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REVISITING A "PROMISING INSTITUTION": PUBLIC LAW LITIGATION IN THE CIVIL LAW WORLD

Lesley K. McAllister*

INTRODUCTION

Group litigation has been the focus of a significant body of comparative law literature since the 1970s. This body of work was largely inspired by the emergence of class actions and other public interest law in the American legal system—the new types of civil litigation that Abram Chayes termed “public law litigation” in 1976.¹ Comparative legal scholars, particularly scholars from outside the United States, have often considered the extent to which such group litigation can and should be transplanted into countries whose legal systems form part of the civil law tradition.²

Within this literature, Brazil has attracted attention as one of the few civil law countries that has successfully incorporated and developed a procedural mechanism for group litigation.³ The public civil action—*ação civil pública*—created by statute in 1985, enables

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1. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

2. See Richard B. Cappalli & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 TEMP. INT'L & COMP. L.J. 217, 223 (1992); Michael S. Greve, *The Non-Reformation of Administrative Law: Standing to Sue and Public Interest Litigation in West German Environmental Law*, 22 CORNELL INT'L L.J. 197, 207, 229–43 (1989); Per Henrik Lindblom, *Individual Litigation and Mass Justice: A Swedish Perspective and Proposal on Group Actions in Civil Procedure*, 45 AM. J. COMP. L. 805, 817 (1997). “Civil law” countries include most of Western Europe, all of Central and South America, and many parts of Asia and Africa. “Common law” countries include Great Britain, the United States, Canada, Australia, and New Zealand. On the origins and operation of the civil law tradition, see generally JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* (2d ed. 1985).

3. See Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 323–25 (2003); Michele Taruffo, *Some Remarks on Group Litigation in Comparative Perspective*, 11 DUKE J. COMP. & INT'L L. 405, 412 (2001).

the legal defense of environmental, consumer and other “diffuse and collective” interests. Brazilian jurists and political scientists have called the introduction of the public civil action a “radical transformation” and even “a revolution” in the Brazilian legal order.⁴ Referred to as the “Brazilian class action” by some, it has been held up as a model for other civil law countries.⁵

However, the most interesting aspect of the public civil action in Brazil is not the procedural instrument itself, but the legal institution that has been key in establishing and using the public civil action to enforce statutory and constitutional rights. This legal institution is the Brazilian *Ministério Público* or, using its French name, the *Ministère Public*—the prosecutorial institution that constitutes the civil law tradition’s analog to the Attorney General in common law countries.⁶ In the late 1970s, the Italian legal comparativist Mauro Cappelletti identified the *Ministère Public* as a “promising institution” for the legal defense of group and public interests.⁷ In Brazil, to a greater extent than in other civil law countries, prosecutors have shown signs of living up to this promise.

The public law litigation work of Brazilian prosecutors, rather than the procedural instrument they use, is the focus of the present article. As such, it is an exercise in comparative law scholarship of the “legal systems” type rather than the “rule” type, as distinguished by John Henry Merryman.⁸ Merryman explains that while rule comparison has been the predominant form of comparative legal scholarship, rule comparison has “declined into a spent, static enterprise whose potential

4. ROGÉRIO BASTOS ARANTES, *MINISTÉRIO PÚBLICO E POLÍTICA NO BRASIL* 24 (2002); ÉDIS MILARÉ, *DIREITO DO AMBIENTE* 510 (2001).

5. See Gidi, *supra* note 3, at 326; Taruffo, *supra* note 3, at 412. Because of the substantial differences between the American class action and the Brazilian public civil action, I use the literal translation of the Brazilian term, public civil action, throughout this paper.

6. *Ministério Público* can be literally translated as the Public Ministry, but it is more usefully translated as “attorney general,” “public prosecution,” or “procuracy.”

7. 2 ACCESS TO JUSTICE: PROMISING INSTITUTIONS (Mauro Cappelletti & John Weisner eds., 1979) [hereinafter ACCESS TO JUSTICE, VOL. II].

8. See Pierre Legrand, *John Henry Merryman and Comparative Legal Studies: A Dialogue*, 47 AM. J. COMP. L. 3 (1999); John Henry Merryman, *Comparative Law Scholarship*, 21 HASTINGS INT’L & COMP. L. REV. 771, 775–77 (1998).

for significant academic productivity is exhausted.”⁹ He promotes an approach to comparative law that takes as its unit of comparison not the text of legal rules, but rather the legal institutions, actors, and other components of the “social sub-system” that constitutes the legal system.¹⁰ In his view, a legal systems approach will reinvigorate comparative law studies and help it move past the stagnancy of its traditional tasks.

In the case of group litigation in Brazil, it is not the text of the public civil action law or the details of its judicial implementation that represent the most significant legal innovation, but rather the Brazilian *Ministério Público*'s role in enabling and supporting its development. The story of group litigation in Brazil is the story of this legal institution. Using the public civil action, the Brazilian *Ministério Público* has established a novel and powerful way of enforcing statutory and constitutional rights in the Brazilian legal system—a notable feat in a legal system long characterized by unequal and inadequate enforcement of the law.¹¹ To the extent that civil law countries look to Brazil as a model for group litigation, they should focus their attention on the institutional innovations that occurred rather than novelties in the text of the enabling statute.

In Part I of this article, the literature on public law litigation and the *Ministère Public* is reviewed. Part II describes the role that the Brazilian *Ministério Público* has played—establishing the legal framework, building its institutional capacity, and doing public law litigation. The conclusion offers final remarks about the potential of the *Ministério Público* in the representation of group interests, including a discussion of important concerns that have been raised about having public prosecutors play this role.

9. Merryman, *supra* note 8, at 782.

10. See Legrand, *supra* note 8, at 62.

11. See Keith S. Rosenn, *Brazil's Legal Culture: The Jeito Revisited*, 1 FLA. INT'L L.J. 1, 19 (1984); Keith S. Rosenn, *The Jeito: Brazil's Institutional Bypass of the Formal Legal System and Its Developmental Implications*, 19 AM. J. COMP. L. 514, 514 (1971).

I. PUBLIC LAW LITIGATION

In 1976, the American legal scholar Abram Chayes observed that a new type of civil litigation had become common in the federal courts of the United States. As this new civil litigation concerned public policy issues that arose from the implementation and enforcement of public laws, he called it “public law litigation.” Other scholars before and after Chayes have described this legal activity using many other names—group litigation, public interest litigation, private attorney general actions, and policy-oriented litigation.¹² Although their definitional contours vary, each of these terms expresses the idea that civil lawsuits are being used in a new way to benefit the condition of groups within society or society as a whole.

While Chayes and other scholars described this new type of litigation in the United States, foreign scholars analyzed the need for group litigation in their legal systems. In particular, Mauro Cappelletti, an Italian comparativist, researched and wrote extensively about how European countries with civil law systems might enable the legal defense of group interests, which he viewed as an essential aspect of “access to justice” in a modern society.¹³ The basic question that motivated his research was whether and how the legal systems of civil law countries might be made available for enforcement of social rights in the way that United States courts were

12. See OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978); DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977); STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987); Mauro Cappelletti & Bryant Garth, *Finding an Appropriate Compromise: A Comparative Study of Individualistic Models and Group Rights in Civil Procedure*, 2 CIV. JUST. Q. 111 (1983); John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215 (1983); Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207 (1976); Taruffo, *supra* note 3.

13. See, e.g., 1 ACCESS TO JUSTICE: A WORLD SURVEY (Mauro Cappelletti & Bryant Garth eds., 1978) [hereinafter ACCESS TO JUSTICE, VOL. I]; ACCESS TO JUSTICE, VOL. II, *supra* note 7; 3 ACCESS TO JUSTICE: EMERGING ISSUES AND PERSPECTIVES (Mauro Cappelletti & Bryant Garth eds., 1979) [hereinafter ACCESS TO JUSTICE, VOL. III]; 4 ACCESS TO JUSTICE: ACCESS TO JUSTICE IN AN ANTHROPOLOGICAL PERSPECTIVE (Klaus-Friedrich Koch ed., 1979). Cappelletti and his coauthors in the Florence Access to Justice Project conducted “a worldwide survey” of access to justice. Funded by the Ford Foundation and the Italian National Research Council beginning in 1973, the Florence Access to Justice Project culminated in the publication of four volumes comprised by fifty-five articles in 1978 and 1979.

in the 1960s and 1970s. This section reviews the literature on public law litigation that developed in the United States as well as the literature concerned with enabling group litigation in other countries, particularly civil law countries.

A. *Public Law Litigation in the United States*

While other scholars had written about the phenomenon of public interest litigation, Chayes was the first to identify it as a "new model of civil litigation" and describe its essential characteristics in a way that analytically distinguished it from traditional civil litigation.¹⁴ Rather than a dispute between private parties about individual rights, the new type of litigation involved "a grievance about the content or conduct of policy."¹⁵ Chayes observed that the interests of groups rather than individuals formed the basis of the legal complaint and that the type of relief was often "corrective rather than compensatory."¹⁶ He highlighted the role of the judge, who often fashioned the remedy through a process of negotiation and remained involved in supervising the implementation of the remedy.

Public law litigation constitutes a subset of what others have referred to as group actions or group litigation. Michele Taruffo makes a useful distinction between two categories of group litigation based on their remedial objective.¹⁷ The first category, damage-oriented group litigation, seeks compensation for the individuals in the group for the harms or injuries suffered. The second category, policy-oriented group litigation, is aimed at achieving some sort of legal change, usually a change in regulatory policy or legally relevant

14. See Chayes, *supra* note 1; Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982) [hereinafter Chayes, *Burger Court*].

15. Chayes, *Burger Court*, *supra* note 14, at 5.

16. *Id.*; see also Chayes, *supra* note 1, at 1288–1302.

17. See Taruffo, *supra* note 3, at 406–08; cf. Cappelletti & Garth, *supra* note 12, at 121–40 (offering an alternative way to divide group actions into four types based on the type of plaintiff: *parens patriae* suits brought by the government; actions brought by civil society organizations; actions brought by administrative agencies, and private actions brought as class actions); Mauro Cappelletti, *Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study*, in ACCESS TO JUSTICE, VOL. II, *supra* note 7, at 773 (offering the categories of "public (governmental) attorney general," individual "private attorney general," and organizational "private attorney general").

behavior. Taruffo's policy-oriented group litigation encompasses Chayes's public law litigation. Public law litigation can also be considered a subset of public interest law, a vague term which has been used widely to encompass any legal activity that purports to seek social change. The present article adopts the term public law litigation because of its more delimited and defined character as well as its significant parallel with the new type of litigation that has emerged in Brazil as described in Part II.

The set of cases that Chayes described concerned school desegregation, employment discrimination, prisoners' rights, securities fraud, and other significant public policy issues. Chayes suggested that such cases arose from the emergence of the modern administrative state.¹⁸ The decisions and actions of administrative agencies affected large groups of people who, in turn, called upon the courts to exercise legal oversight. Previously viewed as neutral arbiters in private disputes, courts were now being asked "to deal with grievances over the administration of some public or quasi-public program and to vindicate the public policies embodied in the governing statutes or constitutional provisions."¹⁹ Unsurprisingly, judicial decisions in such cases had broad public policy implications and thus transformed the American judiciary into a more political actor. As stated by Chayes, "[l]itigation inevitably becomes an explicitly political forum and the court a visible arm of the political process."²⁰ While judicial intervention in political issues has been criticized on the grounds of both illegitimacy and inefficacy, public law litigation continues to be prevalent in the United States.²¹

18. See Chayes, *Burger Court*, *supra* note 14, at 60.

19. *Id.* at 4.

20. Chayes, *supra* note 1, at 1304.

21. See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1017-19 (2004).

B. The Ministère Public: A "Promising Institution" in the Civil Law World

Similar to Chayes, Cappelletti theorized that a new set of group interests had emerged with the rise of modern society.²² He viewed society as having undergone a process of "massification" with the "massive organization of labor," a "mass psychology molded by modern mass media," and "the rise of the mass-oriented 'welfare state.'"²³ In the new mass society, rights became increasingly "diffuse and collective."²⁴ These were rights that were held by many people at once—by associations, communities, and classes of people.²⁵ According to Cappelletti, such rights included "freedom from indigency, ignorance, and discrimination, as well as the right to a healthy environment, to social security, and to protection from massive financial, commercial, corporate, or even governmental oppressions and frauds."²⁶

Cappelletti viewed the American legal system as the most advanced in terms of its legal protection for this new set of social rights.²⁷ He saw this legal development, however, not as unique to the United States, but rather as a trend in all legal systems: a necessary adaptation of legal systems to the new mass society. The legal protection of diffuse interests formed the second wave of what Cappelletti called the "three waves" of access to justice in the worldwide access-to-justice movement.²⁸ The first was the provision

22. See Mauro Cappelletti & Bryant Garth, *Access to Justice: The Worldwide Movement to Make Rights Effective—A General Report*, in ACCESS TO JUSTICE, VOL. I, *supra* note 13, at 35–36 (making note of Chayes's work, referring to the "worldwide movement in the direction of what Professor Chayes has called 'public law' litigation").

23. Mauro Cappelletti, *Vindicating the Public Interest Through the Courts: A Comparativist's Contribution*, in ACCESS TO JUSTICE, VOL. III, *supra* note 13, at 517–18; see Cappelletti & Garth, *supra* note 22, at 35–36, 49.

24. See *infra* note 51 (explaining the different meanings of these terms in Brazil). Following the "access to justice" literature, I will refer to both hereinafter simply as diffuse rights or interests.

25. See Cappelletti, *supra* note 23, at 518.

26. *Id.* at 519.

27. See *id.* at 516.

28. See Cappelletti & Garth, *supra* note 22, at 6 (defining access to justice as having both a procedural and a substantive dimension: "[f]irst, the system must be equally accessible to all, and

of legal aid to the poor; the second was the representation of collective or diffuse interests other than those of the poor, particularly the interests of consumers and environmentalists; and the third wave involves the creation of alternative dispute processing procedures and institutions that are more specialized and less formal than traditional courts.²⁹ He based his model largely on the United States, which experienced significant legal developments in each of these areas beginning in the 1960s.

Cappelletti was interested in how countries in the civil law tradition might extend legal protection to this new set of social rights. He found that the *Ministère Public*³⁰—the analog to the Attorney General in common law countries³¹—had certain characteristics that might enable it to play a role in the legal defense of group interests. He observed that the prosecutors that formed part of the *Ministère Public* in civil law countries were traditionally responsible not just for prosecuting crimes, but also for representing the *ordre public*, or “public interest,” in litigation involving private individuals.³²

The first of the traditional roles of the *Ministère Public* was to prosecute criminal cases, preparing and presenting the state’s case against the accused in court. The second traditional role was to intervene in ordinary judicial proceedings between private individuals to ensure the representation of the “interests . . . of society

second, it must lead to results that are individually and socially just.”). They state that their work has emphasized the procedural dimension. *Id.*

29. See Cappelletti & Garth, *supra* note 22, at 35–36, 49.

30. This discussion of the “access to justice” literature follows Cappelletti in his use of the French version of the institution’s name, the “Ministère public.”

31. See John Bilyeu Oakley, *The United States as Participant in Public Law Litigation: Recent Developments*, 13 U.C. DAVIS L. REV. 247 (1980) (discussing the potential role of the United States Attorney General in public law litigation).

32. See generally Vincenzo Vigoriti, *The Role of the “Ministère Public” in Civil Proceedings: Italy*, in ITALIAN NATIONAL REPORTS TO THE IXTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW, TEHRAN 269–88 (1974), as reprinted in COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS 501–07 (John Henry Merryman & David S. Clark eds., 1978); Burton A. Weisbrod, Joel F. Handler & Neil K. Komesar, PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS (1978). The *Ministère Public* has traditionally had wide discretion in determining what constituted the public interest, and has tended to be conservative in its determination.

and of the law.”³³ Most commonly, prosecutors intervened in private litigation that involved weak individual parties such as “minors, widows, absentees, and incompetents,” often in cases involving marital and paternity disputes.³⁴ As explained by Merryman, the theory behind this “public interest” function was that parties could not be expected to present all arguments in a given dispute and, thus, the representative of the *Ministère Public* was necessary “to assure that an impartial view, in the interest of the law, is presented.”³⁵ Cappelletti argued that this traditional public interest role should be extended to include the new set of public interests that had emerged in the massification of society.³⁶

Cappelletti saw signs of this potential in the historical development of the institution in European countries. In several countries, particularly Belgium, France, and Italy, the *Ministère Public* had gained the power in the late nineteenth and early twentieth centuries to initiate as well as intervene in civil cases involving “*ordre public*.”³⁷ The *Ministère Public*’s role had generally shifted over the centuries from defending the state’s interest to defending society’s interests.³⁸ In the process, the *Ministère Public* was increasingly dissociated from the executive branch and placed within the judicial branch, or even made autonomous from all three branches.³⁹ For these reasons, Cappelletti identified the *Ministère Public* as an institution that could become active in the legal defense of the newly emerging set of diffuse and collective interests.

33. See RENÉ DAVID, *FRENCH LAW: ITS STRUCTURE, SOURCES, AND METHODOLOGY* 59–61 (1972), as reprinted in *COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS* 498–500, *supra* note 32; MERRYMAN, *supra* note 2, at 103.

34. Cappelletti, *Governmental and Private Advocates*, *supra* note 17, at 778.

35. MERRYMAN, *supra* note 2, at 103.

36. See Cappelletti, *supra* note 17, at 775.

37. See Cappelletti, *supra* note 23, at 526.

38. DAVID, *supra* note 33, at 499–500.

39. See MERRYMAN, *supra* note 2, at 104 (referring to the “judicialization” of the public prosecutor service); Vigoriti, *supra* note 32, at 501 (stating that the Italian constitution of 1948 abolished the institution’s dependence on the executive branch and affirmed prosecutors as members of the judicial branch); MAURICIO DUCE & CRISTIÁN RIEGO, *CENTRO DE ESTUDIOS DE JUSTICIA DE LAS AMÉRICAS (CEJA), DESAFÍOS DEL MINISTERIO PÚBLICO FISCAL EN AMÉRICA LATINA* 24–25 (2005) (identifying the *Ministerio Público* in Argentina, Bolivia, Chile, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, and Venezuela as “autonomous or outside the other branches of government”).

Although he identified the *Ministère Public* a “promising institution,” Cappelletti ultimately concluded that it would be ineffective in the defense of diffuse interests. In his view, prosecutors are too much like judges in that they stand above the people, and they are too much like executive branch officers to defend people against “abuses by the political branches of government.”⁴⁰ He also identified obstacles in the seemingly inflexible bureaucratic structure of the *Ministère Public*, particularly its lack of specialized sections in areas such as marketing regulations or environmental protection.⁴¹ He concluded that the *Ministère Public* was “inherently unsuited to becoming the forceful promoter of the type of group, class, and public-interest actions that are most important in modern societies.”⁴²

II. THE BRAZILIAN *MINISTÉRIO PÚBLICO* AND PUBLIC LAW LITIGATION

Despite Cappelletti’s predictions, Brazil’s *Ministère Public*—the Brazilian *Ministério Público*—is extremely active in defending group interests. A series of changes in Brazilian law redefined the institutional mission and profile of the Brazilian *Ministério Público* in the 1980s. Through these legal changes, the *Ministério Público* was transformed from the part of the executive branch responsible for criminal prosecution into a more independent governmental institution responsible for legally defending the “diffuse and collective interests” of society as well as prosecuting crimes.⁴³

The *Ministério Público*’s work in Brazil constitutes an analog to the public law litigation described by Chayes. The Brazilian *Ministério Público* often files legal actions that challenge public policy decisions and that seek to restructure and change how public laws—both statutes and the Constitution—get implemented and

40. Cappelletti, *supra* note 17, at 784–85.

41. *See id.* at 787.

42. *Id.* at 785.

43. This section is based on original research that is fully presented in Chapter 3 of LESLEY K. MCALLISTER, *MAKING LAW MATTER: ENVIRONMENTAL PROTECTION AND LEGAL INSTITUTIONS IN BRAZIL* (2008).

enforced. Prosecutors view themselves as the representatives of societal interests, rather than governmental interests. As they often see governmental interests to be in conflict with societal interests, many of their lawsuits are against the government itself.

Yet, while Chayes highlighted the role of the judge in American public law litigation, it is the role of the prosecutor that is most significant in Brazilian public law litigation. Prosecutors play a major role in both litigating and negotiating remedies for public law cases. Even though civil society organizations and a number of other governmental institutions are authorized to file public civil actions under the Public Civil Action Law, over ninety percent of public civil actions have been filed by prosecutors.⁴⁴

This section examines the close relationship between the Brazilian *Ministério Público* and public law litigation in Brazil. Part A shows how the *Ministério Público* helped establish the statutory and constitutional framework that enabled the representation of group interests. Part B shows how the *Ministério Público* restructured itself to represent group interests. Part C shows how the *Ministério Público* has predominated in representing group interests, describing how prosecutors develop public law litigation and their primary areas of litigation. While most of the examples and data presented come from the Brazilian state of São Paulo, the *Ministério Público* of other Brazilian states as well as the Federal *Ministério Público* play a similar role.⁴⁵

44. Sílvia Cappelli, *Novos Rumos do Direito Ambiental*, in TEMAS DE DIREITO AMBIENTAL: UMA VISÃO INTERDISCIPLINAR 55 (Enio Costa Hausen, Orci Paulino Bretanha Teixeira & Pécio Brasil Álvares eds., 2000).

45. The author conducted field research in 2000 and in 2001–02 in the Brazilian states of São Paulo, Pará, Rio Grande do Sul, Mato Grosso, Rio de Janeiro, Amazonas, Paraná, and Pernambuco. While the *Ministério Público* of all these states had cases in many if not all of the areas of public law litigation described in this paper, the volume and significance of this work varied. São Paulo's *Ministério Público* is the country's largest state prosecutorial institution and its most active in the defense of public interests in terms of the number of cases handled.

A. Building the Legal Framework

The legal framework for public law litigation in Brazil consists of procedural law, substantive law, and constitutional law passed in the 1980s and 1990s. The procedural law set forth a mechanism for the legal representation of group interests. The substantive laws created new rights with a group dimension—environmental laws, consumer laws, disability rights laws, and others. The constitutional law established the *Ministério Público* as a defender of societal interests and granted the institution a high degree of autonomy. The *Ministério Público* played an important role in writing the statutes and constitutional law that expanded its legal authority to defend group rights.

While the *Ministério Público*'s institutional initiative played a significant part in constructing this legal framework, the social and political context of the 1980s was very favorable for an expansion of the *Ministério Público*'s role. In the 1980s, large social and political changes were taking place as Brazil transitioned to democracy after fifteen years of military dictatorship. The period of redemocratization was a time for questioning the authority of the government and exposing the ways that it had violated the rights of citizens during the dictatorship. There was a general lack of confidence in government, particularly in the executive branch that had dominated and subdued the judicial and legislative branches during the military dictatorship.

Given the post-dictatorship fervor for democracy, the idea of having the *Ministério Público* become politically independent of the executive branch and assume the role of defending societal rights was well-received in the Constitutional Assembly convened to draft the Brazilian Federal Constitution of 1988.⁴⁶ As Rogério Bastos Arantes points out, one of the historically “commonplace” ideas of Brazilian

46. See Fábio José Kerche Nunes, *O Ministério Público e a Constituinte de 1987/88*, in *O SISTEMA DE JUSTIÇA* 61, 69 (Maria Tereza Sadek ed., 1999). The National Constitutional Assembly (*Assembléia Nacional Constituinte*) was composed of 559 elected representatives from diverse political parties. The work of the Assembly took almost two years and included the preparation of eight drafts as well as the final constitutional text. There was significant public participation in the process and more than 65,000 amendments were offered. *Id.* at 61.

political thought was that Brazilian society was fragile, disorganized, and incapable of defending its fundamental rights:⁴⁷

[Emerging from this idea were] abundant complaints about the artificiality of [Brazilian] political institutions, especially representative institutions, and criticisms that [the Brazilian] tradition lacked mechanisms to enforce laws and the constitution. At times, this point of departure led to a desire for a neutral power, external to the world of politics and with sufficient autonomy to protect and lead society.⁴⁸

In the period of democratization, the *Ministério Público*'s long-held institutional interest of increasing its autonomy from the executive branch dovetailed with its interest in taking a leading role in the protection of the new set of emergent diffuse and collective rights.⁴⁹ With capable leadership and strong organization, the *Ministério Público* was able to take a leading role in "one of the most radical transformations in Brazilian law—the introduction of collective and diffuse rights into the legal order."⁵⁰

47. See ARANTES, *supra* note 4, at 129.

48. *Id.*

49. See *id.* at 21. There are several studies by Brazilian scholars on the *Ministério Público*'s institutional reconstruction in the 1980s. In a study of the historical evolution of the *Ministério Público* in Brazil, Arantes shows that its institutional reconstruction was the result of a series of changes that were intentionally pursued by the members of the institution. To the extent that the institutional reconstruction depended on legislative changes, he shows that the legal changes were suggested and lobbied for by the institution itself. *Id.* at 22. He explains that in the 1970s, even before the country's redemocratization, the *Ministério Público* began to define a new role for the institution in defending societal rather than governmental interests. See generally MARIA TEREZA SADEK, O MINISTÉRIO PÚBLICO E A JUSTIÇA NO BRASIL (1997); ELA WIECKO V. DE CASTILHO & MARIA TEREZA SADEK, O MINISTÉRIO PÚBLICO FEDERAL E A ADMINISTRAÇÃO DA JUSTIÇA NO BRASIL (1998); CATIA AIDA SILVA, JUSTIÇA EM JOGO: NOVAS FACETAS DA ATUAÇÃO DOS PROMOTORES DA JUSTIÇA (2001); Nunes, *supra* note 46; Maria de Gloria Bonelli, *Ministério Público Paulista: Construção Institucional e Identidade Profissional* (2001) (unpublished manuscript, São Paulo) (on file with author). This section draws from the work of these scholars in addition to data collected in my own research to explain the institutional transformation.

50. ARANTES, *supra* note 4, at 24.

1. *Procedural Law: The Public Civil Action Law*

The Public Civil Action Law (*Lei de Ação Civil Pública*) of 1985 authorized the *Ministério Público*, as well as other governmental entities and civil society organizations, to file public civil actions (*ação civil pública*) to impose civil liability for harms caused to the public interest. The 1985 law authorized public civil actions in the areas of harms to the environment, consumers, and cultural patrimony. The 1988 Constitution and the Consumer Defense Code of 1990 extended this new instrument to also cover all “other diffuse and collective interests.”⁵¹ Sometimes referred to as the “law of diffuse interests,” the Public Civil Action Law is the primary procedural vehicle for public law litigation in Brazil.

Before the passage of the Public Civil Action Law, the *Ministério Público* had already begun litigating on behalf of group interests in the environmental area. The 1981 National Environmental Policy Act (*Lei da Política Nacional do Meio Ambiente*) authorized the *Ministério Público* to initiate civil litigation on behalf of environmental interests. The law states, in relevant part, “the Federal and the State *Ministério Público* may bring civil and criminal liability actions for damages caused to the environment.”⁵² Paulo Affonso Leme Machado, a São Paulo prosecutor who many years later

51. See Consumer Defense Code [*Código de Defesa do Consumidor*] Art. 81, Law no. 8,078 (Braz.). In Brazil, the term “diffuse and collective interests” (*interesses difusos e coletivos*) is preferred to “public interest” in referring to those interests commonly grouped together as the public interest in the American legal context. Traditionally, “public interest” (*interesse público*) has been used in Brazil to refer to interests of the state or government. Diffuse interests (*interesses difusos*), in contrast, are those of society as a whole, defined in Brazilian law as interests that are transindividual, indivisible by nature, and held by an indeterminate number of people linked by a factual situation. The interest in conserving forests and many other environmental interests are examples of diffuse interests. Collective interests (*interesses coletivos*) are transindividual, indivisible interests held by a determinable number of people who are part of a particular group, class or category that are united through a basic legal relationship. An example would be the protection of the lands of a certain indigenous group. Brazilian law further distinguishes “homogenous individual interests” (*interesses individuais homogêneos*) which refers to collective interests that are divisible—such as the recovery of damages by purchasers of an automobile with a manufacturing defect. It is also important to note that the term “diffuse and collective interests” is used interchangeably with “diffuse and collective rights” (*direitos difusos e coletivos*). See also HUGO NIGRO MAZZILLI, A DEFESA DOS INTERESSES DIFUSOS EM JUÍZO 41–55 (2001) (for a complete definition of these terms); SILVA, *supra* note 49, at 40–41.

52. Federal Law 6,938 of Aug. 31, 1981, art. 14, ch. IV, §1.

became recognized as the foremost expert in Brazilian environmental law, suggested the inclusion of this provision of the law.⁵³

A couple years after the passage of the 1981 Act, the *Ministério Público* of São Paulo created a new prosecutorial position specializing in environmental protection. In 1983, dynamite explosions in a stone quarry caused a rockslide that ruptured an oil pipeline and provoked a large oil spill on the São Paulo coast. The São Paulo attorney general appointed one of his prosecutors, Édis Milaré, to work on this case. In November 1983, Milaré filed the first lawsuit pursuant to the National Environmental Policy Act seeking to impose civil liability on the construction company and the state-owned oil company for the environmental harm caused by the spill. The lawsuit was well-covered by the press and began building the reputation of the *Ministério Público* as an actor in environmental protection.⁵⁴

The São Paulo *Ministério Público* also played a significant role in the passage of the Public Civil Action Law. In the late 1970s, Brazilian legal scholars began discussing the need for legal protection of group rights, drawing inspiration from the American class action and the "access to justice" writings of Cappelletti.⁵⁵ In 1982, the São Paulo Association of Judges (*Associação Paulista de Magistrados*) established a commission of four law professors and judges to draft a law enabling the legal protection of group rights.⁵⁶ The Commission's bill focused on giving civil society organizations the legal power to file lawsuits on behalf of diffuse rights in the area of environment and cultural heritage, and it was introduced in the Brazilian legislature in early 1984.⁵⁷

53. Interview with Paulo Affonso Leme Machado, Piracicaba, São Paulo, Brazil (Dec. 13, 2001). When asked about the provision, he explains that he wrote it because he "thought that the *Ministério Público* needed to have some involvement in the [environmental] area."

54. See Interview with Édis Milaré, São Paulo, Brazil (Oct. 8, 2001).

55. See ARANTES, *supra* note 4, at 54-55 (discussing Cappelletti's "access to justice" writings and mentioning other Italian scholars that also influenced Brazilian doctrine, including Vittorio Denti and Andréa Proto Pisani).

56. See *id.* at 58; SILVA, *supra* note 49, at 45-46.

57. See *id.*

Prompted by the Commission's work, several prosecutors in the São Paulo *Ministério Público* initiated an institutional discussion about the role of the *Ministério Público* in the protection of diffuse interests and the ways that the bill might be rewritten to enable the *Ministério Público* to play a more significant role in this new legal area. With the endorsement of the São Paulo *Ministério Público*, they authored a new bill based on the one drafted by the Commission that strengthened the institution's role. While both bills gave the *Ministério Público*, as well as civil society organizations, jurisdiction to bring public civil actions, the *Ministério Público*'s version included several innovations that favored the institution. Most importantly, it created the civil investigation, which the *Ministério Público* could use to collect evidence in preparation for a public civil action.⁵⁸ The *Ministério Público*'s bill also expanded the interests that could be defended in a public civil action to include consumer interests and "any other diffuse interest."⁵⁹

The *Ministério Público*'s bill was sent through the São Paulo Attorney General to the Federal Ministry of Justice in June 1984, and it was introduced to the National Congress as a proposal of the executive branch in February 1985.⁶⁰ Unlike the Commission's bill, the *Ministério Público*'s bill received prompt attention and was quickly passed by both houses of Congress.⁶¹ On July 24, 1985, the bill became the Public Civil Action Law.

The 1985 law was hailed as a significant innovation in Brazilian civil procedure and as a significant legal advance for the *Ministério Público* as an institution. One prosecutor writes "the law represented, without doubt, a 'revolution' in the Brazilian legal order, as the judicial process stopped being seen as a instrument merely for the defense of individual interests and became seen as an effective

58. See *id.* at 72–73.

59. See RUDOLFO DE CAMARGO MANCUSO, AÇÃO CIVIL PÚBLICA 37–39 (1999). The provision of the bill stating that the public civil action could be used to defend "any other diffuse interest" was vetoed by the president. However, this provision was reinserted in amendments made to the law in the Consumer Defense Code, Federal Law 8,078 of Sept. 11, 1990. *Id.*

60. See SILVA, *supra* note 49, at 46.

61. See *id.*; ARANTES, *supra* note 4, at 59–60.

mechanism for the participation of society in . . . those conflicts that involve supra-individual interests."⁶² Another prosecutor states that the Public Civil Action Law "inaugurated a new phase of Brazilian law and opened a new horizon for the activities of the *Ministério Público* in the civil sphere. . . . In this new phase, the prosecutor assumes the role of a true lawyer of the collective and diffuse interests of society."⁶³

2. *Constitutional Law: The Federal Constitution of 1988*

The passage of the Federal Constitution of 1988 consolidated the *Ministério Público*'s new role as a defender of societal interests. Most importantly, it made the *Ministério Público* substantially independent of the three traditional branches of government and constitutionalized its new role in the protection of diffuse interests. Here too, the institution played a significant role in establishing the legal framework that would govern its work on behalf of diffuse interests.

Three constitutional articles were dedicated to the institution. Article 127 set forth the institution's general character, proclaiming the *Ministério Público* to be "a permanent institution, essential to the judicial function of the State, responsible for the defense of the legal order, the democratic regime and the indispensable interests of society and individuals."⁶⁴ It further granted the *Ministério Público* "administrative and functional autonomy" with the power to submit its proposals regarding the creation and extinction of jobs, the institutional budget, and career advancement plans directly to the legislature.⁶⁵

Article 128 defined the institution's structure and job guarantees. It determined that the attorney general of each *Ministério Público* must be a prosecutor from within that *Ministério Público*, generally chosen

62. MILARÉ, *supra* note 4, at 510.

63. Ronaldo Porto Macedo Júnior, *A Evolução Institucional do Ministério Público Brasileiro*, in *UNA INTRODUÇÃO AO ESTUDO DA JUSTIÇA* 42 (Maria Tereza Sadek ed., 1995).

64. Constituição Federal (C.F.) 1988, art. 127 (Braz.).

65. *Id.*

by the executive from a list of three prosecutors elected by the institution. It also guaranteed all prosecutors job security after a two-year trial period, protection against involuntary transfer to another geographic location, and protection against salary reductions. Finally, it established several restrictions on prosecutors, prohibiting them, for example, from working on the side as private lawyers, receiving honorary fees or private reimbursement for their work, and participating in political party activities.

Article 129 listed the institutional functions of the *Ministério Público* including, in addition to its traditional criminal and civil functions, several relating to its new role in protecting diffuse interests. Most importantly, it defined “advocat[ing] zealously to ensure that the government and publicly relevant services have effectively respected the rights ensured in this constitution by taking the necessary measures to guarantee this,” and “us[ing] investigations and public civil actions to protect the public and social patrimony, the environment, and other diffuse and collective interests” as institutional functions.⁶⁶

As such, the new constitution made the *Ministério Público* largely autonomous from the traditional three branches of government. As analyzed by Mazzilli, its autonomy is established through different types of constitutional guarantees.⁶⁷ First, the constitution provides for autonomy in the administration of the institution (*garantias nas atividades-meio*), mainly through its Article 127 powers described above. Second, the constitution provides for autonomy in carrying out of its functions (*garantias nas atividades-fim*). In other words, it is not subordinated to any other governmental organs in the three traditional branches but rather determines which activities it undertakes subject only to the constitution and other laws. Finally, the constitution provides individual functional autonomy to each prosecutor, bolstered by the job guarantees of Article 128 (*garantias dos órgãos e agentes*). Each prosecutor independently chooses how

66. See *id.* art. 129, I-III.

67. See Hugo Nigro Mazzilli, *Independência do Ministério Público*, in *MINISTÉRIO PÚBLICO: INSTITUIÇÃO E PROCESSO* 104-15 (Antonio Augusto Mello de Camargo Ferraz ed., 1999).

to conduct the investigations and lawsuits in his jurisdiction without fear of dismissal, demotion, or involuntary transfer to another jurisdiction. Having emerged from the constitutional process as an independent institution, the *Ministério Público* is often referred to as the fourth branch of government (*o quarto poder*).⁶⁸

The *Ministério Público* was intimately involved in forging its new role during the Constitutional Assembly of 1988. The *Ministério Público* lobbied on behalf of constitutionalizing its new role in the defense of diffuse interests and, moreover, argued that it needed independence from the other branches to fulfill this new role. While the *Ministério Público* of São Paulo and a couple other southern states led the lobbying effort, the effort was national in scale as leaders of the *Ministério Público* throughout Brazil participated in the meetings that defined the *Ministério Público*'s proposal and helped to persuade the constitutional assembly to support it. In what has been referred to as the greatest institutional novelty of the Constitution of 1988, the *Ministério Público* was largely successful in getting the profile it sought.⁶⁹

To understand the institutional trajectory of the Brazilian *Ministério Público*, it is important to realize that the institution had a long-held institutional interest of increasing its autonomy from the executive branch. In the period of democratization, this institutional interest dovetailed with its interest in taking a leading role in the protection of the new set of emergent diffuse and collective rights. As Claudio Ferraz de Alvarenga, a leader of the São Paulo *Ministério Público* in the 1980s, explains:

The great victory was to stipulate in the Constitution that the *Ministério Público* has administrative autonomy, political autonomy, financial autonomy, and budget-making autonomy. This was the great work of construction. . . . What was always desired was to head in the direction of this autonomy, of this independence—to be able to

68. See HUGO NIGRO MAZZILLI, *MANUAL DO PROMOTOR DE JUSTIÇA* 39 (1991).

69. See Nunes, *supra* note 46, at 61.

use this to freely work in defense of society, even when faced with abuses by the executive branch.⁷⁰

Arantes explains that the *Ministério Público* went to the Constitutional Assembly “with the discourse that *its* political independence was essential to the future constitutional democracy and a guarantee for society more than for the institution itself.”⁷¹ With these arguments, the *Ministério Público* lobbied for the constitutional provisions that made it almost completely autonomous of the other three branches of government and gave individual prosecutors job security similar to that of judges.

The story of the *Ministério Público*’s success in the Constitution of 1988 is a story about strong, organized leadership.⁷² Leaders of the São Paulo *Ministério Público* networked and coordinated with institutional leaders from other states throughout the country. These leaders built consensus within the institution about its role and effectively lobbied legislators to achieve their vision. Alvarenga states:

It was an extremely competent group, it was a group of people with great character, people who loved the *Ministério Público* and thought a lot about a new ideological formulation of the *Ministério Público*. It was people who drew upon the work of previous members of the institution as well as contemporary work to create a new way of thinking about the *Ministério Público* that would overcome certain difficulties that the institution had. At that time, for example, the *Ministério Público* was tied to the executive branch and the executive branch practically controlled the institution. This was something that the

70. Bonelli, *supra* note 49.

71. ARANTES, *supra* note 4, at 77.

72. On political skill and institutional leadership, see generally MARTIN A. LEVIN & BARBARA FERMAN, THE POLITICAL HAND: POLICY IMPLEMENTATION AND YOUTH EMPLOYMENT PROGRAMS (1985); EUGENE BARDACH, THE SKILL FACTOR IN POLITICS; REPEALING THE MENTAL COMMITMENT LAWS IN CALIFORNIA (1972); ROBERT A. KAGAN, *Regulatory Enforcement*, in HANDBOOK OF REGULATIONS AND ADMINISTRATIVE LAW (David H. Rosenbloom & Richard D. Schwartz eds., 1994).

prosecutors didn't agree with. They wanted to change this and create a truly independent institution.⁷³

For several years before the passage of the Constitution, meetings were organized to discuss the future of the institution and determine what the institution would seek in terms of its rights and responsibilities in the new constitution.⁷⁴ In June 1985, the Sixth National Conference of the *Ministério Público* was held in São Paulo and many papers were presented on the topic of the position and organization of the institution in the future constitution.⁷⁵ In October 1985, the National Association of Members of the *Ministério Público* sent a questionnaire to all 5793 prosecutors throughout the country to gather opinions on future constitutional provisions, and almost 1000 prosecutors responded.⁷⁶ In the First National Meeting of Attorney Generals and Presidents of Associations of the *Ministério Público*, held in 1986, leaders of the *Ministério Público* from many states endorsed a draft of the constitutional provisions relating to the *Ministério Público*.⁷⁷

While the proposal suffered some modifications in the constitutional assembly, the *Ministério Público* basically emerged with the profile that it had proposed—as a defender of the public interest, with institutional guarantees allowing it to be sufficiently independent to challenge the actions of the government.⁷⁸ Alvarenga describes the intensity of their work in organizing and lobbying on behalf of the institution:

We worked hard to get things . . . [i]n each situation, the Ministério Público sought to validate its profile, further the vision, strengthen its autonomy. At each point, the Ministério Público moved forward a step because we had all the work of

73. Bonelli, *supra* note 49.

74. See HUGO NIGRO MAZZILLI, O MINISTÉRIO PÚBLICO NA CONSTITUIÇÃO DE 1988 24 (1989).

75. See MAZZILLI, *supra* note 68, at 22.

76. See *id.* at 23.

77. See MAZZILLI, *supra* note 74, at 30.

78. See *id.* at 20.

previous generations—ideas, objectives—and we knew what we wanted . . . [i]n the constitutional process . . . [W]e mobilized the Ministério Público from all over Brazil—it was not just us, it was the institution that did this. We had a vision, we knew what we wanted, and we worked like madmen. In terms of coordination, we participated in everything that happened in the Constitutional Congress, with prosecutors from all over Brazil. When differences arose among the state Ministérios Públicos, we were always able to find an equilibrium point. We had great support in the constitutional convention.⁷⁹

The combination of institutional independence with the power to investigate and file public civil actions on behalf of a large variety of diffuse and collective interests made the Brazilian *Ministério Público* a very powerful political actor.⁸⁰ Its new role involved prosecutors in significant political and social debates: governmental corruption, environmental protection, urban development, public health, education, and many others. As explained by one prosecutor, “through its innumerable investigations and lawsuits, [the *Ministério Público*] began to question a series of extremely pertinent practices involving large economic interests of private groups as well as the government itself. The *Ministério Público*’s actions began to directly affect public policies and social interests.”⁸¹

Comparing the Brazilian *Ministério Público* with the *Ministério Público* in nine other countries, Nunes finds that on the spectrum of independence from political control, the Brazilian *Ministério Público* exhibits the extreme case of independence.⁸² Moreover, the *Ministério Público* of Brazil has been observed to be almost unique among similar institutions throughout the world in terms of its power

79. Bonelli, *supra* note 49.

80. See Ronaldo Porto Macedo Júnior, *Ministério Público Brasileiro: um Novo Ator Político*, in *MINISTÉRIO PÚBLICO II: DEMOCRACIA 103* (José Marcelo Menezes Vigliar & Ronaldo Porto Macedo Júnior eds., 1999).

81. *Id.* at 109.

82. See Fábio José Kerche Nunes, *O Ministério Público e a Constituinte de 1987/88*, 12, 28 (1997) (unpublished master’s thesis, University of São Paulo) (on file with author).

to act in defense of public interests.⁸³ As stated by Alvarenga, “[w]ith the constitution, [the Ministério Público] gained a lot of new responsibilities and a very modern, advanced new institutional profile—it was given the most advanced profile in the world and I doubt that there is a comparable Ministério Público in any other country of the world.”⁸⁴

3. *Substantive Laws*

In the years following the passage of the Federal Constitution of 1988, a number of substantive laws were passed that expanded the statutory basis for diffuse and collective interests and the *Ministério Público*’s role in defending them. In 1989, federal laws were passed establishing the rights of disabled people⁸⁵ and stock market investors.⁸⁶ In 1990, a new children’s rights law (*Estatuto da Criança e do Adolescente*)⁸⁷ and consumer defense code (*Código de Defesa do Consumidor*)⁸⁸ were passed. In 1992, a law concerning government corruption was passed (*Lei de Improbidade Administrativa*),⁸⁹ and a new antitrust law was passed (*Lei Antitruste*) in 1994.⁹⁰ All these laws established new diffuse and collective interests and specifically granted the *Ministério Público* a role in defending them using the public civil action. The Consumer Defense Code is of particular importance because it amended the Public Civil Action Law to allow the instrument to be used to defend “any diffuse or collective interest,” a clause that had been vetoed when the law was originally signed in 1985.⁹¹ It also amended the 1985 law to

83. See Macedo Júnior, *supra* note 63, at 39.

84. Bonelli, *supra* note 49.

85. See Federal Law No. 7,853 of Oct. 24, 1989.

86. See Federal Law No. 7,913 of Dec. 7, 1989.

87. See Federal Law No. 8,069 of July 13, 1990.

88. See Federal Law No. 8,078 of Sept. 11, 1990.

89. See Federal Law No. 8,429 of June 2, 1992.

90. See Federal Law No. 8,884 of June 11, 1994.

91. Federal Constitution of 1988, art. 129, III, had already given the *Ministério Público* power to use investigations and lawsuits to protect any diffuse or collective interest. This amendment thus primarily affected the other potential plaintiffs in public civil action groups, such as other governmental and non-governmental entities.

allow the *Ministério Público* to settle cases extrajudicially and to create a legal mechanism to enable group litigation seeking damages.⁹²

B. Building the Institution

In the years following the passage of the Federal Constitution of 1988, the Brazilian *Ministério Público* underwent a period of institution building and renewal based upon its new role in public law litigation. The signs of the new *Ministério Público* were apparent in its growth and specialization; increasingly selective recruitment and training; and a strong new institutional *esprit de corps*. As shown below, the Brazilian *Ministério Público* became a strong institution with talented, energetic and well-compensated prosecutors imbued with a sense of institutional mission and *esprit de corps* in the work of protecting the public interest.

1. Growth and Specialization

Even as hiring tended to stagnate in the public sector in Brazil in the 1990s, the São Paulo *Ministério Público* was able to grow markedly. The number of prosecutors in São Paulo state almost doubled over the same period, increasing from 849 to 1,620.⁹³ The physical and administrative infrastructure of the *Ministério Público* grew to accommodate the new prosecutors. Historically, prosecutors had worked inside the courthouse and had little or no administrative support. By the late 1990s, the São Paulo *Ministério Público* acquired a new headquarters building, hired 2,500 administrative staff, and became computerized.⁹⁴ To pay for these changes, the budget of the

92. See Gidi, *supra* note 3.

93. MCALLISTER, *supra* note 43, at 76. There was similar growth in other *Ministérios Públicos* in Brazil as well. Between 1985 and 2002, the number of state and federal prosecutors in Brazil almost doubled, from less than 6,000 in 1985 to about 10,000 in 2002. *Id.*; see also Maria Tereza Sadek & Rosângela Batista Cavalcanti, *The New Brazilian Public Prosecution: An Agent of Accountability, in DEMOCRATIC ACCOUNTABILITY IN LATIN AMERICA* 209 (Scott Mainwaring & Christopher Welna eds., 2003).

94. See MARIA DA GLORIA BONELLI, *PROFISSIONALISMO E POLÍTICA NO MUNDO DO DIREITO* 157 (2002).

Ministério Público of São Paulo grew significantly, particularly in the early and mid-1990s.⁹⁵

With growth came greater prosecutorial specialization, particularly in the new areas of diffuse and collective interests. A brief explanation of the general course of a prosecutorial career in Brazil is helpful in understanding how this growth enabled specialization. Prosecutors are hired through a competitive civil service exam (*concurso público*), as described further below. During the first two years of their careers, prosecutors are considered to be "in training" and they work in a judicial district (*comarca*) with other prosecutors. After these two years, they acquire full job guarantees and are usually assigned to a less populated judicial district, often in a rural area where they serve as the only prosecutor. As the sole prosecutor, they are responsible for all areas of prosecutorial responsibility within their judicial district, including criminal prosecution as well as the diverse areas of civil prosecution, including the protection of diffuse and collective interests.

As the prosecutor receives promotions, he moves to more populated judicial districts where there are more prosecutors, and he has the opportunity to increasingly specialize his work in the criminal or civil area. After several promotions to larger cities and towns, he may be promoted to a position in the capital city. In the capital, he may completely specialize in one area of law such as environmental protection or prosecution of homicides. Ultimately, after many years of service, the prosecutor may be promoted to become an "appeals court prosecutor" (*procurador*). As an appeals court prosecutor, he deals only with cases that have reached the appeals court and his work generally becomes less specialized, covering many areas of law. Prosecutors at this level of the profession are often heavily involved in institutional leadership as a member of the institutional

95. See Antonio Araldo Ferraz Dal Pozzo, *1990–1993: Um Relatório de Reformas*, 55 JUSTITIA 163, 173 (1993) (showing there was a 103% real increase in the São Paulo *Ministério Público*'s budget between 1990 and 1991); ASSOCIAÇÃO PAULISTA DO MINISTÉRIO PÚBLICO, *O MP E A CRISE ORÇAMENTÁRIA* 49 (Renato Nascimento Fabbrini ed., 2002) (after adjusting for inflation, the budget data presented shows there was another 100% real increase in the São Paulo *Ministério Público*'s budget between 1994 and 1995).

council, as the general secretary, as the attorney general, or other leadership position.

In 2001, about 750 São Paulo state prosecutors worked in the capital city of São Paulo, and the other 870 worked in judicial districts throughout the rest of the state.⁹⁶ The city of São Paulo had specialized prosecutors in seven areas of diffuse and collective interests: environmental protection, constitutional rights, children's rights, worker health and safety, housing and urban problems, consumer protection, and disability rights. To assist unspecialized prosecutors in conducting cases in the more specialized areas of law, the São Paulo *Ministério Público* established Prosecution Support Centers (*Centros de Apoio Operacional*) in the state for each area of law. These centers were staffed by prosecutors experienced in that area of law and, in some cases, other professionals with expertise relating to that area. Other state and federal *Ministérios Públicos* in Brazil also developed similar centers to provide institutional support and training in specialized areas of law for prosecutors.

The area of environmental protection serves as an example of how the institution developed its expertise in the protection of a diffuse interest. By 2001, São Paulo city had five specialized environmental prosecutor positions as well as an Environmental Prosecution Support Center (*Centro de Apoio Operacional das Promotorias de Justiça de Meio Ambiente*) staffed by three other prosecutors and several scientists. Other medium and large cities in the state tended to have several semi-specialized environmental prosecutors, responsible for an area such as consumer defense as well. Even in smaller towns, it was often possible to have at least two prosecutors, allowing one to specialize in criminal matters and the other to specialize in civil matters. In total, there were about 350 São Paulo state prosecutors with responsibility for environmental protection, including specialized, semi-specialized, and unspecialized prosecutors.

96. MCALLISTER, *supra* note 43, at 79.

2. *Selective Recruitment*

A second sign of the emergence of a new *Ministério Público* was the high selectivity of its recruitment processes. Entrance to the *Ministério Público* became very selective, and *Ministério Público* prosecutors were privileged within the government bureaucracy in terms of salary. Even as hiring froze and salaries stagnated in the public sector in Brazil in the 1990s, the São Paulo *Ministério Público* maintained its growth and continued to offer very competitive salaries. The institution's selective recruitment and generous compensation provides further evidence of the extent to which the *Ministério Público* has become a strong institution in Brazil.

The *Ministério Público* recruits through a very selective civil service exam (*concurso público*) and thousands of applicants competed for tens of positions each year throughout the 1990s. Candidates are generally recent law graduates, and they often spend a year preparing for the exam through enrollment at the "School of the *Ministério Público*" affiliated with the institution.⁹⁷ The exam is given in three increasingly selective phases—a multiple-choice test, an essay exam, and an oral exam and interview—spanning the course of almost one year. While hiring was historically quite selective, it became even more selective in the 1990s. In the early 1990s, the São Paulo *Ministério Público* hired, on average, 3.3% of candidates who took the civil service exam.⁹⁸ In the late 1990s, this average dropped to 1.3%.⁹⁹

High salaries and prestige contribute to and reinforce the selectivity of the profession. Like judges, prosecutors are well compensated among governmental employees. The basic salary of a São Paulo prosecutor who has completed the two year training period is about R\$7000/month, over twice that of a private lawyer in São Paulo, four times that of the average college graduate employed by the government in São Paulo, and thirty-five times the minimum

97. *See id.* at 77.

98. *Id.* at 77.

99. *See id.*

wage.¹⁰⁰ Salaries increase significantly depending on promotions and time of service, culminating with a salary of over R\$15,000/month for a São Paulo prosecutor with twenty years of service who has been promoted to become an appeals-court prosecutor, the highest echelon of the institution which included about one-eighth of São Paulo prosecutors.¹⁰¹ As suggested by the salary, prosecutors enjoy a high degree of prestige. They are generally considered to be very smart and capable individuals, and as the profession has become increasingly selective, this perception has been reinforced.

3. *Esprit de Corps*

In addition to marked institutional growth and increasing selectivity, the new *Ministério Público* is characterized by a strong degree of *esprit de corps* that supports its public interest activity. Scholars have noted that an administrative elite with a strong sense of *esprit de corps* arises under certain circumstances in public administration.¹⁰² Describing this phenomenon, Perez Perdomo explains that where *esprit de corps* is present, “[t]he group is composed of individuals who identify with each other and serve, or say that they serve, the public interest and are usually aware of their own status and privileges.”¹⁰³ This *esprit de corps* is evident in the discourse of prosecutors about the importance of their work. There is generally a strong identification among prosecutors deriving from the shared experiences of passing a very selective exam, learning how to be a prosecutor alone in the “trial-by-fire” conditions of a remote judicial district, and being promoted through the ranks to ultimately

100. Salary data for the São Paulo *Ministério Público* was acquired from the General Directorate of the São Paulo *Ministério Público*. Data on other salaries are from the 2001 RAIS (*Relação Anual de Informações Sociais*), published annually by the *Ministério do Trabalho e Emprego*. The minimum salary in Brazil was R\$180 per month from April 2001 to March 2002, after which it increased to R\$200 per month.

101. MCALLISTER, *supra* note 43, at 78.

102. See, e.g., HERBERT KAUFMAN, *THE FOREST RANGER, A STUDY IN ADMINISTRATIVE BEHAVIOR* (1960).

103. Rogelio Pérez-Perdomo, *Corruption and Political Crisis*, in *LESSONS OF THE VENEZUELAN EXPERIENCE* 317 (Louis W. Goodman et al. eds., 1995).

arrive back to the capital city, where many of the prosecutors were educated and perhaps even knew each other in law school. Frequent conferences and seminars allow prosecutors to meet, see each other through the years, and follow each other's careers.

The public service ethos is very present in the Brazilian *Ministério Público*. As written in 1991 by one São Paulo prosecutor:

There's a lot of strength and idealism, there's a lot of fight in the institution, and there's a lot of work to be done [I]n each judicial district of this country, there is a public prosecutor that attends the public, that pursues criminals rich or poor, that defends the environment, that works on behalf of those injured on the job, the disabled, the workers.¹⁰⁴

The young average age of Brazilian prosecutors, a product of the rapid institutional growth in the 1980s and 1990s, contributes to a prevailing sense of idealism. In São Paulo, newly hired prosecutors in the mid-1990s were, on average, twenty-seven years old.¹⁰⁵ The average age of São Paulo prosecutors in 1997 was thirty-seven and a half years old, and only a third were over forty.¹⁰⁶ The age profile of prosecutors in other states was similar. A 1996 study of the *Ministério Público* of seven Brazilian states including São Paulo found the average age of prosecutors to be thirty-three.¹⁰⁷

Brazilian scholars have noted a strong sense of institutional mission among prosecutors. Arantes calls it an "ideology of political voluntarism" (*ideologia do voluntarismo político*) and finds that it is rooted in two beliefs that are widely-held by prosecutors.¹⁰⁸ First, prosecutors believe that civil society is too weak and disorganized to defend its own interests. Second, prosecutors believe that the government often violates or offends the public interest. From these

104. MAZZILLI, *supra* note 68, at 19.

105. Calculated from data in the listing of prosecutors ("*Lista de Antigüidade*") of December 1997, published in the January 1998 issue of *Justitia* (the journal of the São Paulo *Ministério Público*).

106. *See id.*

107. *See* WIECKO V. DE CASTILHO & SADEK, *supra* note 49, at 9.

108. ARANTES, *supra* note 4, at 119.

beliefs emerges their view that the *Ministério Público* plays an essential role in defending the public interest against a frequently predatory state. As Arantes states, “[f]rom this equation emerges the proposition, instrumental in nature, that ‘someone’ should intervene in the state-society relationship in defense of the latter.”¹⁰⁹ Many Brazilian prosecutors consider themselves to be that someone.

Prosecutors are motivated and energetic in their public interest work, perhaps even to the detriment of the traditional criminal defense work of the institution. A survey of state and federal prosecutors carried out in 1996 showed that while 72% of prosecutors prioritized criminal work in the past, only 61% planned to in the future.¹¹⁰ In contrast, while 32% of prosecutors had prioritized environmental protection in the previous two years, 43% planned to prioritize it in the next two years. There were similar increases in plans to give priority to other public interest areas including fighting political corruption, consumer protection, and advocacy on behalf of the elderly and handicapped. Interpreting this data, Arantes states, “[t]here are strong signs, therefore, that the ideology of political voluntarism is mobilizing an ever larger number of prosecutors to give more attention to diffuse and collective rights, implying stagnation or even decline—in terms of priority—in the traditional areas of the institution’s work like criminal prosecution.”¹¹¹ Many prosecutors perceive the institution’s civil work to be more dynamic and important than its criminal work.¹¹²

109. *Id.* at 129.

110. The survey was conducted by the Institute of Economic, Social, and Political Studies of São Paulo (IDESP, *Instituto de Estudos Econômicos, Sociais e Políticos de São Paulo*). It included fifty-one members of the federal *Ministério Público* and 712 members of state *Ministérios Públicos* comprising 20% of all members of the *Ministério Público* of each of seven states: Goiás, Sergipe, Bahia, São Paulo, Rio de Janeiro, Paraná, and Rio Grande do Sul. Results of the survey are published in Sadek, *supra* note 49, and discussed in ARANTES, *supra* note 4, at 115–27.

111. ARANTES, *supra* note 4, at 118–19.

112. *See id.*

C. *Doing Public Law Litigation*

With its new legal framework and institutional restructuring, the *Ministério Público* had the conditions to engage in group litigation on behalf of statutory and constitutional rights. The *Ministério Público* became a “fourth branch” of government dedicated to the enforcement of statutory and constitutional rights on behalf of societal groups and public interests generally.¹¹³ While other governmental entities as well as civil society organizations were also legally authorized to file public civil actions, the *Ministério Público* has filed over ninety percent of them.¹¹⁴ Private and public entities that are also authorized to file public civil actions often choose to make complaints or notifications to the *Ministério Público* instead. As proclaimed in a 1991 meeting of environmental prosecutors throughout Brazil, “[w]hat happened, above all, is a remarkable transformation which places Brazil as one of the most pioneering countries in the world in terms of this new function of the *Ministério Público*, making it the most qualified institution to protect social, diffuse, and collective interests in the civil order.”¹¹⁵ This section first reviews how Brazilian prosecutors develop their cases and then discusses the various areas in which the São Paulo *Ministério Público* has focused.

1. *Case Development*

Investigations are the starting point for the *Ministério Público*'s public law work. Prosecutors open investigations when they are made aware of a potential offense or harm to a diffuse or collective interest by a public complaint or by a notification from another government agency.¹¹⁶ With prosecutors stationed in each local jurisdiction, prosecutors are known for their accessibility and responsiveness to

113. See MAZZILLI, *supra* note 68, at 39.

114. See Cappelli, *supra* note 44.

115. O MINISTÉRIO PÚBLICO E A DEFESA DO MEIO AMBIENTE 243 (Édis Milaré ed., 1992).

116. See Federal Law No. 7,347 of 1985, art. 6 (stating “Any person may, and a civil servant has the duty to, inform the *Ministério Público* of facts which may constitute the object of a public civil action”).

public complaints, particularly in small and medium sized towns.¹¹⁷ Prosecutors may also open investigations without provocation from an external source.¹¹⁸ After opening a civil investigation, prosecutors pursue evidence by meeting with complainants, potential defendants and other interested or knowledgeable parties and by requesting relevant documents and reports from public and private entities.¹¹⁹ Investigations usually lead to one of three outcomes: the investigation may be terminated for lack of evidence of harm; a public civil action may be filed based on the information collected; or the case may be settled during the investigation, with the signing of a formal settlement agreement.¹²⁰

To file a public civil action, the prosecutor must be able to characterize the harm and identify the responsible party. Prosecutors may file public civil actions to address both completed harms and potential future harms. In cases where the harm has already occurred, the court may order the party to pay money damages to a state fund or it may enjoin the party to take a certain action (*obrigação de fazer*) or to abstain from taking a certain action (*obrigação de não fazer*).¹²¹ Where harm is threatened by a party's activities, a prosecutor may request a preliminary injunction (*mandado liminar*) in which the court orders a party to take or abstain from taking a certain action as an emergency measure before the court makes a final decision on the merits of the case. To be granted a preliminary injunction, the *Ministério Público* must show that its case has a good legal foundation (*fumis boni iuris*) and that absent such an emergency

117. See O SISTEMA DE JUSTIÇA 16 (Maria Tereza Sadek ed., 1999) (stating “[t]his direct contact with the public transforms the prosecutor, especially in small towns, into a very special agent of the state: a government authority to whom access is easy, who has the power to resolve many types of questions and to ‘defend’ the weak.”).

118. One São Paulo prosecutor estimates that 80% of his environmental investigations are opened on the basis of information that he reads in the newspaper. MCALLISTER, *supra* note 43, at 90.

119. See Federal Law No. 7,347 of 1985, art. 8, § 1 (providing that “The Ministério Público can open and preside over a civil investigation, requiring any private or public entity to submit certifications, information, technical reports or opinions”) (translation by author).

120. See MCALLISTER, *supra* note 43, at 90–93, 95.

121. See Federal Law No. 7,347 of 1985, art. 3, 13.

order the objective of the lawsuit will be lost because the interest being defended will be irreparably damaged (*periculum in mora*).

In the course of the investigation, settlement agreements are often negotiated.¹²² Formalized in a written instrument called a "conduct adjustment agreement," settlements determine the actions that the party must take to remedy the harm and any applicable monetary penalties. In the case of noncompliance, the prosecutor may judicially enforce the agreement. Enforcement lawsuits are won almost automatically, given that the conduct adjustment agreement represents the accused party's admission to causing the harm and his acceptance of the agreement terms. Prosecutors settle more cases than they litigate. In the area of consumer defense, for example, it has been estimated that 90-95% of cases are resolved by settlement while only 5-8% are litigated.¹²³ As a São Paulo prosecutor explains, "[t]here are drawbacks to the formal legal process that affect the parties directly, tiring them out emotionally and causing them financial losses. When possible, the public civil action should be avoided."¹²⁴ Many prosecutors view settlement agreements as the most efficient way to resolve cases and view filing a public civil action as a last resort.¹²⁵

2. Areas of Litigation

The Brazilian *Ministério Público* is constitutionally authorized to defend all types of diffuse and collective interests. In the 1980s and 1990s, the São Paulo *Ministério Público* developed civil litigation practices in the areas of environmental protection, constitutional

122. See Federal Law No. 7,347, art. 5, II, § 6 (stating "[t]he public institutions with jurisdiction can negotiate agreements to bring conduct into accord with legal requirements, with fines in case of noncompliance, that will be considered judicially enforceable agreements.").

123. See José Geraldo Brito Filomeno, *Ação Civil Pública Consumerista*, in *AÇÃO CIVIL PÚBLICA*, LEI 7347/1985—15 ANOS 392 (Édis Milaré ed., 2001).

124. Daniel Roberto Fink, *Alternativa a Ação Civil Público Ambiental (Reflexões sobre as Vantagens do Termo de Ajustamento de Conduta)*, in *AÇÃO CIVIL PÚBLICA*, *supra* note 123, at 114.

125. See, e.g., Antonio Augusto Mello de Camargo Ferraz & João Lopes Guimaraes Júnior, *A necessária elaboração de uma nova doutrina de Ministério Público, compatível com seu atual perfil constitucional*, in *MINISTÉRIO PÚBLICO: INSTITUIÇÃO E PROCESSO* 27 n.15 (Antonio Augusto Mello de Camargo Ferraz ed., 1999).

rights, children's rights, worker health and safety, housing and urban problems, consumer protection, and disability rights. Table 1 provides data regarding the number of open cases, including both investigations and public civil actions that the São Paulo *Ministério Público* had in each area in November 2001.¹²⁶

TABLE 1: THE NUMBER OF OPEN INVESTIGATIONS AND PUBLIC CIVIL ACTIONS BY THE SÃO PAULO *MINISTÉRIO PÚBLICO* ACCORDING TO AREA OF DIFFUSE AND COLLECTIVE INTERESTS, NOVEMBER 2001.

Area of Diffuse and Collective Interests	Number of Investigations and Public Civil Actions
Environmental Protection	9203
Constitutional Rights	9073
Children's Rights	8184
Worker Health and Safety	4374
Housing and Urban Problems	3801
Consumer Protection	1866
Disability Rights	252

This section describes the work of the São Paulo *Ministério Público* in each of these areas, providing information about the priorities that have been set by the institution in each area and, when available, examples of prominent cases.

a. *Environmental Protection*

In terms of numbers of investigations and actions, environmental protection is the largest area of the *Ministério Público*'s public law work (see Table 1). As described above, it was the first area of diffuse interests in which the *Ministério Público* became involved. Priorities of the São Paulo *Ministério Público* in this area have

126. See Corregedoria Geral, Aviso No. 04/02 – CGMP, de 8 de fevereiro de 2002 (providing statistics regarding the activities of the São Paulo *Ministério Público* in October and November 2001; noting also that the data are partial rather than complete).

included protecting parks and other legally protected lands; promoting measures to harmonize agricultural activities with environmental protection; and identifying and eliminating sources of soil, air, water, noise, and electromagnetic pollution.¹²⁷

One of the first lawsuits filed under the 1985 Public Civil Action Law charged the twenty-four petrochemical and steel companies that constituted Brazil's most important industrial district, Cubatão, for \$800 million worth of environmental damages.¹²⁸ The lawsuit requested that the court hold the companies liable for the costs associated with stabilizing the mountainsides that had become susceptible to landslides; decontaminating the soils; cleaning and recuperating local streams and rivers; and reforestation with native species.¹²⁹ Other environmental lawsuits of the São Paulo *Ministério Público* have been filed to prevent the construction of manufacturing facilities and theme parks in protected areas; to challenge infrastructure projects with large environmental impacts; and to force municipal and state governments to clean up rivers and hazardous waste sites.

b. Constitutional Rights

The most visible area of the São Paulo *Ministério Público*'s work has been in the area of constitutional rights, with an emphasis on anti-corruption. In terms of the number of investigations and actions, it is the second largest area of the institution's public law litigation work.¹³⁰ Priorities have included promoting honest government by working against illegal contracting, improper use or transfer of public funds, the request for and acceptance of bribes, improper government hiring decisions, illegal private enrichment from public funds, and

127. See São Paulo Ministério Público, Ato Normativo no. 276-PGJ, de 26 de fevereiro de 2002 (pt. n° 94.646/01) [hereinafter General Plan of Activities—2002].

128. See MILARÉ, *supra* note 4, at 271 n.142. The lawsuit was filed by the *Ministério Público* with an environmental group, OIKOS, as co-plaintiff. *Id.* at 579–83 (a reproduction of the initial complaint in the case).

129. See *id.* at 579–83.

130. See *supra* Table 1.

nepotism; promoting improvements in the quality and consistency of public health services by working against the falsification of medicines, fraud in the public health care system, and discriminatory practices in the provision of health care; and improving the quality and consistency of public services that are provided through private concessions or contractors.¹³¹

The *Ministério Público*'s work against governmental corruption has had significant political ramifications. Its investigations and lawsuits have affected the careers of prominent politicians, including several governors and many mayors in São Paulo state. For example, Governor Orestes Quécia, in power from 1987 to 1991, was accused by prosecutors of fraud and overpayment in the procurement of scientific equipment from Israel and various illegalities in the privatization of the state airline.¹³² In 1998 and 1999, the São Paulo *Ministério Público* made news headlines for breaking a large corruption ring in which São Paulo building inspectors threatened large fines in order to collect bribes.¹³³ Other large corruption cases in the same year concerned fraud and overpayment in the procurement of materials by the municipal health system and municipal cemeteries and contracts made with phantom employees by city concessionaires.¹³⁴

c. *Children's Rights*

The São Paulo *Ministério Público*'s institutional priorities in the area of children's rights have included the use of extrajudicial and judicial measures to ensure the availability, quality, and democratic management of public schools, and the reform of juvenile delinquency facilities to increase training and probation opportunities. As shown in Table 1, this area of public law litigation

131. See General Plan of Activities—2002, *supra* note 127.

132. See ARANTES, *supra* note 4, at 154–55.

133. See *id.* at 160–75.

134. See *id.* at 176–79.

was the third largest in terms of the number of open investigation and actions in 2001.

A study of 135 lawsuits brought by São Paulo prosecutors in the area of children's rights showed that fifty-three of them (39%) concerned the area of education.¹³⁵ Other large areas of litigation included the government's implementation of local child welfare councils, public benefits, and provision of health services. Of the 135 cases, 111 of them (82%) named municipal, state, or federal government agencies as defendants.¹³⁶ A large number of the education-related cases in the 1990s were provoked by a restructuring in the state school system in which children were transferred to different schools and new age requirements were imposed for matriculation.¹³⁷ The *Ministério Público* filed a number of lawsuits against the state department of education and school directors based on complaints they received from families whose children were denied matriculation generally or access to their preferred school because of the reforms.¹³⁸ These lawsuits sought not only corrections of specific administrative decisions but also changes in the processes by which state educational policies were determined, based on the right to have access to a school "near home" and the general democratic principle of "community participation."¹³⁹

d. *Worker Health and Safety*

The São Paulo *Ministério Público* also had a very large caseload in the area of worker health and safety.¹⁴⁰ Priorities of state prosecutors in the area of worker health and safety included identifying and mitigating the largest health risks to workers and promoting enforcement of regulations relating to workplace hygiene.¹⁴¹ The

135. See SILVA, *supra* note 49, at 123.

136. *Id.* at 124.

137. See *id.* at 125.

138. See *id.* at 128.

139. *Id.* (quoted language is from one of the lawsuits, as described by Silva).

140. See *supra* Table 1.

141. See General Plan of Activities—2002, *supra* note 127.

Ministério Público's work on behalf of diffuse rights in this area generally involves the investigation of conditions at workplaces subject to worker complaints or notifications of serious injury or deaths.¹⁴² Where the *Ministério Público* verifies unsafe working conditions, they negotiate a settlement agreement or file a lawsuit seeking to bring the workplace into compliance with applicable regulations. Prosecutors also do preventative work in this area, seeking to proactively address unsafe working conditions and prevent work accidents.¹⁴³

e. Housing and Urban Problems

In the area of housing and urban problems, priorities included preventing illegal housing and land development; protecting urban recreational areas; and promoting the use of municipal zoning and planning tools.¹⁴⁴ In terms of the number of open investigations and actions, it was the fifth most important area of the institution's public law litigation work.¹⁴⁵ As described by a prosecutor who specialized in the area of housing and urban issues in the city of São Paulo, the work of the *Ministério Público* focused on six areas: legalizing illegally-constructed housing subdivisions and condominiums; eliminating risks of unsafe housing; implementing laws concerning land use, particularly zoning laws; overseeing the permitting of concessions for the use of public space; overseeing the provision of urban public services; and reducing visual pollution.¹⁴⁶ Broadly speaking, prosecutors seek to ensure that laws concerning housing and urban issues are implemented, and most of their lawsuits are against municipal governments for allegedly failing to do so.¹⁴⁷

142. See Email to author from Carlos Alberto de Salles, São Paulo state prosecutor for worker health and safety (May 14, 2004, 2:37 pm) (on file with author).

143. See *id.*

144. See General Plan of Activities—2002, *supra* note 127.

145. See *supra* Table 1.

146. See Email to author from João Lopez Guimarães, São Paulo state prosecutor for housing and urban problems (May 10, 2004, 3:15 pm) (on file with author).

147. See *id.*

f. Consumer Protection

In the area of consumer protection, the São Paulo *Ministério Público*'s priorities have included fighting false or abusive advertising and imposing liability for such advertising; fighting other abusive practices such as conditioning the provision of one product or service on another; sending or giving the consumer a product or service that was not requested; the selling of products that do not conform to applicable legal requirements; the use of anti-competitive practices; and the inclusion of unfair terms in contracts of adhesion.¹⁴⁸ According to one institutional leader in this area, the São Paulo *Ministério Público*'s consumer defense work in the late 1980s and 1990s may be categorized into six broad themes: health, safety, product quality and quantity, marketing, and abusive practices.¹⁴⁹ In the area of health, prosecutors have mainly focused on the hygiene of municipal slaughterhouses and drinking water quality. In the safety area, prosecutorial work has concerned design defects in automobiles and unsafe housing construction. In the area of product quality and quantity, prosecutors have pursued manufacturers that adulterate their products or misrepresent product quantity on their packaging. Lawsuits concerned with marketing practices have been filed against companies that engage in false advertising or advertise products that are illegal to use. Finally, in the area of abusive practices, prosecutorial attention has focused on the practices of health plans, credit card companies, and private schools.

g. Disability Rights

In the area of disability rights, priorities of prosecutors included the elimination of physical barriers to handicapped access in public buildings and other public spaces; investigation of the extent to which public schools provided programs for the disabled and, if necessary, the filing of litigation seeking educational inclusiveness for the

148. See General Plan of Activities—2002, *supra* note 127.

149. See Filomeno, *supra* note 123, at 385–97.

disabled; and legal measures to increase handicapped access to public transport.¹⁵⁰ According to a São Paulo prosecutor active in this area, public civil actions have been filed seeking to guarantee handicapped access to all public and private schools and handicapped access to public buses.¹⁵¹ Conduct adjustment agreements have been negotiated which require the provision of handicapped parking spaces in public parking lots, the modification of sidewalks to include tactile directional surfaces for the visually impaired, and the adaptation of public playgrounds for disabled children.

CONCLUSION

To understand the success of group litigation in Brazil, one must understand the institutional trajectory of the *Ministério Público*. The group litigation work of the *Ministério Público* has made the Brazilian public civil action a dynamic and potent procedural instrument. Its use and development cannot be disassociated from the institution that bore and bred it without losing an understanding of what has made it so successful and how it can serve as a model for other civil law countries. Indeed, it is difficult to imagine the public civil action being successfully transplanted to another civil law country without a corresponding role for the *Ministério Público* of that country. In other words, the model that Brazil presents does not simply require a reform of civil procedure to allow the legal representation of group interests. Rather, it requires fundamental political and institutional changes that empower public prosecutors, or perhaps another similar governmental institution, to act in the name of society and hold other governmental actors accountable.

The Brazilian *Ministério Público* in many ways exceeded Cappelletti's vision of what a *Ministère Public* could accomplish in terms of representing and defending collective interests. Cappelletti recognized the possibility that the *Ministère Public* might play this

150. See General Plan of Activities—2002, *supra* note 127.

151. See Email to author from Luiz Antonio Miguel Ferreira, São Paulo state prosecutor for disability rights in Presidente Prudente (Feb. 7, 2008, 4:39 pm) (on file with author).

role but concluded that the *Ministère Public* was too dependent on the executive branch, too hierarchical, too removed from the people, and too unspecialized to effectively represent collective and diffuse interests.¹⁵² The Brazilian *Ministério Público*, however, is characterized by a very high degree of independence from the executive branch and an absence of internal hierarchy that controls the actions of individual prosecutors. Brazilian prosecutors developed an institutional ideology that emphasized the active representation of societal interests and the institution expended significant resources to establish specialized prosecutorial positions and support systems for specialized work. In a land where laws are infamous for remaining “on paper” (*ficar no papel*), the Public Civil Action Law and the substantive laws granting authority to the *Ministério Público* to defend public interests have been used extensively.

While the Brazilian *Ministério Público* illustrates the great potential of this institution to develop a practice in public law litigation, questions have been raised about appropriateness and desirability of having a state institution advocate on behalf of the public interest. Cappelletti raised the question of whether an expanded role for *Ministère Public* would go “hand in hand” with an undesirable level of judicial activism.¹⁵³ Trubek expressed concern that the *Ministère Public* would supplant legal advocacy by private actors while not truly challenging the government on the most important issues as it created the “appearance but not the reality of a countervailing force.”¹⁵⁴ Sarat raised the question of whether the state would be able to tolerate and support a vigorous enforcement of rights from within itself over time.¹⁵⁵

These concerns are being played out in Brazil. The *Ministério Público*'s work has indeed been associated with a trend of the judicialization of politics, and it has been charged with advocating

152. See Cappelletti, *supra* note 17, at 781–87; Cappelletti, *supra* note 23, at 525–26.

153. Cappelletti, *supra* note 17, at 808.

154. David Trubek, *Public Advocacy: Administrative Government and the Representation of Diffuse Interests*, in ACCESS TO JUSTICE, VOL. III, *supra* note 13, at 490–93.

155. See Austin Sarat, *Book Review: Access to Justice, Mauro Cappelletti, General Editor, Vols. I, II, III, and IV*, 94 HARV. L. REV. 1911, 1917 (1981).

vigorously on behalf of middle-class interests such as environmental quality while ignoring lower class concerns such as agrarian reform and racial equality.¹⁵⁶ Perhaps most importantly, there have been increasing challenges to the *Ministério Público*'s group litigation by the legislative and executive branches.¹⁵⁷ Proposed legal reforms would reduce the *Ministério Público*'s powers to pursue the kinds of public law litigation cases for which it has become well-known. The future of the Brazilian *Ministério Público* as an institution will determine whether public law litigation in Brazil can be proffered as a successful model for other civil law countries.

156. See Rogério Bastos Arantes, *Constitutionalism, the Expansion of Justice and the Judicialization of Politics in Brazil*, in THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA 231 (Rachel Sieder, Line Schjolden & Alan Angell eds., 2005); Alvino Oliveira Sanches Filho, *Instituições, cidadania e movimentos sociais: o papel do Ministério Público da Bahia*, 182 CADERNOS DE CEAS 47–65 (1999).

157. Sadek & Cavalcanti, *supra* note 93, at 224–26.