Janeiro, most threats are perpetrated by public agents. Protection by an organ of the state structure against agents employed by the same

state is seen as lacking in legitimacy by some sectors of civil society and by the victims of such threats. However, as there might be ways of linking the technical team to independent state institutions, the debate as to the best administrative model to be implemented is ongoing.

All these difficulties make us wonder whether it is really possible to enforce human rights from inside the government using public policy measures when almost every human rights violation involves state or government agents in some way. Or are we destined to face the fact that every step towards a governmental implementation of human rights standards is necessarily minimal at best, and virtually ineffective at worst?

Collaboration between SEASDH and SESEG has largely improved—for example, during the debates on PPDDH model—but that does not fully answer either of our questions. It is a fact that, increasingly, governmental officials—not only police officers, but also bureaucratic personnel—have been committing themselves to understanding human rights as basic standards for the re-shaping of policies, although in practice this might be more difficult to change. That is partially the 'paradox of human rights', as critical legal theory formulates it: the more human rights are legally accepted the greater the possibility that they will be violated or not fulfilled.[43]

In practice, this paradox is best exemplified by the 'Daniel' case. SEASDH officers became, themselves, witnesses of a strange set of events that involved not only general (military) police corruption, but also an intricate network of corruption that ranged from the local police force and drug dealing level to, perhaps, the federal government. Nevertheless, they had to admit that what granted security to them on the occasion was, bizarrely, the corrupt relationship between the military police and the local drug dealers—probably because no one fully knew what was really at stake on the occasion, as Daniel himself decided never to expose the entire situational context of threat.

[43] Costas Douzinas, 'The Paradoxes of Human Rights' (2013) 20(1) Constellations 51.

It does seem, moreover, that despite these difficulties—or perhaps because of them—protection programmes benefited (albeit minimally, some could say) from the personal commitment of public officials inserted into the governmental structure, who felt challenged by an extremely difficult security environment and decided to compel implementation at the next level. This seems to confirm that the implementation of human rights public policies, particularly challenging ones, need officers committed to the cause, who are willing to transform problems into windows of opportunities. It is worth noting that this had not happened before in Rio de Janeiro, possibly as a result of all the challenges posed.

It seems that, as our case shows, real advances were only made within a 'resistance' conception of human rights, i.e., when the system was set against itself. Emergency situations went beyond political agreements, shortening negotiations that would otherwise take years and expanding policy through an almost dialectical tension.