COMPLIANCE AND COMPETITIVENESS:

HOW PROSECUTORS ENFORCE LABOR AND ENVIRONMENTAL LAWS AND PROMOTE ECONOMIC DEVELOPMENT IN BRAZIL

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ABSTRACT

This dissertation bridges the fields of international development, legal sociology, and organizational behavior to examine how Brazilian prosecutors enforce labor and environmental laws. Typically, the enforcement of protective regulations produces a range of outcomes. In some cases enforcers create major hurdles for business growth. In others, they overlook blatant violations and fail those interests they were supposed to protect. Yet, in some instances, enforcement agents find ways to reconcile compliance with competitiveness. What explains this variation? Why do these agents sometimes deepen existing conflicts and grant (temporary) victories to one of the parties, but in other occasions they engineer positive-sum outcomes?

To answer this question I spent 18 months in the field and immersed myself in the life of the Brazilian procuracy. I interviewed more than 50 prosecutors, attended internal proceedings, and accompanied them as they attempted to enforce protective regulations. I also interviewed more than 100 representatives from government agencies, NGOs, industry associations, private firms, and labor unions from a cross-section of sectors in which actors struggled over the enforcement of labor and environmental laws.

Eventually, I discovered that outcomes depended on prosecutors realizing that compliance requires costly and risky changes in business practices. Rather than prosecute, which they anticipate will eliminate jobs and undermine business profitability, or clarify the law, which they fear will be futile, these prosecutors reach out and assemble a network of institutions willing to cover some of the costs and insure some of the risks associated with compliance. They lead an effort of inter-institutional root-cause analysis and joint-problem solving, and through this method they strive to make compliance the easiest choice for all involved.

This study goes beyond showing that compliance can be reconciled with competitiveness. Rather, it hopes to redirect the attention of development experts away from pre-set ingredients, recipes, and best-practices and towards the organizational behavior of those front-line regulators who are out in the field, using their discretion to reshape businesses practices along more equitable and sustainable lines. These agents are the long arm of the state and their aggregate action can constitute the industrial policy of the 21st century.

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This dissertation is all about the prosecutors and the people with whom they interact, and all that is reported here I learned from them. It took me a long time to understand what they were trying to tell me, but I hope that, in the end, they will recognize themselves in these pages. To thank all the professionals, public servants, managers, and activists who generously agreed to talk to me and to teach me about their professional tribulations, I single out two prosecutors, Ronaldo Porto Macedo Junior and Liliane Garcia Ferreira. Ronaldo, an accomplished prosecutor, provided me with a roadmap to understand the procuracy, introduced me to his colleagues, commented on my drafts, and gave me access to his private library. He showed me what to look for, and when I could not find it, he took me there. Liliane has already accomplished so much in

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1 – INTRODUCTION

1.1 – The interplay between protective regulations and economic competitiveness

During the 1980s and 1990s, three global trends – namely trade liberalization, democratization, and decentralization of government functions – have created a problem that did not exist before. On one side, private sector firms, thrust into the global marketplace, protest that restrictive labor and environmental regulations limit their ability to compete. On the other side, workers, activists, and concerned citizens point out that no one should be subjected to an unhealthy, hazardous, and depleted environment to promote an economic development that can be limited in duration and scope (Tendler 2006).

Unsure on how to proceed, governments often alternate between two equally objectionable extremes. In some occasions, they try to encourage private sector growth by offering businesses a range of benefits, including tax breaks, firm-specific infrastructure, and – crucially – formal and/or informal exemptions from labor and environmental regulations, either by repealing laws or by weakening the agencies responsible for enforcing the regulations. In other occasions, governments take the opposite stance and tighten protective regulations, hoping that firms will adjust. Naturally, none of these courses of action is fully satisfactory. Those governments that scrap protective regulations abandon some of the core functions they are supposed to perform; and those that crack down hard also force private sector enterprises to downsize, move underground, outsource, and sometimes even pack up and leave (Tendler 2002).

Scholars and commentators have been debating the relative merits of each of these approaches at both national and international levels. Some argue that regulations should be eliminated at once to spur economic growth, in whose wake labor and environmental standards

will rise (Baghwati 1995; Krugman 1997; Myerson 1997; Djankov et al 2003, Alesina 2005, Kristof 2009). Others contest this logic (Tendler 2002) and claim that governments ought to enforce labor and environmental regulations first, as it attracts superior kinds of investment, reduces inequality, promotes innovation, and pushes the whole economy along a 'higher' road (Bourguignon 2003; Freeman and Elliott 2003; Shrank 2007, and Locke and Romis 2007).

As foretold by Karl Polanyi's (1944) 'double-movement', it is unlikely that this debate will ever be resolved. But while it goes on, a large share of these real-life conflicts are being adjudicated locally and on a daily basis by public officials responsible for enforcing regulations. Every day, an army of public and private inspectors, auditors, monitors, surveyors, and assessors visit private enterprises to check on their production practices, assess whether they are complying with pertinent legal codes, and decide whether to impose a fine, issue a warning, demonstrate a technical solution, grant an exemption, refer for prosecution, or follow another course of action. These agents operate at the "street-level" (Lipsky 1980) and are arguably the most pervasive, flexible, and fine-grained tool that governments can have as they try to influence the economy in the global age.

As for any tool, outcomes will depend on how expertly the instrument is deployed, and so far the dominant pattern is variation. In some cases, enforcement agents act in an unreasonably strict and legalistic manner and create serious hurdles for business growth (Bardach and Kagan 1982). In other cases, they take the opposite stance and retreat, overlooking blatant violations and failing those they are supposed to protect. In both these scenarios, the result is a zero-sum or a trade-off in which one side gains at the expense of the other. Still, there is a third option: in some cases, enforcement agents use their discretion to produce positive-sum outcomes in which

compliance with protective regulations coexists or even reinforce the private sector's ability to compete (Tendler 2006, Pires 2008, Schrank 2007, Locke, Amengual and Mangla 2009).

What explains this variation? Why, in some occasions, enforcement agents deepen existing conflicts and/or grant a (temporary) victory to one of the parties, but in other occasions they produce consensual solutions in which compliance coexists or even becomes a source of competitiveness? In broader terms, how can the state be developmental and regulatory at the same time? To answer these questions, I examine the role of public prosecutors in Brazil.

1.2 – Setting the stage: Brazil and its prosecutors

Brazil provides the ideal setting in which to investigate the reconciling of compliance and competitiveness. It is a large and diversified country, and one in which the clash between these two imperatives is both widespread and acute. On one side, Brazil has a very large and active civil society, with plenty of unions, NGOs, social movements, and other civic groups devoted to improving labor and environmental standards. These activists often join forces with a fairly large and professional public bureaucracy, including tax, labor, and environmental inspectors who devote themselves to advocating for and then enforcing a wide array of fairly strict regulations (French 2004).

Naturally, other actors see this situation from a different angle, and Brazilian private firms regularly point out that existing laws and regulations create a maze that severely detracts from their ability to compete. Labor laws are a frequent target of protest (Rezende, Silveira and Kreter 2008), accused of increasing operational costs, causing unemployment, and preventing firms from adjusting to dynamic economic conditions. And that is just the tip of a much larger iceberg. According to an industry source (Amaral et al 2008), from 1998 to 2008 the Brazilian

government published 3,776,364 new rules, and 471,290 of those remained in force in 2008. The bulk of these norms (2,628,962) were issued by one of the 5,565 municipal governments in the country, and the remaining ones by either a state or the federal government. Considering that few businesses have a truly national presence, the same source estimates that private firms operating in Brazil must comply, on average, with 3,207 different norms with 17 articles each.

At this cross-fire between private sector pressures for deregulation and an "improved business environment", and civil society's counter-pressures for more stringent labor and environmental regulations, sit the public prosecutors. Prosecutors are those public officials who represent the state in criminal proceedings. They *are* the state in the standard courtroom formulation "*the state versus* ...". A prosecutor's core function is to receive reports and/or complaints on alleged criminal violations, gather additional data, and then decide whether to indict or drop the case. Of course, in most places prosecutors do more than that. In some locales, they are affiliated with the Executive branch and also defend the government in civil suits. In other places, they oversee the functioning of prisons and police. In still others, they investigate politicians and government bureaucrats to prosecute alleged cases of corruption. And in some jurisdictions, including both Brazil and the US, they can initiate criminal and civil lawsuits against public and private institutions to "defend society".

There are approximately 10,000 prosecutors[1] in Brazil and they are aided by almost 20,000 clerks and support staff (Ministerio da Justica 2006 and MPSP 2006). These prosecutors are organized into 26 separate and independent state-level agencies, plus a set of four specialized federal-level counterparts; one of them devoted solely to enforcing labor laws. There are some

[1] I use the generic term "prosecutor" to refer to all those officials that, in Brazilian Portuguese, and depending on actual atttributions and affiliations, are called "promotor de justiça", "procurador de justiça", "procurador-geral de justiça", "procurador da república", "sub-procurador geral da república" and "procurador-geral da república".

minor differences in the way each of these entities organize its internal affairs, but they all bear the same name - *Ministério Público* (MP) - and follow the same national and constitutional guidelines concerning prosecutors' rights, powers, attributions, duties, and career paths.

The *Ministério Público* is a deconcentrated organization, and a large proportion of its prosecutors work in field offices spread out throughout the national territory. The Sao Paulo State *Ministério Público* is the largest in the country and employs 1,700 prosecutors who operate out of 250 different municipalities (MPSP 2006). The average age for newly hired prosecutors in that state is 28 years old, and the average age for all practicing prosecutors in Sao Paulo is 42 years old. Most of them (68%) are men, but the gender distribution is becoming more balanced over time (MPSP 2006).

Brazilian law grants prosecutors a series of professional prerogatives that gives them high status, insulates them from typical external pressures, and provides them with large amounts of professional autonomy. These prerogatives include:

- "*Independencia funcional*" → prosecutors are entitled to act on their own legal opinion and do not have to follow directives coming from above;[2]
- "*Vitaliciedade*" → after a probationary period of approximately two years, prosecutors acquire full job security and can only be fired by a final court order;
- "*Inamovibilidade*" → they cannot be transferred or promoted against their will;
- "*Irredutibilidade de vencimentos*" → salaries are fixed and cannot be reduced; and

[2] Of course, and as any professional, prosecutors' actions may be judged ex-post, and those who are seen by their peers as having failed their professional ethics (for instance, by espousing unsubstantiated legal positions) may still be punished for it.

- "*Princípio do promotor natural*" → cases are automatically distributed to prosecutors according to pre-determined rules, i.e. prosecutors have full authority over certain types of cases occurring within a certain territory (no cherry-picking)

To counter-balance these prerogatives and to avoid conflicts of interest, prosecutors are barred from acting as private attorneys, operating private businesses, running for office, or taking up posts in the executive branch.[3]

Finally, prosecutors have a range of exceedingly powerful legal weapons at their disposal. In practice, they can (a) bring legal suits against both private firms and/or public bureaucracies, (b) subpoena documents (through "*inquérito civil*"), (c) request that defendants repair the harm, pay monetary damages, and/or change their conduct ("*obrigação de fazer e não-fazer*"), and (d) deploy an instrument akin to a deferred prosecution agreement to settle cases as they see fit ("*Termo de Ajustamento de Conduta – TAC*")[4]. Moreover, prosecutors have a legal monopoly over criminal cases (i.e. only a prosecutor can indict and request that someone be sent to jail), and in Brazil they also have a virtual monopoly over civil class-action suits (an estimated 95% of all class-actions in the country are brought by prosecutors[5]). This means that they are the gatekeepers of the judicial system, and this privileged position gives them one of their most powerful, subtle, and therefore unexamined weapons: by deciding not to bring a case, the prosecutor is, to all effects, declaring a situation legal. Together, these prerogatives and legal

[3] Those prosecutors admitted to the Ministério Público prior to 1988 face less stringent constraints. All prosecutors can teach, and many do, particularly in law schools.

[4] A "*termo de ajuste de conduta*" (TAC) is the specific contract through which plaintiff (usually the prosecutors) and the defendant settle a civil class-action lawsuit. What is important about the TAC is that, to settle, the defendant must plea guilty. This means that the defendant who infringes a TAC is immediately found guilty of the prior violation and has no further legal recourse. In the US, defendants often settle without admitting any prior fault.

[5] In Brazil, punitive damages are not nearly as high as in the US, so the potential payoff for a private class-action entrepreneur is small. Moreover, prosecutors are paid for by the state and do not have to pay court expenses in case they loose. Under these conditions, it is almost impossible for a private class-action bar to emerge.

tools make Brazilian prosecutors powerful arbiters of all types of disputes and veritable regulators-of-last-resort.

Being so powerful, independent, and omnipresent, prosecutors elicit heated and conflicting opinions. The next section describes the most representative of these perspectives and then puts the differing viewpoints in the context of the larger literature on organizational behavior and the enforcement of regulations.

1.3 – Conflicting opinions and perspectives on the *Ministério Público*

Many commentators see Brazilian prosecutors as impediments for economic development. In 2007, a leading Brazilian business magazine gave voice to this view in an article whose title could be translated as "*The Powerpuff Boys*"[6] and that depicted prosecutors as "*young and autonomous agents who flex their muscles and jam the development of infra-structure in Brazil*" (Paul 2007). A similar perspective surfaced in many of the interviews I conducted with business leaders and other representatives of private-sector interests. For example, the head of a business association in Minas Gerais claimed that "*prosecutors are doing their job, and they are very active at it*" but "*from our point of view, they represent a major obstacle to business and they really mess things up*". The manager of a large sugar and ethanol operation corroborated this view: "*the prosecutors, they think they are like god. They do as they please and that's it. No discussion, it is their way or the highway*".[7] And the head of a business association in Sao Paulo was even blunter: "*here we have to contend with a prosecutor who is a lunatic, completely deranged and intent on destroying our sector*".

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[6] The original title in Portuguese was "*Os Meninos Superpoderosos*", a spoof on the Brazilian title of the Emmy award-winning US animated TV series "*The Powerpuff Girls*" about a group of kindergarten-aged girls who use their superpowers to defend their town against villains and giant monsters (Wikipedia).

[7] [O MP] eles sao assim como deus. O que eles acham e pronto, nao tem divergencia. O MP age do jeito que eles entendem e metem o pau mesmo. Nao tem espaco para diagologar. É abuso de poder, ne?

Public officials also complain about prosecutorial interference. An urban planner employed by the city of Sao Paulo said that "*prosecutors are concerned solely with formalities, legalisms, laws, and deadlines; they don't care about what is good for the city. There is absolutely nothing [good] a public servant can do that a prosecutor will not show up and spoil things*". The CEO of a public development bank took a subtler and more diplomatic but no less revealing approach: "*prosecutors are central actors; for good or for evil*" [emphasis added].

Even President Lula, a historic ally of unions, social movements, and environmental activists has found reasons to complain about the prosecutors. Soon after launching a country-wide infrastructure initiative named 'Plan for the acceleration of economic growth', he said:

> "*I'm devoting myself ... to identifying all the pending snags that I have with the environment, the Ministério Público [my emphasis], the indigenous people, the maroon communities, and the General Accounting Office and then I will prepare a package, take it to Congress and tell them: 'look, this is not a problem for the president to solve, this is a problem for the country*"[8]

This view is buttressed by scholars who, even if sympathetic to the MP in the abstract, still reprimand the institution for being too independent and democratically unaccountable. For instance, Fabio Kerche (2007) argues that the *Ministério Público's* "*considerable autonomy is not counteracted by a significant amount of accountability*". Then, he observes that this is "*a rare occurrence in Brazil and in other democracies*". Likewise, Maria Teresa Sadek and Rosangela Cavalcanti (2003) argue that "*the large degree of freedom and autonomy given to*

[8] ""Eu estou me dedicando, neste mês de novembro e neste mês de dezembro, para ver se eu pego todos os entraves que eu tenho com o meio ambiente, todos os entraves com o Ministério Público, todos os entraves com a questão dos quilombolas, com a questão dos índios brasileiros, todos os entraves que a gente tem no Tribunal de Contas, para tentar preparar um pacote, chamar o Congresso Nacional e falar: "Olha, gente, isso aqui não é um problema do presidente da República, não. Isso aqui é um problema do País" Source http://www.info.planalto.gov.br/download/discursos/PR1332.DOC - 21 Nov 2006

members of the Public Prosecution ... constitutes the most important problem facing the institution". Flavianne Nobrega (2007) is more explicit about her judgment when she points out that prosecutorial discretion "*ends up leading to negative results of the practical point of view to democracy [sic]*".[9] A high-level official from a multilateral development bank, also speaking more in theory than on facts, expressed a similar dissatisfaction: "*I look at the MP and say wow! There is no oversight, and prosecutors can act as they please. And how do they act? They implement the laws selectively. This is a horrifying thought*".

Naturally, there is another side to this coin, and many observers, including some of the scholars mentioned above, see prosecutors in a much more favorable light. According to a recent poll, a staggering 85% of Brazil's population think MP's performance is either good or excellent, 75% think it should either maintain or expand its scope of action, and 58% hold the MP in high esteem, in contrast to Judiciary's 48%, Executive's 40%, and Legislative's 35% (IBOPE 2004).

Likewise, many scholars portray the Brazilian prosecutors as commendable agents of accountability. For instance, Benjamin Hensler (2005) points out that the MP has become "*one of the country's most vital weapons for combating corruption in the public sector*". Lesley McAllister (2008) concurs and points out that, thanks to prosecutors, "*Brazil stands as a model of how developing countries can empower their legal institutions to act in ways that make environmental law matter*". Bernardo Mueller (2006) also agrees and indicates that prosecutors "*enforce enforcement*", i.e. thanks to a personal devotion to selfless public service whose origins are "*difficult to ascertain*" (Mueller calls it "*zealotry*"), prosecutors solve the thorny 'who will guard the guardians?' conundrum.

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[9] A respected Brazilian political scientist summarized this view in an interview with me: "*political scientists do not like organizations such as the MP that have autonomy as their raison d'etre. It will lead to corruption, and to eliminate politics from the table is undemocratic*".

In the interstices of these two camps, some NGOs and activists complain that prosecutors can be too lenient with wrongdoers. For instance, Brenda Brito and Paulo Barreto (2006) analyzed a sample of 55 environmental infractions in the Amazon and found that in 83% of these cases federal prosecutors dropped the charges in exchange for small and inconsequential donations of food and/or medicine ("*transação penal*"). Conversely, some business people, particularly those who have already invested in labor and environmentally-friendly practices, praise and support the prosecutors' stern actions against those who infringe these same laws.

Amidst all these controversies, one finds cases in which prosecutors' actions are admired across the board. For instance, they have been responsible, alongside other institutions, for a decline in illegal logging in the Brazilian Amazon; the cleaning up of Cubatão, a municipality once so polluted by a cluster of petrochemical plants that it was known as 'the valley of death'; the retrofitting of pig-sties to reduce river contamination in the Brazilian South, and many other cases – some reported in this study – in which private enterprises started complying with protective regulations and either maintained or even increased their competitiveness because of it (for additional cases, see Almeida 2004, Sant'anna 2004, and Lazarte 2005).

The bottom-line is that there is enormous variation in how prosecutors act and in the results they achieve, and this variation begs two questions: what are the styles or strategies that they adopt in producing these varying outcomes? And which organizational features allow for, or even propel, their behavior?

The standard answer is that their actions and results vary because prosecutors are independent. As stated by a senior prosecutor, critical of his colleagues' excessive autonomy: "*what do prosecutors do every day? They do whatever they want*". And yet, anyone who studies

organizations knows that nobody is unconstrained. The *Ministério Público* is not a formless agglomeration of prosecutors operating in a vacuum. Rather, it is a rigidly structured organization, with numerous internal councils, committees, and caucuses. The official manual of procedures of the Sao Paulo MP (MPSP) is more than 100 pages long, and MP's internal dynamics are also regulated by a series of laws, most notably the "*Lei Orgânica do Ministério Público*". Moreover, prosecutors are selected, trained, assessed, and promoted according to some criteria that inevitably influence what they do. They face an external task environment that also conditions how they respond. And the organization provides prosecutors with certain forms of support and guidance that make some activities 'easy' while others become 'difficult' and the former type is bound to prevail over the latter. In the end, all these variables play a major role in influencing what prosecutors do and how they do it.

Before tackling these concrete questions, and to put the Brazilian prosecutors in context, I examine two bodies of scholarly work, namely (a) the literature on the enforcement of regulations and (b) the literature on the organizational behavior of public sector bureaucracies – most notably street-level bureaucracies.

1.4 – The MP in a broader canvass: literature review

Since the late 1970s scholars from around the world have been trying to understand how public agents enforce protective regulations, the variables that determine their behavior, and the results that they achieve. At the core of this literature lies a methodological challenge concerning aggregation: the only observable manifestation of regulatory enforcement is the 'enforcement act', i.e. the discrete signal conveyed by an inspector in his or her interaction with the regulated enterprise, such as a site visit, a verbal admonishment, a phone call, a written warning, or the

imposition of a fine. Susan Hunter and Richard Waterman (1992) studied how EPA enforces water regulation and discovered that regulatory agents deployed sixty different enforcement techniques. Of course, no regulatory act means much by itself, isolated from other acts and from the context in which they are deployed. The real challenge is to make a forest out of these trees.

To this end, scholars of regulatory enforcement have been aggregating enforcement acts into either static, hard-wired "*styles*" and/or into dynamic, interactional "*strategies*". This task, which was pioneered by, and proceeds along, the same analytical line as the inquiry on police behavior (Wilson 1968, Muir 1979), can be divided into three separate steps or challenges.

The first challenge concerns the determination of the appropriate unit of analysis, i.e. whether one ought to study the individual agent (for instance Muir 1979, May and Burby 1998, May and Winter 2000, and Locke, Amengual and Mangla 2009), the enforcement agency (Wilson 1968, Silbey 1981, Hawkins 1984, Braithwaite 1985), the country (Kelman 1981, Badaracco 1985, Brickman, Jasanoff and Ilgen 1986, Vogel 1986) or an even more encompassing 'legal tradition' (Piore and Schrank 2006).

The second challenge concerns the determination of the dimensions of variation. Initially, researchers assumed a single axis of variation and debated what the axis was. Some distinguished between means-oriented and results-oriented approaches (Silbey 1981, Bardach and Kagan 1982, Scholz 1984); others distinguished between the arms' length detection and punishment of violations – the so-called "deterrence", "sanctioning", "adversarial" or "policing" model of enforcement – from the interactive processes of cooperation and negotiation – the "compliance", "cooperation", "pedagogic", "bargaining" or "persuasive" model (Hawkins 1984,

Braithwaite 1985, Day and Klein 1987, Hutter 1989, Hunter and Waterman 1992, Zinn 2002, Piore and Schrank 2006, Locke, Amengual and Mangla 2009).

A subsequent wave of studies started proposing that enforcers' behavior varies in more than one axis / dimension at a time, and suggested that scholars consider a bidimensional space: one axis would reflect how enforcers interpret the legal code, ranging from a narrow-legalistic to a broad-cooperative approach, and the other axis would reflect how facilitative (or "friendly") the enforcers are when acting on their interpretation, i.e. whether they emphasize the correction or the punishment of the perceived violations (Braithwaite, Walker and Grabosky 1987; May and Burby 1998; May and Winter 2000).

Some researchers took this endeavor a step further and incorporated contextual variables into their models. So, instead of proposing a taxonomy of static styles, they started identifying (and sometimes prescribing) dynamic strategies in which regulatory agents choose their enforcement actions in a way that counterbalances the enterprises' intrinsic inclinations and prior responses (Scholz 1984, Ayres and Braithwaite 1992, Sparrow 2000, Baldwin and Black 2007).

And then, once this analytical space is drawn, the third and final challenge is to aggregate myriad enforcement acts into actual styles or strategies and to place them in relation to one another. The vastness of the fields' vocabulary highlights the complexity of the task: according to the literature, enforcers can be accommodative, flexible, insistent, strict, legalistic, persuasive, retreatist, creative, and more. Some temper their cooperation with the credible threat of punishment (Zinn 2002) while others adopt a tit-for-tat approach (Scholz 1984). Firms deemed to be 'amoral calculators' could be met with increasingly stiffer fines, while those that are 'organizationally incompetent' responded better to a gentler, more educative approach (Kagan

and Scholz 1984). In all cases, enforcers are supposed to be at their best when they start with a cooperative and friendly approach and toughen up and deploy increasingly more punitive measures whenever cooperation fails to deliver appropriate results – this is the logic of the multi-layered responsive[10] strategy devised by Ayres and Braithwaite (1992).

This whole analysis dovetails seamlessly with the study of public sector organizations in general (Wilson 1989) and with studies of front-line public organizations in particular.

The organizational behavior of public sector organizations

Arguably the most influential piece on the behavior of front-line government officials is Michael Lipsky's (1980) "Street-Level Bureaucracy". According to Lipsky, "*street-level bureaucracies are the schools, police and welfare departments, lower courts, legal service offices, and other agencies whose workers interact with and have wide discretion over the dispensation of benefits or the allocation of sanctions*". Thanks to their inherent discretion, street-level bureaucrats do not simply enact policies conceived by others but rather make policy themselves.

Also important, street-level bureaucrats always have to contend with a demand for services that vastly overwhelms the supply. As a result, and according to Lipsky, these bureaucrats replace both their own preferences concerning public service and any official directives they may receive from above with routines, categories, and informal rules of thumb that allow them to cope. In Lipsky's words, "*they create routines to make tasks manageable*".[11]

[10] The term "responsive" means different things for different people: Ayres & Braithwaite 1992 use the term to mean 'effectively attuned to context'; Silbey (1981) use it to mean 'reactive case-processing'

[11] John van Maanen (1973, 1978) describes how police officers learn / develop and then systematically deploy some of these informal routines and categories.

In an ironic and sad twist, these routines dominate their occupational lives and create a crucial problem: even if discretion is intrinsic to their jobs, the overwhelming nature and amounts of work prevent them from using it. As stated by Lipsky, "*the existential problem for street-level bureaucrats is that with any single client they probably could interact flexibly and responsively. But if they did this with too many clients their capacity to respond flexibly would disappear*". The result is a "*dilemma*", and also a level of service that falls way short of everybody's expectations.

This view was developed at a time when the US was in the grip of considerable social and economic turmoil and many of its public agencies were seen as hopelessly flawed. In this setting, Michael Lipsky developed a sympathetic but pessimistic portrait of the street-level bureaucrat: similar to the public at large, these government officials are prisoners of the system in which they work and can not do much to improve their own status, the agency in which they work, and/or the public services that they provide.

However, Lipsky's is not the only – or final – word on the organizational behavior of front-line officials. Other perspectives try to explain why street-level bureaucracies fail (or succeed) in their tasks, and one alternative is the public choice theory of bureaucracy. This theory is based on the assumption that discretion is an undesirable trait that opens the door for corruption and other types of undesirable ("rent-seeking") behavior (Niskanen 1975, Buchanan and Tullock 1962, Rose-Ackerman 1986). The way forward, according to proponents of this view, is for government agencies to align incentives and adopt checks and balances that will eliminate discretion. If done right, potentially unruly front-line workers will become obedient bureaucrats.

A third alternative is provided by Herbert Kaufman's analysis of the US Forest Rangers (1960). Similar to Michael Lipsky, and contrary to rational choice theorists, Herbert Kaufman roots his study on the recognition that discretion is inherent to front-line work. Yet Kaufman does not assume that prevailing work conditions will always force workers to abandon their discretion in favor of the same suboptimal routines and rules of thumb, or that front-line officials will inevitably abuse their discretion for private gain. Instead, he posits that it is up to the organization and its management system to encourage front-line workers to use their discretion to further the goals of the organization.

Table – Competing Theories – Organizational Behavior of Front-Line Workers

		Collective leaning	
		Convergence	**Divergence**
Discretion	**Intrinsic**	Michael Lipsky	Herbert Kaufman
	Avoidable	n/a	Public choice

Kaufman's perspective allows for the existing model of the organizational behavior of front-line workers to be expanded in three consequential ways. First, it allows for the existence of internal variation, i.e. front-line workers may still adopt routines and other heuristic devices, but there is no imposition that they all adopt the same routines, even when exposed to the same constraints. Several empirical studies support this view. For instance, at the agency level, Roberto Pires (2006) examines how Attorney General Offices in both Massachusetts and New York strive to enforce labor laws, but while the former adopted a case-by-case approach, the latter targeted sectors as a whole. Similarly, but at the individual level, Rodrigo Canales (2009)

examines micro-credit loan officers in Mexico and shows how some of them adopt a legalistic 'letter-of-the-law" style while others – performing the same task for the same organization – adopt a more flexible 'spirit-of-the-law' style. Judith Tendler (1997) shows how Brazilian public health workers find enough room for maneuver within their routines to depart from their job descriptions in ways that ingratiate them with clients and allows them to provide improved services during home visits. Likewise, Richard Locke, Amengual and Mangla (2009) explain how private auditors regularly depart from their assigned roles to help inspected firms comply with labor standards. In the same vein, Catia Aida Silva (2001) reports the existence of two types of prosecutors in the Brazilian MP.

In fact, the existence of internal variation within any given organization might be a good thing. For instance, James March (1991) used computer modeling to analyze this matter and he concludes that the co-existence of 'exploration' and 'exploitation' modes of action within an organization enhances overall performance. Others have reported that pockets of variation (sometimes called 'reform fractions') may serve as breeding ground for organizational innovation.

Second, front-line workers do not have to remain the passive recipients of the environment in which they work. To the opposite, and as indicated by a series of studies, many front-line agents may try to change their own organization (Joshi 2006), the policies that it adopts (Dowbor 2008), and/or the legal framework that legitimizes their action. For instance, they may reinterpret existing laws and precedents (ex: McMaster 2006, Kessler 2002), lobby the legislature to change applicable laws (Carpenter 2001, Macedo 1995, Arantes 1998), or use their status as 'repeat-players' (Galanter 1974) to elicit the judicial jurisprudence that they favor.

And third, front-line workers who retain a considerable amount of discretion may depart from mutually exclusive binary relationships with their clients. In other words, these agents do not have to always be '*serial monogamists*' who interact with one client at a time while no other institution interferes. For instance, and as will be discussed in this dissertation, regulatory enforcement officials may realize that compliance revolves around a collective action problem (i.e. "*I would comply if my competitors did…*"). In other cases, the binding constraint concerns the available technology ("*I would install the required filters if they fit in my plant, or if the did not disrupt my production process so much*"). And in other cases, the central bottleneck concerns access to markets (i.e. "*I would comply with regulations if I found customers who paid more for a green-seal certified product*"). Of course, the list of potential problems is vast, and thus front-line workers may try to adopt a variety of creative and innovative approaches and recruit a variety of allies when trying to perform their jobs.

1.5 – Methodology and research design

The view proposed above suggests that I examine not only the prosecutor-in-action, but also the milieu in which they operate – including the MP and its external environment – and the different ways that these different spheres of action interact and influence one another. To this end, I adopted a three-pronged approach. First, I examined the trajectory of the *Ministério Público* to understand how it evolved into its current form. Second, I immersed myself in the life of the procuracy to understand how the *Ministério Público* operates and how its various organizational features influence the way prosecutors work. And third, I examined a set of four concrete cases in which the prosecutors have strived to enforce labor and environmental laws in a way that does not detract from private firms' ability to compete.

Understanding the Brazilian Procuracy (MP)

To understand how the Brazilian Ministério Público works, how it evolved over time, and how the different features of the organization help determine how prosecutors perform their jobs, I interviewed approximately 50 prosecutors from the state (MPE), federal (MPF) and labor (MPF-T) procuracies , especially in and around Sao Paulo. I selected interviewees with a wide range of experiences, from newly-hired prosecutors to those with decades of practice, some who had already retired. I also interviewed prosecutors assigned to all areas of the organization (i.e. both front-lines and support functions), and made sure to include those assigned to small, medium, and large offices, and those designated to handle criminal, civil, and collective affairs matters. Among those prosecutors performing support functions, I interviewed those assigned to public relations, training ("*Escola Superior do Ministério Público*"), information systems, and those responsible for providing legal guidance to their colleagues in a variety of fields, including environment, consumer protection, and the rights of individuals with disabilities ("*centros de apoio operacional - CAO*"). Finally, I interviewed prosecutors associated with the *Ministério Público Democrático* (MPD), an internal NGO (more about this later), and those elected by their peers to run the Sao Paulo Prosecutors' Association (APMP) and the National Prosecutors' Association (CONAMP), in Brasilia.

To complement these interviews, I also consulted with members of the procuracy's support staff, who provide prosecutors with technical guidance in a variety of fields, including forestry, chemical engineering, biology, building safety, and more.

The majority of these conversations lasted one to two hours, and most of them took place at the individuals' offices. In some occasions I was invited to visit prosecutors at their homes,

and these interviews often lasted longer. All conversations were unscripted, and I took handwritten notes in all of them. When in a prosecutors' office, and depending on the circumstances, I asked for permission to peruse files and legal cases, and in all cases was granted unrestricted access.

In addition to interviews I also conducted participant-observation, and my objective was to see the organization and prosecutors from as many different vantage points as possible. To this end, I visited the private school that helps candidates prepare for the procuracy's entrance exam and interviewed the former prosecutor who owns and runs the business. I also attended a range of formal and informal meetings and proceedings at the MP, including a deliberative session of the *Conselho Superior* ("superior council") of the MPSP; talks delivered by prosecutors to both legal and lay audiences; formal public hearings ("*audiências públicas*"); informal meetings with community groups; and a range of sessions in small claims, juvenile, homicide, environmental crimes, and appeals courts ("*Tribunal de Justiça de São Paulo*").

The highlight of this participant-observation effort was attending, for 10 hours a day for two full weeks, the prosecutors' exclusive orientation course in which tens of seasoned prosecutors waded in front of their newly-hired colleagues to teach them about the career, the organization, the tricks of the trade, and the different resources and skills they would need to handle the vicissitudes of the job.

Examining the Prosecutor-in-Action

In addition to understanding the historical trajectory and inner-workings of the organization, I invested considerable time to deciphering the "prosecutor-in-action", i.e. I wanted to know how prosecutors structure their days, which cases they choose to pursue, which

enforcement styles they adopt, the alliances they make, and why. This inquiry was informed to a large extent by Pfeffer and Salancik's (1978) insight that organizations and the agents within them are influenced by the external environment in which they operate.

During my interviews with prosecutors I often asked them about concrete cases in which they had worked, and what kinds of outcomes they had achieved. As a result of these inquiries, and thanks also to my daily reading of Brazilian media, I identified a series of cases fitting the following criteria: (a) existence of an industry (usually a cluster of firms) that systematically violates labor and/or environmental laws in the course of their normal business activities (for instance, by not registering their workers, or by dumping toxic effluents into the environment); (b) sharp disagreement among stakeholders – including the firms themselves, NGOs, different government agencies, and various activists, on whether these labor and environmental laws should be enforced at all; (c) a long trajectory, including both advances and setbacks; and (d) geographical diversity.

Eventually, I chose to examine four cases into further detail and to understand the context and trajectory of these industries and the role that prosecutors have played in each of them, I visited the localities and interviewed approximately 100 officials representing different government agencies (including labor and environmental inspectorates; trade promotion agencies, business development enterprises, and others), international and Brazilian NGOs, social movements, industry associations, private firms, church groups, research institutions, labor unions, and more.

The four cases are as follows:[12]

(a) Granite tile production in Rio de Janeiro: In the poorest region of Rio de Janeiro state, in and around the municipality of Santo Antônio de Pádua, there is a cluster of small firms that employ an estimated 6,000 people to produce low-value added granite tiles, which they sell in the domestic market. Unfortunately, the quarrying of granite is wasteful of a natural resource and hazardous to workers. Moreover, the cutting of tiles generates a large quantity of stone powder that is illegally dumped into local rivers, killing wildlife and rendering the water unusable to downstream farmers.

(b) Shrimp farming in the Northeast: In the early 1990s, and after many decades of trial-and-error, Brazilian entrepreneurs found a way to cultivate shrimp in the Brazilian Northeast at a relatively low cost and high productivity. At roughly the same time, a disease ravaged the shrimp industry in Ecuador and thus the Brazilian industry boomed, creating thousands of jobs in an economically depressed region. However, many of these entrepreneurs decided to establish their farms on top of – and thus destroy – the region's many mangroves, which are environmentally sensitive, legally protected, and publicly-owned areas that replenish fresh- and sea-water fish stocks and provide fuel, food, and a cash crop to dwellers of impoverished coastal communities.

(c) Charcoal production in the Amazon: In the eastern part of the Brazilian Amazon, in a region known as Carajás, hundreds (or even thousands) of small, informal, and highly mobile firms devote themselves to illegally felling native trees and using the timber to produce charcoal, which they sell to 15 pig-iron smelters in the region. These charcoal producers employ an estimated 30,000 people, but labor standards tend to be very low, and reports of health and

[12] Other potential cases, such as pig-farming in the South, petrochemical production in Cubatão, and real-estate development along the Brazilian coast got dropped

safety, and wage and hours violations, including many cases of so-called 'modern-day slavery', are rampant.

(d) Sugarcane production in Sao Paulo: Brazil is the largest producer of sugarcane in the world. In 2005, it had approximately 320 sugar and ethanol mills that, together, crushed 431.4 million tons of cane, and approximately 60% of which originated in Sao Paulo. According to industry sources, the sector employs approximately 1 million people nation-wide and accounts for 2.4% of national GNP. Brazilian sugarcane production has being growing considerably (50% growth between 1996 and 2006) and it is widely heralded as a source of clean energy. Nevertheless, problems abound and the industry remains associated with environmental harms and widespread violations of labor standards. More concretely, many sugarcane farms rely on manual harvest and thus they burn their fields prior to the workers moving in, causing air pollution and public health problems in nearby cities. Also, many of these farms do not provide their workers with personal protection equipments, adequate housing, or safe transportation to and from the fields as required by Brazilian law. Finally, many do not register their workers and/or illegally deduct certain expenses from their paychecks.

Chart – The location of each of the four case studies

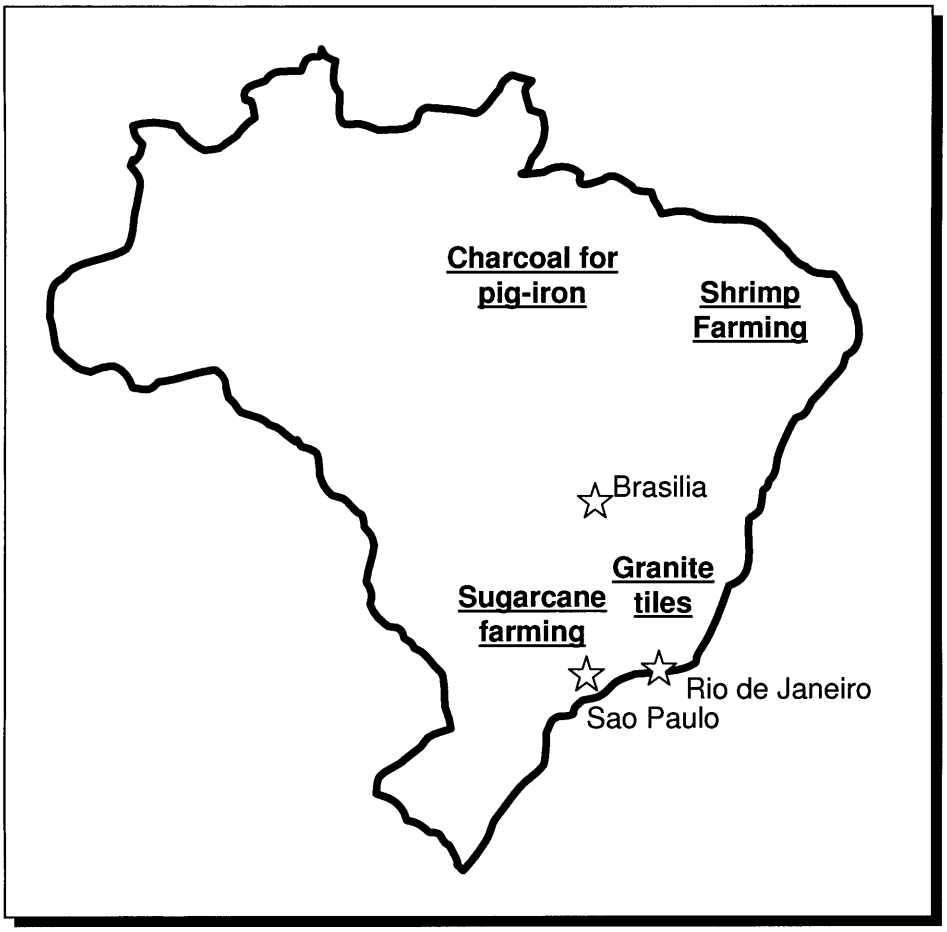
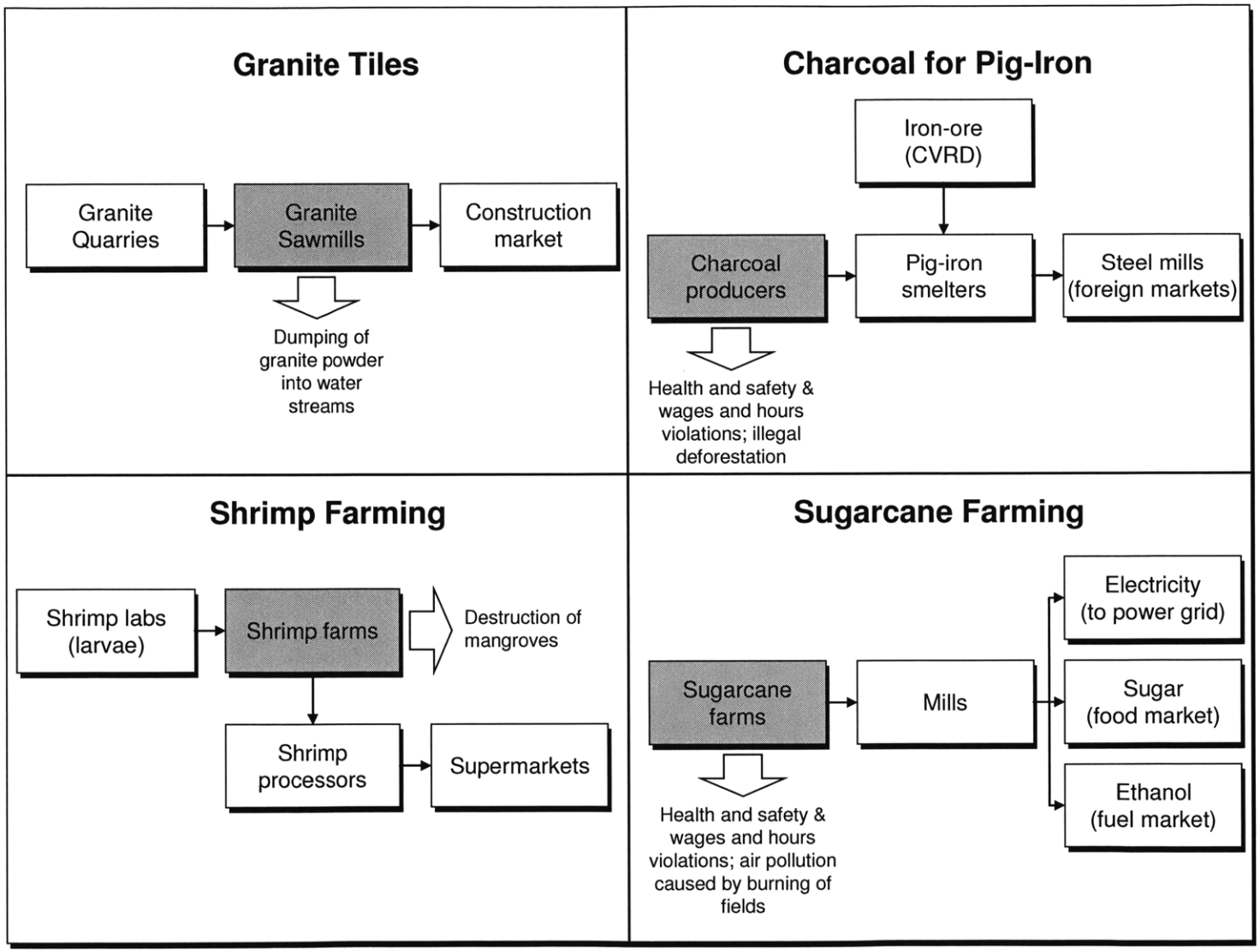


Chart – The harms in context



Note: in grey, the link in the supply chain causing the negative externality

Table – Summary of Cases

	Sugarcane farming	Charcoal for pig-iron	Granite tiles	Shrimp farming
Location	São Paulo	Pará and Maranhão	Rio de Janeiro	Rio Grande do Norte
Nº Firms	n/a sugarcane farms	5,000 – 15,000 charcoal producers	200-300 granite sawmills	800-1,000 shrimp farms
Nº Jobs	500,000 workers	15,000 – 30,000 workers	6,000 workers	5,000 – 15,000 workers
End users	Domestic food, fuel, & electricity sectors	Mostly foreign steel industry	Mostly domestic construction industry	Both domestic and foreign food industry
Economic Significance	Sugar and ethanol industry responds for 2.4% of GDP and 21% of national exports	Pig-iron industry exports US$400 millions per year and creates jobs in one of the poorest areas of the Amazon	Industry creates jobs in one of the poorest areas of Rio de Janeiro State	Industry exported US$220 millions in 2004 and creates jobs in the poorest areas of the Brazilian Northeast
Problems Engendered	Violations of workers' health and safety & wages and hours; burning of fields causes air pollution	Violation of workers' health and safety & wages and hours; illegal deforestation	Violation of workers' health and safety & wages and hours; granite powder pollutes water streams	Private appropriation of public lands; destruction of mangroves, excessive use of antibiotics breeds resistance
Advances Already Achieved	Formalization of labor contracts; use of personal protection equipments; machines harvest the sugarcane green (i.e. unburnt)	Formalization of labor contracts; use of personal protection equipments; pig-iron smelters fund an NGO devoted to verifying compliance with labor standards	Sawmills filter and recycle their water; attracted a plaster factory that now buys the granite powder that used to be dumped on rivers	Attempted removal / relocation of farms away from mangroves and other sensitive areas; production of organic, free-range shrimps in tandem with other species

1.6 – Structure of the dissertation

This dissertation is divided into five chapters, as follows:

(1) Introduction;

(2) The prosecutor-in-action: stitching it together;

(3) The making of the new *Ministério Público*: a reassessment

(4) The organizational basis of creative law-enforcement

(5) Conclusion: relational regulation

Notes:

Unless noted, translations of interviews and sources in Portuguese are all mine; names, gender or other identifying features of interviewees have been changed.

2 – THE PROSECUTOR IN ACTION: STITCHING A SOLUTION TOGETHER

2.1 - Introduction

Prosecutors have wide jurisdiction and in their work they confront a wide array of alleged legal violations in a multitude of fields. Some of the most pervasive of these violations, and the type that motivate this study, concern private firms that infringe upon labor or environmental laws in the normal course of doing business.[13] For instance, in the realm of labor violations, many sugarcane farms do not register their seasonal migrant workers and do not provide them with legally-required personal protection equipment, housing, access to food and water, bathrooms, and/or safe transportation to and from the field. Likewise, many charcoal producers neglect to register their workers, and do not provide them with a healthy and safe work environment as determined by law.

In the realm of environmental violations, charcoal producers regularly engage in illegal deforestation. Many shrimp farmers establish their operations on top of mangroves, destroying these publicly-owned and environmentally protected areas in the process. And many granite tile producers dump large quantities of stone powder onto local rivers, illegally polluting the water for downstream users.

These are the concrete cases that I examine in this chapter, but they are drawn from a much larger, perhaps endless, pool. For instance, in Sao Paulo, many footwear manufacturers employ children in their production networks, and many orange farmers employ children during harvest. In Toritama (Pernambuco), a group of blue-jeans laundries draw large amounts of scarce

[13] Other types concern the construction of major infra-structure projects, such as highways, ports, or cargo terminal, which may harm the environment, neighboring communities, and/or indigenous populations; or the neglect, by municipal, state or federal governments, of some legal right afforded to the citizenry, such as the right to health and education.

water from the local river and then dump noxious effluents back (Lazarte 2005, Almeida 2005). In Bonito (Mato Grosso do Sul), local entrepreneurs have been welcoming an ever growing flow of tourists, but the excessive traffic threatens the environmentally-protected natural beauty of the place. A similar problem afflicts the archipelago of Fernando de Noronha, a fragile ecosystem and a legally-protected national park with a low carrying capacity. In other cases, the problems are intrinsically urban, and they involve the proper disposal of garbage, the renovation and use of historic buildings, the provision of housing for the poor, the control of visual and sound pollution, and countless other similar cases in which compliance clashes with competitiveness and certain rights are left unfulfilled.

When confronted with these sorts of problems, what do prosecutors do? They are lawyers, so they are tempted to sue. As will be analyzed at length in a subsequent chapter, prosecutors have law degrees and are admitted to the MP thanks to their extensive and detailed knowledge of Brazilian law. Because the *Ministério Público* encourages them to enroll in continuing education and graduate programs, many prosecutors pursue advanced degrees in law. Some even teach in law schools. Prosecutors' offices tend to be located inside courthouses, and their support staff is trained to handle judicial cases and files. Legal adjudication is a central feature of prosecutors' professional lives, so upon learning of an alleged violation, their first reaction is to indict or request an injunction. As stated by an interviewee: "*the prosecutor's business is to write briefs and go to court*"[14], i.e. they crack down on the perceived violation without taking into account any variable other than the perceived illegality of the proximate act. Resorting to Latin legal jargon, they say '*dura lex sed lex*', i.e. the law is tough, but it is the law.

[14] "O negocio do promotor é processo e audiência"

Naturally, those on the other side of this transaction often complain that prosecutors are exceedingly narrow-minded. A business manager claimed that *"prosecutors do as they please; they make up their minds on their own and then come down really hard. There is no discussion or deliberation. They have the final word and that's it, no room for dialogue."*[15] A government official I interviewed conveyed the same image. She was trying to convince a prosecutor of the benefits of a municipal program encouraging private firms to restore historic buildings. This official was particularly interested in raising funds to restore an old church and told the prosecutor, "*'if this church is not restored it will be your fault."* She even insinuated that it would be a sin to block this initiative. The prosecutor was unmoved: "*If the church is not restored it will be my fault? So what? My job is to enforce the law, not restore churches".*[16] Likewise, and upon being questioned about the deleterious effects of his act, a prosecutor who had just filed an injunction blocking the construction of a power plant in the Amazon responded: "*I know about rights, not about power plants*".

This attitude – i.e. to dismiss the immediate implications of one's actions in exchange for a purported higher good – is by no means unique or unreasonable. Very often prosecutors enforce the law without regard for immediate consequences, and are proud and open about it. President Lula recently criticized (again) the *Ministério Público* and other institutions for

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[15] "O promotor vai do jeito que ele entende e mete o pau mesmo. Com o promotor nao tem isso [dialogo], o que eles acham e pronto, nao tem espaco para dialogar"

[16] O irônico é que, antes do promotor intervir na OUC, eu tinha ligado para ele para dar-lhe os parabéns por alguma coisa que ele tinha feito em relação aos anúncios irregulares, não lembro bem. Mas eu so o conhecia por telefone.Então, quando ele interveio na OUC, resolvi ligar, pois achei que era um cara legal, e com bons argumentos eu podia conseguir que mudasse de opinião. O pessoal teve medo, todo mundo morre de medo de brigar com promotor. Mesmo lá no Viva o Centro todo mundo tem medo. Mas não foi nada disso e acabamos brigando. Na nossa conversa eu disse que se a igreja não fosse restaurada seria culpa dele, quase que insinuando que era um pecado o que ele estava fazendo. "Se a igreja não for restaurada é minha culpa? E daí? O meu papel é cumprir a lei, e não restaurar igreja" - ele não estava nem ai! Não ligava para as conseqüências do que estava fazendo. Alias, a OUC foi um pecado, foi abaixo um trabalho enorme, uma oportunidade única, e agora, depois de 4 ou 5 anos, está se provando que o promotor não tinha razão, o judiciário está dando ganho de causa para os defensores da OUC."

blocking important government initiatives. The head of CONAMP, the Brazilian prosecutors' association, responded:

> "*We have the duty to verify compliance with legal principles. Our action, even if criticized by the President, has helped to ensure transparency and respect for the rule of law. Moreover, if we do not verify compliance with the law, who will? It is better to stop what is out of compliance now than to let it go on and later realize that the damage to society is of billions of dollars*" (Domingos, 2009)

Theoretical backing for the view that prosecutors should enforce the law independent of immediate consequences is provided by Frederic Bastiat (1850). He notes that in the economic sphere, law enforcement produces "*not only one effect, but a series of effects. Of these effects, the first alone is immediate; it appears simultaneously with its cause; it is seen. The other effects emerge only subsequently; they are not seen; we are fortunate if we foresee them*". According to Bastiat, the difference between a good economist and a bad economist, or, analogously, between a good prosecutor and a bad prosecutor, is that the bad one "*confines himself to the visible effect*" and presumably closes his eye to a blatant violation or bends the law to "*pursue a small present good that will be followed by a greater evil to come.*" The good economist, or good prosecutor, "*takes into account both the effect that can be seen and those effects that must be foreseen*", presumably enforcing the law strictly to pursue "*a great good to come, at the risk of a small present evil.*"

Despite the apparent soundness of this argument, many prosecutors, in many occasions, report frustration with this view, particularly when two imperatives collide. In many places, including Brazil, prosecutors define as their mission "to *defend the powerless and to protect society.*" It is fairly unproblematic to enact this mission when large, wealthy and supposedly

greedy or careless corporations are infringing labor or environmental laws. In these cases, the prosecutor indicts and moves on. But the situation gets much more complicated when the infringer is a cluster of small and informal firms that provide much-needed jobs to impoverished and unskilled populations. Complicating things further, these firms often perceive the costs of compliance as a mortal blow to their ability to survive.

When confronted with such a dilemma, compelled to choose between social or economic imperatives, what is a prosecutor to do? There is no set answer to this question. As explained by one prosecutor I interviewed:

> *"I'm starting legal action against small shrimp farmers, but it is tough. I schedule hearings, they come and some even cry, they say shrimp farming is their livelihood. So I have this conflict on my hands. I'm not keen on bringing lawsuits against small farmers, but what else can I do, if the law mandates that I start legal action?"*[17]

One option is to let a judge analyze the evidence and decide how the prosecutor should proceed. Although this might seem reasonable in theory, in practice this proves to be quite difficult. Prosecutors often complain that courts are sluggish and conservative:

> *"To bring a case in court just takes too long, it is a lot of work, and takes you nowhere. The courts do not have a body of expert witnesses, and a professional expert will only get paid by the losing party when the case ends. Do you know how long this takes? Half of the experts will be dead by then. So we may try to convince a government agency or public university to send their experts, but they*

[17] "Estou entrando com ação contra esses pequenos, mas é dificil. Faco audiencia, eles chegam a chorar, vivo disso. Tenho um conflito. Nao estou entrando com gosto. Mas como vou arquivar um caso desses, se a lei manda entrar com acao?"

never have any money, so it is a lot of work that rarely pays off. And then, the defendants can appeal in so many ways that the cases never go forward."[18]

Another option is to redirect the problem to specialized government agencies that should have prevented or solved the situation in the first place, but this rarely provides any relief. As reported by the manager of a state-level environmental agency:

"*We have been telling the prosecutors: you want to halt all action by a public agency? Send it ten thousand requests. We don't have enough people even to acknowledge receipt, or to say that we will get back to you. We get bombarded with many more requests than we can handle, and then we are forced to drop all these balls*"[19]

"*In the end, environmental agencies have lost themselves in paperwork. This is a type of goal displacement, and the prosecutors have definitely contributed to this state of affairs, that public managers end up entangled in a maze of rules and legalisms*"[20]

Faced with these obstacles, some prosecutors try to solve the problems on their own. However, those who attempt this often recognize that they may simply be transferring the problem elsewhere, or even making it worse. One of the prosecutors I interviewed used a map on her office wall to visually explain how she had grappled with this type of predicament. She pointed to the far margin of a large water reservoir next to Sao Paulo and explained: *"Let's say*

[18] "ACP demora muito, dá muito trabalho, não resolve nunca. Por isso prefiro fazer acordo. Alem do mais, nao conseguimos fazer pericia, nao tem perito, entao nunca anda. O judiciario nao tem um corpo de peritos judiciais, e o perito profissional só vai receber seu salario da parte perdedora depois de transitado em julgado. Sabe quanto tempo é isso? Metade já vai ter morrido quando chegar a hora de receber. O pessoal do CAO é do MP, entao nao podem fazer pericia. A outra opcao é convencer algum orgao publico, ou universidade, mas nao tem dinheiro, entao é um trabalho danado. E a quantidade de recursos possiveis, fica muito dificil."

[19] "Falamos pros promotores: voce quer parar um orgao, mande 10mil demandas para ele. Nao tem nem gente para responder, pedir prazo. Conseguimos atender umas 4 mil, no maximo":

[20] "Os orgaos ambientais se perderam na papeladas - teve goal displacement - licenciamento é um meio para um fim, e nao um fim em si mesmo, e o MP contribuiu para essa situacao, para que a admi publica tenha se perdido num emaranhado de regras e processos."

there is an invasion, an illegal squatter settlement, here. If I take legal action, these people will eventually be removed. They may well move here instead," she said while pointing to a different area on the map. *"This is the watershed ("area de nascentes"), so the problem got worse."* She then conceded that she was unable to handle the problem: *"Being the prosecutor in charge of protecting the environment in this jurisdiction, I really would like to solve this problem but I don't know how."*[21]

Another prosecutor provided two vivid examples:

> *"The law determines that municipal governments must provide free medicines to patients. At first, it seems like a great achievement, but now there are certain municipalities forced to spend 40% of their budgets on medicines, and these administrations end up without money to do anything else. It is the same thing with the inclusion of certain neighborhoods in the Public Heritage list, you protect certain areas from noxious redevelopment, but you also increase the pressure on other areas."*[22]

A prosecutor who had just joined the MP grappled with this same challenge in a different context. A group of us had just attended a lecture on juvenile crime, and one of the attendees mused on the dilemma of action:

> *"Should I allow for the construction of large detention centers [FEBEM] that house 150 juveniles each? The prevailing idea is that smaller, house-like units are better than these gigantic prison-like complexes. No questions about that! But to*

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[21] "Ele levou-me até um mapa da Represa Billings e mostrou-me uma das suas margens. "Digamos que há uma invasão aqui. Eu atuo, e os invasores são removidos. Eles mudam para cá - mostrou-me outro ponto na margem da represa - que é uma área de nascentes, e o problema fica muito pior do que era antes". E ai ele disse "como procurador de meio-ambiente em SP, eu gostaria de resolver o problema da Billings- Guarapiranga, mas eu não sei como". Só quem pode resolver esse tipo de problema é o poder executivo."

[22] Distribuicao de remedios gratis obrigatoria - parece otima conquista, mas tem municipio com mais de 40% de seu orcamento comprometido. Same thing for tombamento dos bairros - voce tomba um, aumenta a pressao sobre os outros.

manage such a network smaller units may be too much for a country like Brazil. But then what? To privatize? In my town, a non-profit runs the detention center, and costs are three times what they should have been. Moreover, this non-profit belongs to a city councilor, so it gets messy. The more I think about it, the less I know what to do."[23]

A labor inspector made a similar point when describing how problems are pushed from one handler to the next:

"Health and safety problems cannot be solved by punishment alone. You may go in and dump a truckload of fines on them, but when you go back, nothing has changed. When this happens, I am supposed to send the case to the prosecutors, but this will not do any good. The prosecutors will face the same problem and will send the case back to me. And it is useless to sign a deferred prosecution agreement [TAC] with these people if they won't implement anything"[24]

Ultimately, these regulatory enforcement officials are confronting the limits of adjudication as identified by Lon Fuller (1978), and they express their frustration in unmistakable terms. They complain about the pointlessness of "*putting out fires*" ("*apagando incendio*") or trying to "*dry ice*" ("*enxugando gelo*"), meaning that it is useless to run from emergency to emergency, and that post-facto punishment will not deter further violations. One prosecutor explained this reactive pattern and emphasized the need for prevention instead:

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[23] "Bloquear ou nao a construcao de FEBEM para 150 pessoas? [unidades deveriam ser menores]. É ruim para os internos, mas talvez a manutencao de unidades menores seja muito caro para a situacao brasileira. Qual a solucao? Privatizar? Em Aracatuba é uma ONG que cuida, tudo custa o triplo e a ONG é de uma vereadora. Talvez uma empresa privada seja melhor, mas eu nao sei" (frustration)

[24] Mas quando funciona, voce parte para outro tipo de abordagem, nao apenas a fiscalizacao. Quando enfrentava a empresa apenas an questao da saude e seguranca, so punicao nao funcionava. Voce vai, deixa um caminhao de autos, e quando volta continua igual! Uma opcao é encaminhar para o MPT, mas els tem a mesma dificuldade, e o relatorio volta, pois o papel de fiscalizar esta conosco. Nao adianta fazer TAC com essa empresa, pois eles nao se mexem

"We were frustrated, because even though we tried to do a good job and send the criminals to jail, the crime had already been committed and a life had been lost. My colleague used to tell me, we will stay here doing this for years, but nothing will change and we will accomplish nothing. That's my frustration. I wanted to solve the problem at its root"[25]

These prosecutors are grappling with the fact that, considering the problems they confront, none of the known "styles" or "strategies" of enforcement are likely to produce the results that they hope to achieve. To send the case to a judge or to a technical government agency is unlikely to provide any relief either.

Yet, in many cases, they find viable alternatives. The next section examines four of such cases to tease out how some prosecutors, on some occasions, roll up their sleeves and try something different; something that has not been recognized, described, or analyzed by the regulatory enforcement literature.

2.2 – Case Studies

(a) Production of granite tiles in Rio de Janeiro

In the municipality of Santo Antonio de Padua, located in the poorest region of the Rio de Janeiro state, there is a cluster of approximately 200-300 small firms that produce granite tiles and employ an estimated 6,000 workers. This industry is composed of quarries and sawmills. The quarries extract rectangular blocks of granite from the massif nearby and transport them to sawmills which cut the blocks into ever smaller (and thinner) pieces until they obtain the 5"x10" tiles that the region is known for. Sawmills need water to refrigerate their saws and to eliminate

[25] "Estavamos frustrados, pois por mais que tentassemos fazer o melhor trabalho, condenar o homicida, ficavamos frustrados pois a vida se perde. O Juarez falou para mim, ficamos anos aqui e nao vamos mudar nada! Isso é uma fonte de frustração enorme. O que queriamos era atingir as causas do problema.

the resulting granite powder, so many sawmills have established their plants very close to rivers, violating the Brazilian law that protects riparian areas. These mills also tend to illegally dump their granite powder, in the form of sludge, on the river; which kills wildlife and disrupts the production of downstream farmers. This is a fairly rudimentary business, with low entry costs and the bulk of the staff hired on a piece-rate system. Competition among firms is intense, and they see compliance with labor and environmental laws as a threat, particularly if competitors are not forced to follow suit.

In the early 1990s, a group of government agencies – including SEBRAE (*Serviço Brasileiro de Apoio a Micro e Pequenas Empresas*, a federal agency devoted to small business promotion), DRM (*Departamento de Recursos Minerais,* a state-level agency devoted to the promotion and regulation of mineral industries), and CETEM (*Centro de Tecnologia Mineral,* a federal agency devoted to mineral technology) – sent experts to help local firms increase their productivity, safety, and the quality of the products. As these government agencies started helping firms upgrade, they also recognized that firms had to formalize their operations and comply with various applicable laws. According to the envoy from CETEM, "*Some of these firms were signing export contracts with severe penalties in case of default, and yet since none of them had environmental licenses they could be shut down at a moment's notice*"[26].

Indeed, in 1996 the state-level environmental police moved in and conducted a series of inspections in the region. The police imposed fines on practically all firms for multiple violations, including excessive noise, destruction of riparian vegetation, improper disposal of granite refuse, and the illegal discharge of granite sludge. As a response, local firms revived their

[26] "Por um lado, a associacao de exportadores estava assinando contratos de exportacao com multa, e por outro lado as pedreiras podiam ser fechadas a qualquer momento por falta de licenca ambiental"

moribund association and asked their government allies for help. CETEM suggested that firms build sedimentation tanks to filter and reuse their sludge in a closed-system, and DRM suggested that they obtain the proper licenses to operate. The closed-system would protect firms from recurrent droughts, and the licenses would allow them to access subsidized credit, enter into official export promotion programs, and would protect them from fines and impoundment.

Still, the chasm between intention and reality remained large. On one side, firms found licenses and permits irrelevant, and thus, as stated by a government official, "no *arguments could convince them to even request the licenses*"[27]. On the other side, the agency responsible for granting the licenses was anything but responsive. As stated by the head of DRM:

> "*We were devoting a lot of effort to helping these firms obtain environmental licenses, but it was an uphill battle. All firms are treated equally under environmental laws, but that's not right. Small firms should be treated differently; they can't meet the same requirements as large mining corporations*"[28]

In 2002, the federal *Ministério Público* opened a local office in Itaperuna, a nearby municipality, and a local NGO named Puris complained to the prosecutor about environmental damage in Santo Antonio de Padua. The prosecutor summoned the federal police and conducted a series of inspections. As reported by a government executive:

> "*And there he came, charging down the hill. This prosecutor had handled some high profile environmental case in the Amazon and arrived full of steam. Since the river in which firms dumped the granite sludge is federal, he claimed authority*

[27] "No papo a gente nao conseguia convencer as empresas a se formalizar".
[28] O foco era licenciamento, mas era dificil, pois a lei nao diferencia entre os pequenos e os grandes, e os pequenos precisam de tratamento diferenciado"

and, independent on what the state prosecutor said, the federal prosecutor just plowed through"[29]

This initial result was disastrous. The prosecutor found practically all firms to be incurring on multiple violations and liable to be shut down at once. The firms and their allies found the prosecutor to be a disruptive firebrand aloof to local conditions. As stated by the head of DRM, "*the sudden arrival of the police and the prosecutor created total chaos in the region*"[30]. The head of SINDIGNAISSES, the local business association, adds color to this description:

"*The prosecutor and the police, they looked like Rambo, with machine guns and helicopters, it was like a war. An invasion, they threatened us, pistol-whipped the workers, turned tables, and kicked people around. They said they would impound the machines and close the firms down. I said I would block all the exits to the city and only ambulances would go through. That's when we started to negotiate*"[31]

Eventually, the parties met and worked out their differences. As stated by the representative from CETEM: *"the DRM and local politicians met with the prosecutor, to show him that, in addition to the environmental problem, there was also a social side to this industry. This argument mollified the prosecutor somewhat".*[32]

In the course of these negotiations, the prosecutor learned about the filtering and recycling technology that CETEM was developing specifically for small granite sawmills, and

[29] "E ai veio o MPF. O procurador tinha resolvido problemas no Pará, entao veio com gás. Como o rio é federal, ele disse que tinha autoridade para intervir, mesmo que o MPE nao tivesse tomado atitude."
[30] "*A entrada abrupta da policia, do MPF, criou um caos social.*"
[31] "Eles pareciam o Rambo, com armas, helicoptero, uma operação de guerra. A origem do TAC foi invasao da policia federal. "chutando marmita, dando coronhada, ameaçando. Dr. Americo disse que ia fechar todas as pedreiras. Eu disse que ia fechar as saidas de Padua, so saia ambulancia. Ai comecamos a negociar"
[32] "O DRM e politicos locais chamaram o procurador, para mostrar o problema social. Os pequenos produtores estavam tentando se organizar, primeiro via associacao, depois o sindicato, o lider conseguiu contemporizar com o procurador."

agreed to encourage firms to build sedimentation tanks and obtain the proper licenses. He also offered to suspend the ongoing prosecution and grant firms an interim license, but only if each sawmill acknowledged its legal shortcomings and agreed to correct the violations. As stated by the prosecutor, "*to sign a deferred prosecution agreement [i.e. sign a TAC], I need to know what each firm must do to come into full compliance*"[33] .

The prosecutor understood this attitude to be friendly and conciliatory, but firms resisted and complained: "*why do I have to hire an engineer, pay for a survey, perhaps even relocate my firm and build sedimentation tanks when my competitor next door – or in the next state over – continues infringing the law as if nothing had happened?*"[34]

The impasse was broken when different government agencies stepped in and offered to share the costs and burdens of conducting the assessment. SEBRAE agreed to pay for the whole endeavor and CETEM agreed to survey the sawmills, while another entity – SENAI – agreed to survey the quarries. Still, firms were concerned not about their own shortcomings, but about being forced to comply and then being underpriced by competitors that did not follow suit. To solve this problem, the prosecutor agreed to increase monitoring efforts within his own jurisdiction and to reach out to prosecutors in neighboring jurisdictions.

Once these assurances were in place, the prosecutor proposed a two-step plan: first, the sawmills would sign a joint-deferred prosecution agreement (TAC) recognizing their shortcomings, agreeing to request all the proper licenses, and agreeing to prepare a diagnostic of their individual violations (the quarries signed a separate agreement). And second, the firms

[33] "O procurador disse 'se vamos fazer um TAC, precisamos levantar o que cada um precisa ajustar". Foi essa a motivacao do levantamento".
[34] "Porque eu tenho que contratar engenheiro, fazer estudo, relocalizar minha serraria, construir um tanque, e meu vizinho nao faz nada?"

would sign individual agreements containing tailor-made lists of required adjustments and a timeline to implement them. As stated by the head of DRM, "*it was like a moratorium, something that only prosecutors can grant.*"[35] The head of the local business association - SINDIGNAISSES – recognized the progress achieved:

> "*In the end, we found the prosecutor to be a very good person, very fair-minded, easy to talk to, always ready to cooperate and search for a solution. At first, he tried to impose all those environmental requirements on us, but eventually we found common ground, we found things we could work on*"[36]

The signing of this agreement set a virtuous process into motion. As stated by an official from FIRJAN, the state-level business association, "*once these firms had signed a TAC and obtained interim environmental licenses, they had access to credit and could export their goods*" A group of six firms created a consortium to import more sophisticated machinery and to make larger granite pieces with higher value-added, such as tabletops. SEBRAE helped other 20 firms create another consortium named "*Pedra Padua Brasil*", and took them to Italy to learn from the master-masons and to tap new markets. Eventually, these firms exported more than US$ 1 million, but the market became unstable and they had to scale back.

Quarries started paying renewed attention to increasing their productivity. As stated by one of the interviewees, "*back in the day, quarry owners were unconcerned about wastage; the wasted raw material may have been a lost profit opportunity, but it did not involve out-of-pocket expenses, so the owners did not really care. But now that the firms must dispose of the waste,*

[35] "Comecamos a negociar um TAC, que fez uma moratoria ambiental para alcancar a regularizacao"
[36] "Mas o MPF, uma pessoa muito correta, muito boa, facil dialogo, sempre disposta a colaborar. O MPF queria impor condicoes ambientais, comecou com divergencias, mas depois vieram as proposicoes que foram aceitas."

they are paying attention to decreasing granite waste and increasing productivity"[37]. Moreover, the local business association is considering using discarded fragments of granite to make gravel, and then to build a factory to make reconstituted floor tiles.

Even the state-level environmental agency has been forced to shape up. As stated by a government representative, "*FEEMA [the state-level environmental agency] used to be weak- it imposed fines of negligible value, and was ridden with corruption. That's when the MP stepped in and forced everybody to shape up; the prosecutor even threatened the directors of the agency. And then, the TAC created additional demand for FEEMA's work, the firms needed a response and exerted pressure on FEEMA as well*".[38]

The most significant advance came from a different front. As stated by the owner of one of the firms, "*after solving the filtering problem, we encountered a new one: what to do with all this granite powder?*"[39] At this point, approximately 40 firms were filtering the granite sludge, and as a result each of them was accumulating an average of nine tons of granite powder per saw per month. This powder was becoming a major nuisance and it had to be disposed of somehow.

The sawmills and their allies considered various alternatives, reached out to potential partners, and ultimately decided to try to sell the powder in the market. They considered two potential clients: a ceramic manufacturer or to a plaster factory. The sawmills collected some of the powder and sent a few truckloads to a ceramic-maker in a nearby municipality as a test-run. Unfortunately, the price this prospective buyer was willing to pay was too low and transportation

[37] "Antigamente, empersario nao ligava para as perdas na pedreira, pois ele deixava de ganhar mas nao gastava nada. Agora que precisa dar destino aos residuos, comecou a preocupar-se com a produtividade. E estamos conversando sobre construir uma fabrica de piso reconstituido. E britadores, para britar todo o resto."
[38] "A FEEMA estava fraca, multas baixas, corrupcao. O MP entrou para preencher esse vacuo, pos todo mundo para trabalhar, ameacou ate os diretores da agencia. O TAC obrigou a agencia a funcionar, e os produtores tiveram que entender os danos que estavam causando ao meio-ambiente e a saude dos trabalhadores"
[39] "Depois de resolvida a questao da filtragem, veio o problema do que fazer com o pó"

costs were too high. So they tried another option, i.e. to establish a plaster factory in Santo Antonio de Padua itself. SINDGNAISSES wanted to spearhead this initiative, so it would own and manage the future plant. It even used its connections to get a grant from the Ministry of Labor to buy equipments and a tractor for the construction. But without additional collateral the association was unable to secure the financing and had to give up.

Eventually, those leading this effort decided to convince an existing plaster factory to open a subsidiary in Santo Antonio de Padua. To make this possible, CETEM developed a technology that used granite powder instead of gypsum in making plaster. And the federal government provided a grant of R$100,000 to help pay for technical studies and a business plan. In a timely turn of events, the government of the state of Rio de Janeiro passed two laws in 2005 providing tax breaks and subsidized loans to those firms that invested in impoverished municipalities, and the developers accessed these funds as well. Sweetening the deal further, Santo Antonio de Padua's municipal government offered the factory an exemption from municipal taxes for 15 years, a plot of land, and the paving of the road leading to it. Eventually, a private firm agreed to offer the collateral, lead of the operation, and manage the factory.

This larger plan tied various loose strands together. First, the plaster factory agreed to physically collect the granite powder from backyards of the sawmills. Second, it also agreed to pay R$8,000 (approximately US$4,000) per month to SINDGNAISSES; a sum that tripled its monthly revenues and allowed the association to provide even more services to its members. Third, the building of the factory represented an investment of US$1.5 million in an impoverished region, and the plant (which started operating in June 2008) was expected to generate 120 full time jobs. And finally, and perhaps most crucially, this arrangement created

additional pressure for sawmills to continue to recycle their water and to filter their effluents. In essence, it made sure that compliance merged with competitiveness.

One that observes the industry today sees a fairly well-functioning industrial ecosystem, in which firms sell not only their products but also their effluents, all in the presence of a constellation of government agencies that encourage firms to both comply and increase their competitiveness. Yet, and as the history just described demonstrates, it would be a mistake to conclude that this arrangement was inevitable. Instead, it was the result of an open-ended search and of a process of sequential problem-solving in which regulators played a key role.

As will be shown again in subsequent case studies, the prosecutor realized that compliance required costly and risky changes in business practices that no single firm could undertake alone. So, instead of emphasizing punishment, which tends to spark confrontation, or adopting a friendly approach that can be futile, the prosecutor provided a platform in which the various parties could come together and celebrate an agreement. Ultimately, he helped create a network of public and private institutions willing to underwrite some of the costs, insure some of the risks, and partake in some of the benefits stemming from compliance. As stated by the head of SINDGNAISSES, "*at first we had difficulties dealing with the prosecutor, but now he is one of our biggest allies*".[40]

(b) Shrimp farming in the Northeast

Since the early 1970s, public and private entrepreneurs in the Brazilian state of Rio Grande do Norte (RN) had been trying to create a local shrimp industry. In the late 1990s this industry eventually took off, thanks to the introduction of a foreign shrimp species named

[40] "No inicio tivemos dificuldades, mas agora o MP é nosso grande parceiro"

Litopenaeus vannamei (also known as Pacific white leg shrimp) and favorable global conditions- including a supply crisis in neighboring Ecuador.

From 1997 to 2003, Brazilian shrimp production grew an astonishing 25-fold, i.e. it went from a 3,600 tons per year to 90,190 tons per year (Rocha 2003), and export values grew an even more impressive 80-fold, going from US$2.8 million in 1998 to US$225.9 million in 2003. In that year, Brazil was the 6th largest shrimp producer in the world in volume, and the industry seemed poised to grow even more. Brazilian farms had achieved a productivity of 6.0 tons of shrimp per hectare per year, while the equivalent figure for China, the world's largest producer, was only 1.4 tons per ha/year. As described by an external observer, "*it was like a gold rush; in three or four months investors had their capital back, and after one year they had recouped all the money plus sizeable profits*".[41]

In 2003, the industry was composed of (a) 36 shrimp labs, which produce the shrimp larvae (i.e. baby shrimps); (b) 905 shrimp farms, which transform the larvae into fully-grown shrimp; and 42 food processors, which clean, package, and sell the product to its final consumers (Rocha 2003). While shrimp labs are capital and technology-intensive operations, shrimp farms require cheap labor, abundant land, brackish water, and a warm climate. Moreover, there are few economies of scale in this production stage, and thus one finds farms of all sizes and levels of sophistication, from mom-and-pop operations with small tanks to large and fairly sophisticated farms with several tanks larger than soccer fields.

Parallel to all this growth, this industry has also been causing a large roster of social and environmental problems. On their quest to obtain abundant water and to use the naturally-

[41] "Foi uma corrida do ouro. Em 3 ou 4 meses o investidor recuperava o capital. Apos 1 ano, o investidor recuperava tudo e ja estava no lucro"

occurring tides to save on pipes, pumps, and electricity, shrimp farmers often established their operations on top of mangroves, which are publically owned, legally-protected, and environmentally and socially sensitive areas. From a pure business stand-point, it makes sense: according to one estimate: the raising of shrimp in high density tanks far from the mangrove costs US$80 thousand per hectare, while in the mangrove, where land is virtually free and the tides render pipes, pumps, and electricity superfluous, the whole operation costs only US$10 thousand per hectare (OESP 2006). As stated by an observer of the industry, "*the mangroves were just ideal for shrimp farming.*"[42]

Yet, mangroves provide crucial environmental and social services. On the environmental front, they (a) filter the water and keep rivers and estuaries healthy; (b) serve as breeding ground for numerous fish species and replenish marine lives in both rivers and the sea; (c) avoid coastal erosion; and (d) store carbon and thus help prevent global warming. On the social front, they provide food, fuel (i.e. timber), construction material, and a cash crop for numerous poor families that live in their vicinities (crustaceans for hunter-gatherers, and fish for fishermen). As stated by an activist, "*Fences, and sometimes even armed guards, separate poor people from the mangroves, which has traditionally been a source of food and fuel to them*".[43]

There are other problems as well. The brackish water from shrimp farms infiltrates underground water streams and ruins the local water supply. Representatives from local communities often complain that the water in their wells, formerly potable, has become briny. Moreover, as part of their harvesting procedures, shrimp farmers soak the shrimp in a chemical preservative ("*metabissulfito de sodio*") and discharge the water from the tanks into the

[42] "O mangue era o ambiente ideal"
[43] "Pescadores nao tem mais acesso ao mangue, que era sua fonte de proteinas e alimentos"

environment. The chemical often leaks and kills wildlife, and the large quantities of organic materials in the shrimp water promote the explosive growth of algae that also kill wildlife.

Another quandary for shrimp farmers is that, to any single farmer, it makes sense to increase the density of production (i.e. the number of shrimps per hectare of tank) as much as possible. Yet, high shrimp densities across the board, combined with the excessive use of antibiotics that goes with it, increase the risk that new diseases (or resistance to old diseases) will emerge, spread, and eventually decimate the industry; as occurred in Ecuador during the 1990s.

So far, the two sides of this conflict have not been able to find any common ground. Social and environmental activists claim that there is no such a thing as "*sustainable shrimp farming*"[44] and call the industry "*assassin*"[45]. Conversely, industry representatives deny all the accusations. They claim that "*mangroves are unsuitable for shrimp farming,*"[46] mainly because the soil does not allow for the construction of good embankments and one cannot control the quality of the water.[47] Brazilian industry leaders also point to a study (that they financed) that claims that mangroves have expanded over the past ten years, implying that shrimp farming is good for the environment. When they talk about their foes, businesspeople complain that "*NGOs are too radical, if they had a say, they would shut the whole industry down.*"[48] As stated by an industry official, "*some people just hate shrimps.*"[49],[50]

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[44] "Nao existe carcinicultura sustentável"
[45] "Industria assassina"
[46] "Area de mangue nao serve para camarao"
[47] "Mangue é ruim para construcao civil. A gente so constroi os tanques atras dos mangues. E aqui no NE, ha muitos tanques antigos e abandonados. Alguns construidos pelos holandeses no sec 18, outros eram salinas"
[48] ONGs sao muito radicais, querem que feche tudo
[49] "tem gente que tem raiva de camarao"
[50] As far as I could ascertain, once the colorful rhetoric is set aside, the substantial debate revolves around what constitutes a mangrove, i.e. what are the actual boundaries of this sprawling ecosystem, and whether areas that used to be covered with mangroves but have been converted into something else, such as salt marshes or fish tanks, some of it centuries ago, are still entitled to the legal protection afforded to mangroves

Operating under such divisive conditions, local governments often alternate between two equally objectionable extremes, i.e. to lower environmental standards or to enforce the laws strictly independent of cost. The shrimp industry has backers in high places – in RN, "*the secretary of environment and vice-governor is a shrimp farmer; the local congressman, also the son of the ex-governor, is a large shrimp farmer; and the speaker of the state assembly owns a shrimp farm inside a protected area.*"[51] Therefore local government agencies often promote the industry and allow it to grow unimpeded. For instance, during the 1990s, the government of RN offered tax-breaks, fast-track licensing, subsidies, and, most importantly, a lax regulatory environment – particularly in the form of friendly regulators and a weakened enforcement agency. As stated by local activists, '*to lodge a complaint with IDEMA [the state-level environmental agency] is a waste of time.*"[52] According to a local scholar, "*IDEMA devotes a lot of its resources to 'educate' the people about the environment. But anyone can do that. To inspect and to impose fines, which is something only the government can do, that IDEMA does not do.*"[53] She concludes, concisely and conclusively: "*IDEMA? Forget about it*".[54]

The federal government is not always beholden to local interests, and in 2001 local environmental activists bypassed both IDEMA and the local office of IBAMA (the federal environmental agency) and reached out to IBAMA's headquarters in Brasilia, triggering a large scale enforcement operation, known locally as the *mega-operação*. A team of environmental inspectors came from out of state and ended up imposing fines on every single shrimp farm they

[51] "O atual secretario de meio ambiente de RN e vice-governador é carcinicultor. O filho do ex-governador que presidiu sobre a grande expansao dessa industria e deputado e grande carcinicultor. O presidente da assembleia legislativa tem criacao de camarao em uma area de dunas"
[52] "Tentar algo atraves do IDEMA é perda de tempo"
[53] "O IDEMA esta fazendo educacao ambiental, mas isso qualquer um faz. Fiscalizar, que so eles podem fazer, que é o trabalho sujo, ai nao fazem"
[54] "IDEMA? Nem pensar"

visited. The upheaval in the region was considerable. According to one observer who was friendly to the industry:

> "*The incursion of IBAMA here into the RN was kind of ridiculous. They treated everybody as criminals, and tried to look like the FBI or a SWAT team from the movies. The inspectors came in helicopters, and they wore combat fatigues- it was a total circus. The local representatives from IBAMA were so mad they would have liked to see their colleagues from Brasilia arrested.*"[55]

But others did not see it as a laughing matter. The secretary of industry, commerce and technology for the state of RN called the operation "*war-like*" and lamented the negative effect it would have on the state's exports. The governor called it "*rushed*" and declared himself "*surprised to hear that a group of environmental inspectors from Brasilia are here to impose fines on our local shrimp producers, conveying the image that all shrimp farmers are criminals*" (Diario de Natal, 2001). He also declared that "*we will not allow any federal agency to come here to mock the interests of the state*" (Jornal de Natal, 2001). Marina Silva, a senator aligned with environmental interests, flew in from Brasilia to lend her support to the inspectors and activists, while Ney Suassuna, the Minister of Regional Economic Development, also flew in to cheer on the shrimp farmers. According to him, "*what this country need is production and exports, and that's why I stand next to the governor and to the shrimp farmers. Shrimp farming is the future of the northeast*"[56] (Jornal de Natal, 2001).

As this controversy raged on, unlikely to be resolved by general sweeping action anytime soon, a number of these conflicts were making their way towards prosecutors' desk. In many

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[55] "IBAMA no RN foi uma trapalhada enorme. Para eles, todo mundo era bandido. Parecia o FBI, a SWAT, tinha helicoptero, o pessoal de roupa camuflada, aquela coisa toda. O IBAMA local queria mandar prender o IBAMA de DF"

[56] "Temos de produzir nesse pais para exporter e por isso estive e estou ao lado do governador e dos carcinicultores, pois a criacao de camarao é o futuro do nordeste"

cases, these prosecutors often adopted the same stances that are typical of the government as a whole. Some ignored the shrimp industry and focused their efforts elsewhere. Others tried a deterrence approach, but they faced stiff resistance. One prosecutor described, "*Once I brought a case against shrimp farmers for destroying the mangrove, and all these people would come to me and say 'so many important things for a prosecutor to worry about and you are going to pay attention to a smelly mangrove?*"[57]

Attempting to avoid this dilemma, some prosecutors tried to negotiate mutually acceptable solutions. According to one prosecutor:

> "*We held weekly meetings with a group of farmers for almost three months. My goal was to show them the illegality of their ways, that they understand the folly of their acts. I wanted to convince them to leave the area in an ordered and peaceful way, with plenty of time to relocate. But it did not work at all. As we held these weekly meetings, the farmers kept on expanding their farms and destroying the mangroves. They were just pretending to be interested while buying time and digging their heels. So I requested an injunction against them and the showdown begun.*"

But then, there were some prosecutors who tried something else altogether. Jairo Azevedo (name has been changed) is a federal prosecutor stationed in Rio Grande do Norte. In his own words, he is not passionate about shrimp farming and did not arrive to his post with a plan:

> "*It is a lot of work being a prosecutor and there are very few of us, so we must prioritize. In this region, there are problems with tourism, vacation resorts, illegal occupation of sand dunes, and also with mangroves. I did not choose to*

[57] "Entrei com uma acao, e ouvi criticas, gente dizendo '*tanta coisa importante e voce vai se preocupar com o mangue?*'

deal with shrimp farming but rather it was shrimp farming that chose me, I was recruited into it."[58]

The specific case he is referring to had started a few years prior to his arrival, when an unknown number of farmers had moved their families to the shore of a lake and established a patchwork of small shrimp tanks atop the mangrove. During its 2001 raid, IBAMA detected this invasion of public lands and the violation of environmental law and fined the farmers. This case made its way to the *Ministério Público*, and the prosecutor in charge started a criminal investigation. He intended to indict the farmers and then offer to settle if they agreed to dismantle their farms and move out. This prosecutor left the post before the case had been completed and the file was eventually sent to Dr. Azevedo. He examined the case and talked to a few of the farmers, pondering what to do:

"They told me 'your honor, I won't ever leave because this is all that I have, this is my livelihood'. One woman told me 'everything I had I sold and invested in shrimp farming. I went to IDEMA and they gave me a license, they provided technical support, they even granted me credit, and now you come and tell me I have to leave?' Another farmer told me 'everything I had I invested here, and the government supported and encouraged me. You can bring any legal case you want, and the judge may even decide against me, but I only leave this place when I am dead.' I felt moved by this, and instead of indicting them criminally I started a civil suit [ACP], with an eye towards requiring that the state pay for the relocation of this people. My goal was to find a solution that encouraged the farmers to leave voluntarily and provided them with a livelihood elsewhere."[59]

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[58] 'É muito serviço para pouca gente, então tem que priorizar. Tem problemas na área de turismo, grandes resorts, ocupação das dunas, e nos mangues. Nesse caso, foi a carcinicultura que me escolheu"

[59] "Dr., nao vou fazer, pois vivo disso. Me sensibiliza. Nao fiz transacao penal, abro ACP. Entrei com ACP exigindo ZEE sob pena de paralisacao das licencas. Quero que o estado pague a relocacao desse povo todo. Um acordo legitima nossa atuacao, temos visao social; facilita a saida deles; e da um modo de vida."

To proceed with this plan, Dr. Azevedo needed basic data on these farmers (i.e. number of farmers, average income of each farmer's family, the size and location of their tanks, etc), so he asked IBAMA for support. The agency responded with another problem: to attend this request it would have to buy satellite pictures and the software to examine them, perhaps even sign a formal cooperation agreement with some university to train the personnel. Of course, there was no budget to pay for any of this. The prosecutor insisted with IBAMA for another six months or so, but he also started asking around for help. Eventually, Dr. Azevedo learned that the much-maligned IDEMA had aerial pictures and the personnel to analyze them. This agency also agreed to send a team to the region to interview and conduct a census of the farmers, and in a few weeks the prosecutor had all the information he needed. In his own words, "*If it was not for IDEMA, I don't know what I could have done.*"[60]

According to these data, approximately 100 farmers were illegally occupying the mangrove and would have to be relocated. The next step was to identify a plot of land that could accommodate them. Ideally, this plot would be large enough to accommodate all the families, located in the vicinity of the existing farms, and viable under both environmental and economic criteria. Dr. Azevedo reached out to the Land Institute in charge of agrarian reform, and he eventually identified an unoccupied parcel of public land in the vicinity, far from the shores of the lake and the mangroves as mandated by law. The governor had authority over this particular plot, and at the behest of the prosecutor she eventually agreed to donate the land to the farmers.

Still, the problem was not solved because the new plot required that farmers have pipes, pumps and electricity to operate their tanks. With the help of various partners, Dr. Azevedo estimated that the relocation of these shrimp farms and the acquisition of the equipment would

[60] "Se nao fosse o IDEMA, eu nao sei o que faria"

cost R$3 million (approximately US$1.5 million). At the time of my visit, he was struggling to find the money. He had already met with different legislators to see if they would include an appropriation amendment in the state budget to pay for this, but nothing was certain yet. When asked why he was taking all this trouble upon himself instead of just indicting and moving on, he answered that "*this is what the MP is all about, and it is from these kinds of solutions that we derive our legitimacy.*"[61]

Like in the other case studies of this chapter, this case demonstrates how the prosecutor realized that the imposition of punishments would have triggered an undesirable confrontation, and amicable and case-by-case negotiations would most likely have been futile. The prosecutor also realized that compliance with protective regulations was not something that each shrimp farmer could alone, i.e. the problem had a collective aspect to it, and thus the solution would have to be collective as well. Finally, the prosecutor recognized that the problem could not be solved by regulator and regulatee on their own. Instead, other institutions – such as a team of committed officers within the discredited IDEMA, plus the land office, the governor's office, and the legislature – would have to be included in the deal.

Of course, the prosecutor could have tried other things. Instead of, or in addition to, relocating the farmers, he could have insisted that they team up with the lone producer of organic, free-range shrimp in Brazil and invest in a low-impact, low-density but high value-added business that would benefit them all. Or he could have suggested that these farmers relocate, certify their shrimp with a "fair trade" or 'green' seal, and pay for pipes, pumps, and electricity by exporting the shrimp at a premium. In brief, while the number of possible

[61] "Resolver isso legitima a minha acao, mostra que temos visao social, e legitima a instituicao. Nao fazer isso vai contra o MP"

arrangements was limitless, the prosecutor's actions demonstrate an open-ended search for workable solutions.

Naturally, a search that is 'open-ended' is also quite risky. At the time of my visit, the prosecutor had not yet found a workable arrangement and there was nothing to guarantee that he would ever find one. But the mechanics of the search are particularly interesting: the prosecutor was looking for, and gradually finding, an array of institutions willing to cover some of the costs, insure some of the risks, and perhaps even partake in some of the benefits stemming from compliance with protective regulations. In his view, this is how economic, social and environmental imperatives can be made not to clash but to match and even reinforce each other.[62]

(c) Charcoal production in the Amazon

During the 1980's, the Brazilian government started investing billions of dollars into creating a 'growth pole' in the eastern Amazon. Called "*Programa Grande Carajás*", this initiative had as its main axis the Iron Ore Project which involved construction of the following:

- An open-pit mine (at the site of the largest deposit of high-grade iron ore in the world) to be managed by then state-owned mining giant CVRD
- A deepwater seaport
- An 800km railway linking the seaport and mine, also operated by CVRD.

[62] As a coda to this story, the Brazilian shrimp industry has fallen into hard times: In 2005, and responding to pressure from American shrimp producers, the US government imposed punitive duties on a series of shrimp exporters, including Brazil, accused of dumping their products below fair market price. Since that date, Brazilian producers withdrew from the large US market. And then, compounding the problem, a series of diseases hit Brazilian shrimp tanks and forced producers to decrease the density in their tanks, hurting their bottom-line some more.

In other fronts, the plan included the establishment of gold, tin, copper, manganese, nickel and bauxite mines, and the construction of a large hydroelectric dam (named Tucuruí) to generate electricity for these ventures, in particular an aluminum plant. The whole *Programa Grande Carajás* covered an area of 900 thousand km^2, a territory far larger than any of the 48 states in the continental US, and Anthony Anderson (1990) called it "*the most ambitious development scheme yet conceived for a humid tropical region.*"

In sync with the state-led developmental ethos of the time, the Brazilian government planned to produce the raw materials and provide the infrastructure while private investors would establish and run the productive enterprises. The federal government offered a series of tax-breaks and subsidies to those willing to relocate to the region, and pig-iron smelters were among the first to move in. To produce pig-iron, smelters deploy what is probably one of the oldest technologies known to mankind: they combine iron-ore with a source of carbon in the presence of heat. In most places around the world, smelters use coal which is dug from mines in the ground. In the Amazon (and a few other places), they use charcoal, which is obtained by heating biomass (such as wood) in the relative absence of oxygen. The plan was for smelters to establish forest plantation, source the wood from the native forest for a few years, and then switch entirely to the plantations once these came into production. Yet, if history is any guide, the prospects for compliance with protective regulations in the larger *Carajás* region were dire.

Roughly 20 years before, in a development project called *Jari*, the American magnate Daniel Ludwig had tried to establish a forest plantation in the northern Brazilian Amazon to feed a pulp and paper mill. Despite massive investments, this particular initiative never took off as planned. In 1988, Philip Fearnside examined the history of *Jari* to draw lessons for Carajás and concluded that, "*Jari's plantations have proved to be far more costly and less productive than*

originally envisioned." Problems included the onset of a range of fungi, bacteria, insects, and other pests that decreased overall productivity; the existence of many patches of soil that proved inadequate to sustain a forest plantation; and the permanent risk of erosion. Moreover, forest plantations also require a fairly high investment in land, saplings, personnel, and equipment to tend for the trees, plus the risk of invasion, fire or expropriation, while native timber is there for the taking. In the end, Fearnside concluded that smelters would surely "*use large amounts of wood from felling native forests for as long as these forests continue to exist.*"

At present, there are 15 pig iron smelters in two states (Pará and Maranhão), that acquire iron-ore from the now private CVRD. These smelters employ an estimated 5,000 to 10,000 people and produce an average of four million tons of pig-iron per year (10% of Brazil's pig-iron production). Roughly 75% of this iron is exported (representing 50% of Brazil's total pig-iron exports), mostly to the US automotive industry.

To acquire charcoal, these smelters turn to the 5,000-15,000 small, highly-mobile, and often informal charcoal producers spread throughout the eastern Amazon. Charcoal is fairly easy to make. To start, one builds sets of six rudimentary furnaces, which are igloo-like structures made of mud and the size of camping tents. These furnaces will be useful for as long as there is a forest nearby, i.e. roughly two years, and then they will be abandoned and the operation moved elsewhere. Next, one recruits a crew of unskilled laborers to cut the trees, clear the foliage, chop the trunks into smaller logs, and feed them into the furnaces. Each furnace is then sealed and set on fire. After roughly six days, the workers open the furnace and crawl in to retrieve the charcoal, which is loaded onto trucks and sent to the smelters. Charcoal producers employ an estimated 15,000 to 30,000 people and burn the equivalent of 14 to 16 million m^3 of wood per

year. For comparison's sake, the Amazon's 2,600 sawmills consume an estimated 28 million m^3 of prime wood per year (Lentini et al 2003).

Pig iron is a globally-traded commodity whose price is determined by the international market, so smelters do not have much control over their revenues. A key ingredient, iron-ore, represents 22% to 25% of the final cost of pig-iron and is also a commodity whose price is set by the international market. Smelters see financial and logistical expenses, which represent 20% to 28% of final cost, under a similar light. In the end, charcoal represents more than 50% of the cost of pig-iron, and as stated by an industry insider, "*for a smelter, the only cost that can be managed is the cost of charcoal; to make money, it is all in the charcoal*".[63]

Not surprisingly, charcoal production is rife with problems: a very large proportion of the wood used to make the charcoal comes from illegal deforestation;[64] and charcoal workers are often not properly registered and not provided with safety equipment, appropriate living conditions, or none of the other health & safety and wage & hours requirements stipulated by Brazilian law. Many charcoal workers live in improvised tents, without access to toilets or potable water, and are forced to buy food and supplies from a company store. In fact, conditions can be so bad that many end up entangled in a system of illegal debt servitude that has been likened to modern-day slavery.

For the past 10-15 years the Brazilian government has been trying to curb these violations. Interestingly, the government has been enforcing labor and environmental laws separately, with very different results in each of these fronts. I discuss each of these fronts next.

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[63] "Unico custo que é gerenciavel é o carvao. Para ganhar dinheiro, é no carvao"

[64] If one estimates that, in the Amazon, clear-cutting produces 60 m3 of wood per hectare, these operations deforest 2350 km2 per year, or roughly the area of Massachusetts every 10 years

Environmental enforcement

Environmental regulators have been trying hard to convince and cajole smelters into complying with applicable laws, but results remain scant. In 2005, IBAMA's regulators based in Brasilia cross-referenced smelters' pig-iron production with their charcoal receipts, and concluded that from 2000 to 2004 these firms had consumed 22,400,000 m^3 of charcoal, while they only had sourcing documents to account for 65% of this total (IBAMA 2005). As a result, IBAMA imposed fines worth more than R$800 million and required that smelters replant 700 km^2 of native forests. At roughly the same time, in 2005 and 2006, IBAMA's inspectors visited smelters to check whether they had environmental receipts for the charcoal deposited in their warehouses. In a series of highly publicized raids, inspectors found plenty of irregularities and impounded 200,000 m^3 of charcoal worth R$10 to R$20 millions. And in 2007, the government of Pará, formerly pro-business, joined in and tightened reporting requirements for smelters and removed tax-breaks and other subsidies from those that did not comply with environmental regulations (Reporter Brasil, 2007).

The regulators wanted smelters to establish enough forest plantations to supply their own charcoal needs, as had always been required of them by the Brazilian law (see "*Código Florestal*" of 1965). Smelters agreed in principle, but claimed that the *Reserva Legal* requirements were an insurmountable obstacle. The *Reserva Legal* is a legal directive asserting that in the Amazon, landowners must maintain 80% of their land covered with native forests.[65] In response to this demand, the smelters pointed out how in their region, large tracts of land had already been clear-cut, and that to reforest them with native species would be too expensive and cumbersome. Instead, they proposed to plant eucalyptus in the entire plot. To this end, they

[65] This means that selective logging – manejo florestal – is permitted, but clear-cutting is not.

requested that the law be changed and claimed that: "*the only obstacle for the success of this initiative is the anachronism of the law that limits the use of land that has been degraded, abandoned and/or underutilized.*"[66]

The "*reserva legal*" of 80% had been adopted in 1996 (see *Medida Provisória* 1.511), when deforestation numbers had reached an all-time high. This threshold has always been hotly contested by agribusiness' interests and defended fiercely by environmentalists. In such a contested setting, prosecutors were not likely to compromise. IBAMA and smelters had been discussing the terms of a deferred prosecution agreement (i.e. a TAC), but the prosecutor had some demands as well. In a memo distributed to journalists, he affirmed that "*the Ministério Público will only sign a TAC that mandates ... the replanting of all native forests that have been clear-cut because of the smelters' operations.*"[67] However, no concessions were made, and the agreement was never signed.

Instead, regulators started searching for alternative solutions. Prodded by officials from the Ministry of Environment, BNDES (Brazil's development bank) offered subsidized credit for forest plantations, EMBRAPA (the federal government's agronomic research institute) started studying new agronomic technologies, and INCRA (the federal government's land reform agency) considered encouraging land-reform settlers to reforest their plots. Yet, progress was minimal.

The smelters also explored alternative possibilities, but did not achieve much. For instance, they considered buying *babaçu*, *açai*, and/or brazil-nut husks; or collecting scrap wood

[66] "A única barreira para o sucesso do programa é o anacronismo da legislação, que limita a utilizacao das areas degradadas, abandonadas ou sub-utilizadas" (ASICA)
[67] "O MPF reafirma que só concordará com o TAC caso os seguintes pontos sejam incluídos: realização de estudo de viabilidade econômica do termo, recuperação do passivo ambiental deixado pelas siderúrgicas e pagamento das multas já emitidas pelo Ibama"

from sawmills, and using the residues from their own furnaces to make briquettes, but prices were high and quantities available were low. Some smelters started importing coal (Steel Business Briefing, 2007), but in addition to being expensive, coal can only be used at a 20:80 proportion with charcoal. Other smelters started injecting charcoal dust back into their furnaces, and nine of them created a rotating capital fund to finance forest plantations (Diario do Para, 2007). Finally, the smelters' association started lobbying the state government of Pará to build a pipeline to bring natural gas to their plants, but this was unlikely to be achieved anytime soon.

Throughout this time, regulators had been trying to coax CVRD only to sell iron-ore to smelters with legal sources of charcoal. CVRD is one of the most powerful companies in Brazil and one of the largest in the world. It ignored these pleas and sat by the sidelines. Yet, in November / December 2006, *Bloomberg Magazine* published a cover story in English entitled "The secret world of modern slavery", which described the horrible labor conditions facing Eastern Amazon's charcoal producers, and linking their plight to the US-auto industry (Voreacos and Smith, 2006). The response was immediate: Ford and other auto-makers vowed to stop buying pig-iron from Brazil and two congressmen – Dennis Kucinich from Ohio and Eliot Engel from New York – started scheduling hearings to investigate the matter (Voreacos and Smith, 2006). In no time, CVRD reversed its prior position and declared that it would only sell iron-ore in quantities commensurate to the smelters' legal charcoal (Smith and Voreacos, 2006). Reportedly, the smelters felt the pressure, but they sought relief from the courts and obtained injunctions that still stand.

In the end, the efforts by the regulators, together with CVRD's threat, have produced some progress. The smelters have been planting some forests, and according to one unofficial estimate, the share of illegal charcoal in the industry has dropped from 60% to 30% (O Eco,

2008). Yet, the old dynamic still remains: smelters postpone making the investments in forest plantations (and the accompanying *Reserva Legal*) while reaching to the native forest to supply their immediate demand for charcoal. A permanent solution seems always to be "only a few years away".

Labor enforcement

From the early 1990's on, and following on decades of groundwork, Brazilian human rights activists joined forces with labor inspectors and prosecutors to build a legal and organizational infrastructure devoted to combating degrading work conditions in the Amazon. This joint-mobilization was triggered by the 1991 assassination of Expedito Ribeiro da Silva, a local union leader. According to Padre Ricardo Rezende, "*the press had been sensitized by the murder of Chico Mendes in 1988, so the killing of Expedito drew a lot of headlines. As a result, I traveled all over Brazil to give interviews, and in Brasilia I found an important ally, the head prosecutor of Ministério Público, Dr. Aristides Junqueira.*"[68]

Together, Ricardo Rezende and Aristides Junqueira created a forum to discuss labor conditions in the Amazon, and they held their meetings at the *Ministério Público*'s premises in Brasilia. In 1995, these meetings yielded one of their first concrete results, when President Fernando Henrique Cardoso reversed a history of denials and officially recognized the existence of slave-like work conditions in the country. That same year, the Ministry of Labor created the "*mobile inspection squads*" ('*grupos móveis*'). These squads are independent task-forces managed directly from Brasilia (and not by the Ministry's state representatives, which may be

[68] "Em 1991, foi assassinado o Expedito, e essa foi a gota d'agua. A imprensa brasileira e mundial ja tinha se sensibilizado pela morte do Chico Mendes em 1988, entao teve muita repercussao que outros assassinatos na regiao nao tiveram. Em viajava pelo Brasil todo dando entrevistas, e em Brasilia encontrei um aliado no Procurador Geral da Republica, Aristides Junqueira."

politically beholden to the states) and that conduct surprise raids in areas or industries likely to harbor slave-like conditions. The squads are staffed by labor inspectors and prosecutors who volunteer for the job, and according to their coordinator, this partnership is the cornerstone of their success: "*in these operations, labor inspectors and prosecutors are joined at the hip; we are crucial partners in performing the job and obtaining results.*"[69]

Throughout this period, labor regulators had been basing their actions on one of the most succinct articles in the Brazilian criminal code. Adopted in 1940, the code stated in its article 149 that it was forbidden to "*submit someone to condition analogous to slavery*". Thanks to concerted action by activists, prosecutors, inspectors, and sympathetic legislators, in 2003 Congress amended the code. From then on, anyone who (i) employed armed guards to monitor the workforce, (ii) retained documents or other collateral to prevent workers from leaving the worksite, (iii) maintained laborers under debt servitude, or (iv) promoted degrading, exhaustive, or forced conditions, would be guilty of the crime of enslavement.

And in 2004 the Ministry of Labor created the *Lista Suja* (see Portaria 540), a directory of private firms found engaging in enslavement, as determined by labor inspectors. A firm found guilty stay in the list for two years, and thanks to an agreement with Brazilian banking authorities, these firms are barred from borrowing any money from official banks and thus have no access to subsidized credit.

While lobbying for these legal and organizational changes, inspectors and prosecutors kept on combating degrading work conditions in the field, and charcoal producers in Eastern

[69] "A PF esta la para dar seguranca, mas MPT e MTE sao socios essenciais na conducao dos trabalhos e obtencao dos resultados."

Amazon had always been one of their main targets. A prosecutor who joined one of the first raids by the "*grupos móveis*" reports horrible work conditions in these plants:

> "*At inspections conducted in charcoal plants, I saw cattle living in better conditions than the workers. Rarely is a worker found with Individual Protective Equipment; they work amid coal soot and smoke, without shirts or with a shirt that is completely ripped and filthy; in shorts and without boots and gloves. In none of the charcoal plants visited did we find drinking water*"[70] (Veras, 2004)

As mentioned earlier, charcoal tends to be produced by informal and highly-mobile operations; they have no fixed asset that can be seized or reputation to preserve. In such a scenario, neither punishment nor education is likely to produce meaningful results. To move forward, prosecutors and inspectors looked back and started invoking a precedent set forth by the Brazilian Superior Labor Court ("*Tribunal Superior do Trabalho*") in 1993, known as TST-331 (Artur 2008). This provision and its subsequent interpretations had created the figures of "legal" and "illegal" outsourcing and defined the criteria that separate the two. According to TST-331, firms can outsource support activities ("*atividades-meio*"), but core-activities ("*atividades-fim*") must be conducted in-house. In other words, TST-331 allowed prosecutors and inspectors to ignore outsourcing contract and attribute responsibility over labor standards directly to those enterprises at the end of the supply-chain.[71] A labor inspector explains how this applies to charcoal:

> "*Charcoal is not a marginal activity for the smelters – it is the quality of the charcoal that determines the quality of the pig iron. We, alongside the prosecutors, defended this argument in court, and won. So now we impose the*

[70] Originally in English
[71] This is not to say that TST-331 "created" this power – according to Licks 2002, precedents of similar nature have existed at least since 1965

fines not on the charcoal producers but on the smelters and make them pay. To us, and for all legal purposes, the smelters don't have charcoal suppliers. Instead, smelters produce the charcoal themselves and thus must respond for labor conditions in charcoal production."[72]

The smelters resisted, and even gained the theoretical support of prominent scholars. A respected Brazilian economist told me the following:

"Now one can only outsource support activities, but not core-activities... you know what, this is crazy. Prosecutors and labor inspectors are really messing things up with this story of illegal outsourcing. This is stupid, and does not benefit anyone. Still, they give it a lot of attention, thinking that they are saving the world. What a folly."[73]

Regulators see no other way forward, and have their actions backed by the Brazilian courts, so they persevere. As described by a labor inspector:

"There is no solution to slave labor unless we drag the smelters in. If charcoal producers complied with the law, I would gladly ignore the illegal outsourcing. In fact, I don't even care about illegal outsourcing. What I care about is ending slavery."[74]

In 1999, and thanks to all the pressure, inspectors, prosecutors, and smelters reached a compromise and signed the Brazilian equivalent of a deferred prosecution agreement (TAC).[75] On one side, prosecutors and inspectors agreed to recognize smelters and charcoal producers as

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[72] "O carvao nao é periférico, pois a qualidade do carvao determina a qualidade do ferro que vai ser produzido. Essa é a tese que nos sustentamos junto ao Judiciário, articulado com o MPT. Assim fazemos a siderurgica pagar a multa, e autuamos. Para nos, nao consideramos que eles tem fornecedores de carvao. Eles produzem o carvao."

[73] "So pode tercerizacao de atividade meio, de atividade fim nao pode – é uma loucura! Promotores e inspetores do trabalho estao atrapalhando demais com essa historia de tercerizacao ilegal. É uma fiscalizacao burra, que nao beneficia ninguem e eles estao dando a maior prioridade para isso, achando que estao fazendo o maior bem do mundo"

[74] "Nao ha solucao para o trabalho escravo sem responsabilizar a siderurgica. Se houvesse boa qualidade do trabalho, nao ligariamos para a tercerizacao. Eu nao ligo para tercerizacao ilicita, meu foco é trabalho escravo" -

[75] In fact, the TAC of 1999 supersedes a TAC signed in 1998.

separate legal entities. And on the other side, smelters agreed to pay for a variety of health and safety provisions directly, and to check whether their suppliers were complying with other health and safety and wage and hour provisions, including the formalization of the workforce. In case a charcoal producer breaches the law, the smelter is supposed to sever commercial relations and pay the charcoal workers what they were due.

Despite all the professed good intentions, regulators report that smelters never fulfilled their part of the deal. One labor inspector related how:

> "*Whenever we conducted inspections we detected several violations, so we invoked TST-331 and imposed all those heavy fines on the smelters. We could have invoked the TAC, but our fines were higher. Still, the smelters would say 'the TAC allows me to outsource charcoal production, I'm not responsible for what the supplier does!' What a joke. If the smelters were not keeping their part of the deal, why should I keep mine?*"[76]

This continued for some time, until a group of non-profit institutions, plus the ILO, stepped in and convinced the parties to try something else. First, they all signed a non-binding "letter of intentions" or *Carta-Compromisso*. In this document, signed in 2004, the smelters recognized that labor conditions in charcoal production remained dire, and once again took it upon themselves to "*impose commercial sanctions on those firms that rely on slave labor.*"[77]

Next, a group of seven smelters started implementing the earlier agreement. These smelters created a non-profit entity called *Instituto Carvão Cidadão* (ICC) devoted to auditing

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[76] "Iamos la, vimos infracao, e multavamos pela 3ª ilegal. Podiamos acionar o TAC, que previa algumas multas. Mas a multa por 3ª ilegal era maior, entao multavamos nos mesmos. Os advogados deles diziam que a 3ª era permitida pelo TAC. O que é isso? Se as empresas nao estao cumprindo a parte delas, nao nao precisamos cumprir a nossa, o acordo esta revogado"

[77] "3 - Definir restrições comerciais àquelas empresas identificadas na cadeia produtiva como utilizadoras de mão de obra escrava"

labor standards in charcoal producers. The ICC was the brainchild of Claudia Brito, a career labor inspector who, for eight years, had been the head of the *'grupos móveis'* and who had plenty of experience inspecting charcoal producers. At first, smelters resisted asking: "*Why should I pay for an auditor to denounce me?*", but eventually they acquiesced, and hired Claudia Brito to be ICC's technical director.

Other smelters later joined in, and currently the *Instituto Carvão Cidadão* has 12 members. Its board of directors is composed of six people: four representing the smelters, one representing the Ministry of Labor, and one representing the *Ministério Público do Trabalho.* The organization is funded by the smelters, and it claims to have an operating budget of roughly R$ 1.5 millions (~US$ 800,000) per year (ICC, 2009). The organization has three professional directors, a safety engineer, a doctor, and a cadre of 12 auditors who work out of offices in two states. They cover an area of 2 million km^2 and since 2004 auditors have visited almost 2,000 charcoal producers and 50,000 workers in 200 municipalities in four states [78] (ICC, 2009). The ICC consolidated annual report is published online and submitted to the ILO, the *Ministério Público do Trabalho*, the Ministry of Labor, the Human Rights Division, and two other NGOs. The auditors also present a detailed report to their board at the ICC's meeting, and more than 300 charcoal producers have had their contracts terminated and cannot sell charcoal to any of the members until the detected violations are solved.

These actions have produced other noticeable results. First, reported formalization rates in the charcoal industry have increased manifold, and ICC representatives boast that the proportion of registered workers in this industry is higher than in the retail sector in the same state. Nowadays, a large number of charcoal workers receive uniforms, personal protection

[78] Some are being counted more than once

equipment, and have access to toilets, clean water and other health and safety and wage and hours provisions, as mandated by Brazilian law. Second, the charcoal sector is undergoing significant structural change as a result of regulatory action. Ideally, charcoal for pig-iron has a certain rate of carbon, volatile materials, and fibers, meets certain granulometry standards, and presents a low percentage of dust or other extraneous materials (such as pieces of wood). Until recently, charcoal producers sold their output by weight in the open market. The charcoal would often go through a chain of intermediaries until it reached a smelter, and the quality of the product was not a relevant variable. Thanks to the regulatory interventions described above, smelters have started to sign long-term exclusive contracts with their suppliers and to send quality experts to help charcoal producers turn out a product of higher quality. These quality experts often join forces with labor auditors, and some adopt the time-tested good-cop-bad-cop routine to encourage charcoal producers to comply with the applicable standards. Finally, both smelters and the Brazilian government have been using the ICC to protect the pig-iron industry from regulatory sanctions and/or retaliation. For instance, when two US congressmen from steel producing states started conducting hearings on slave-labor in the Amazon, Brazilian diplomats posted around the world referred to the ICC to defuse the situation (Brazil, 2006).

Still, much remains to be done. Prosecutors and inspectors point out that many of the formal and law-abiding charcoal producers serve as fronts for other operations, deeper in the forest, that flaunt all applicable laws. For this reason, the prosecutors in charge have been saying that they will denounce the TAC of 1999 and require that the smelters hire all charcoal workers directly. Moreover, even those prosecutors who admire the work of ICC are frustrated with the fact that "*many workers who are rescued from enslavement do not find jobs in the formal sector*

and thus end up going back to their old posts, starting the cycle of exploitation all over again."[79] The suggestion now is for the Brazilian government to scale-up a side project currently conducted by ICC, to act as intermediary connecting these laborers to formal jobs.

The bottom-line is that labor and environmental inspectors and prosecutors have achieved diverging results in their attempts to enforce protective regulation in charcoal production. Three points stand out. First, both environmental and labor regulators realized that charcoal producers – informal, mobile, with no assets or reputation to preserve – were unlikely to respond to fines, indictment, or any of the other "typical" tools of the regulatory trade. Second, regulators zeroed in on the smelters, and found ways to drag them in into the matter (the Forest Code for environmental regulators, and TST-331 for labor regulators). And third, the results diverged because labor inspectors and prosecutors had varying levels of success in finding (or, in one case, creating) other entities that made it relatively easy for smelters to comply.

(d) Sugarcane farming in Sao Paulo

Brazil is the foremost producer, exporter, and consumer of sugarcane, sugar, and ethanol for fuel in the world (see table below). The sugar and ethanol industry employs one million people throughout the country and responds for approximately 2% of national GDP and 21% of Brazil's export earnings. For most of its existence, it was centered in the Brazilian northeast, but over the past three or four decades the industry has migrated south. Presently, 60% of total sugar and ethanol output is generated in the state of Sao Paulo (Valdes 2007, Bolling 2001, and UNICA 2008).

[79] "Os trabalhadores resgatados não inseridos no mercado de trabalho formal, acabam, por falta de opção, retornando ao mesmo tipo de trabalho, dando continuidade a um círculo vicioso"

The Brazilian sugar and ethanol industry acquired its current structure during the 1970s, when the federal government provided a series of incentives and subsidies that encouraged the creation of privately-owned, large, modern, and *latifundia*-based integrated farms-mills. In a sharp reversal from prior policies that protected independent farms (see "*Estatuto da Lavoura Canavieira*"; Sobrinho 1941), these incentives forced smallholders out of their land and created a 'reserve army" of laborers available for seasonal and migrant work (Brant 1975, Saint 1982).

Table – Brazil's Sugar and Ethanol Industry in Perspective - 2006

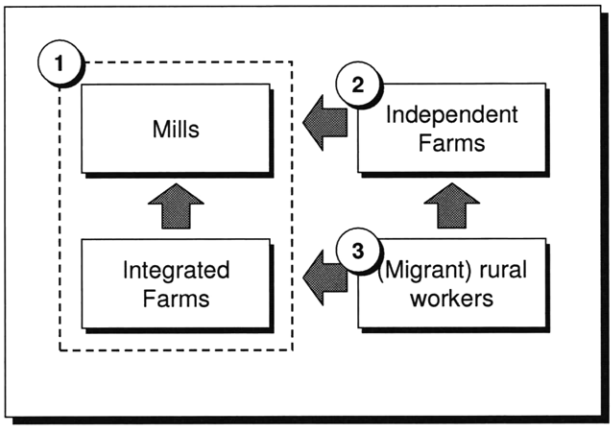
	Sugarcane	**Sugar**	**Ethanol (fuel use)**
Production	425 million tons	28.7 million tons	17.7 billion liters
Share of global production	31%	20%	38%
Exports	--	18.8 million tons	3.7 billion liters
Share of global trade	--	41%	52%
Global ranking	Largest producer	Largest producer and exporter	Largest producer and exporter

The Brazilian sugar and ethanol sector currently stands on three legs. First, there are more than 350 integrated farms-mills that are the industry's main players. They own large tracts of land, plant their own sugarcane, process the raw material in sophisticated industrial plants, and sell or export the output directly to food industries, sugar refineries, and supermarket chains. Yet, none of these mills own enough land to ensure a full supply of cane, and this creates room for the industry's second leg, namely the estimated 11,000 independent farms that plant and then sell sugarcane to mills in their vicinity.[80] And finally, the third leg – roughly 500,000 rural workers –

[80] Sugarcane is bulky and therefore expensive to transport; moreover, it must be crushed soon after being harvested otherwise the stalks lose sugar content; for these reasons, farms and mills must be no more than 200-300 km from each other

emerges from the fact that, ideally, sugarcane is harvested exactly when the sugar content peaks, and thus farms that are not mechanized employ a large number of seasonal workers for a few months every year.

Figure – Basic structure of sugar industry



The central labor relations challenge faced by sugarcane farms is the need to recruit and supervise vast armies of workers for a harvest season that lasts only six to nine months. Historically, farms have relied on labor contractors / intermediaries ("*gatos*" or "*empreiteiros*"), who recruit, transport, house, feed, and manage their own labor gangs.[81] For farms, this system is close to ideal: no hassle and no risk at a relatively low price. According to one labor inspector:

> "*To employ a gato makes total sense for the farmer. The rural worker has no qualms about working here one day and there another day. If needed, they request a new worker's ID ["carteira de trabalho"] that disguises all this back and forth and that's that. The farmers want their cane harvested on time, and the gato ensures that enough workers will be there, and the farmer likes it.*"

It is not that the quality of the work was irrelevant. On the contrary, beginning in the mid 1980s, a gradual increase in the competitiveness of the sector, and a government-induced change

[81] In the NE, many workers lived near the farm and/or mill, in the so-called "arruados", i.e. workers' villages, and thus recruitment was not an issue.

in the contractual arrangement between farms and mills,[82] had been encouraging farms to exercise tight control over rural workers. Workers were required to cut the sugarcane close to the ground to capture as much sugar as possible, cut the tops off to decrease preventable bulk, avoid damaging the skin of the cane to prevent infection from seeping in, and pile the stalks neatly so the trucks would not bring unnecessary dirt to the mill.

Still, labor standards remained dire. Workers were paid piece-rate and had to bring their own food and drink to the field, arrange for their own working clothes, and pay for their own machetes and sharpening files. They lived in overcrowded dorms without proper sanitation, had no safety equipment such as gloves, boots, or shin-guards, no access to fresh water or warm food, and were transported to and from the field on top of open trucks, carrying their machetes in their hands. In addition, they were not properly registered as mandated by Brazilian law and thus they did not receive any of the guarantees or mandatory benefits afforded to laborers in the country. The work itself, conducted under the blasting tropical sun, was becoming ever more regimented and therefore arduous. Even if some observers affiliated with the industry minimize the hardships when relating that "*to cut cane is exhausting but does not kill anyone*", activists report that many men have died of exhaustion in the field. The workers even developed a slang word ("*birola*") to refer to these exhaustion-induced deaths. As stated by the manager of a large mill, "*to cut cane is not for humans, it is work for machines*". [83]

The industry was deregulated in the 1990s, and after going through a major slump it reemerged at the end of the decade under a new banner. Instead of being solely sugar and/or

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[82] During the 1980s, the government mandated that mills pay farms not for the ton of cane, but for the sugar content. This forced the two entities – i.e. farms and mills – to abandon their former arm's length relationship and to become increasingly closer partners in the sugar-making process. Also, farms started to care about the quality of the cane and wastage in the fields.

[83] Ha escassez de mao-de-obra. Ninguem quer mais cortar cana, nao é trabalho pra ser humano, é trabalho para maquina

ethanol producers, the large integrated mills started to sell electricity to the national grid and to bill themselves as producers of "*bio-energy.*" At that time, oil prices were at an all-time high, and investors from around the world were looking for sustainable sources of energy. Foreign capital started to pour in, and the industry seemed poised to grow fast over the next several years.

As the sugar and ethanol business became prominent again, prosecutors and inspectors moved in to check on compliance with protective regulations. They obtained some success enforcing labor laws in the mills, and they also managed to eradicate some of the worst forms of child labor in rural areas. Yet, labor standards in the farms remained subpar. As stated by a social activist and long-time observer of the industry:

> *"In their industrial site, mills tend to have everything in place; they have doctors, nutritionists, psychologists, even soccer fields for workers to play. Conversely, in the farms they do not do anything. Until 2004 they used to abandon agricultural sites completely and pay no attention whatsoever to labor or environmental standards."*[84]

Whenever prosecutors and inspectors tried to enforce labor laws in sugarcane farms, they would run into the same hurdle: the workers had not been hired by the farms or the mills, but by an intervening *gato*. Naturally, none of these *gatos* had assets or a reputation to preserve. Many did not have a registered business or even a bank account. In these conditions, neither heavy fines nor a friendlier, educative approach were likely to produce any results.

To move forward, prosecutors and inspectors followed the same course of action adopted by their colleagues combating slave labor in the Amazon: they started invoking TST-331. As

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[84] Usinas costumam ter tudo em ordem: medico, nutricionista, psicólogo, campo de futebol. Por outro lado, na parte agrícola, eles abandonam completamente. Até 2004, eles nao tinham preocupacao nenhuma com parte agrícola, trator, pesticida, sem preocupacao social ou ambiental.

explained earlier, this legal provision differentiates between "legal" and "illegal" outsourcing and allows regulators and law enforcement officials to ignore the outsourcing contract and attribute the responsibility over labor standards directly to those benefiting from the good or service.

Naturally, a number of farmers complained, sometimes in bitter terms:

> *"Now we have to provide rural workers with cold drinking water, a table, sunshade, chairs, separate toilets for men and women...If they are migrant workers, we have to provide housing and meals, even wash their clothes for them."*[85]

> *"The law requires that you analyze the quality of the water that goes into the tank of the workers' bus. If you fill it up with tap water, the one that everybody drinks, you get fined, it is not allowed."*[86]

> *"It is too much pressure. One needs to know how thick the mattress in which they sleep is, one must allot four people to a room, eight people to a bathroom, it is impractical."*[87]

> *"These demands are very difficult to attend, because the price of the commodities does not change depending on whether you feed your workers or not, whether the mattress in which they sleep is hard or soft."*[88]

Instead of succumbing to the regulatory pressure, many farms and mills started to encourage their workers to create cooperatives that would be hired to harvest the cane. Some

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[85] "NR-31 dificultou muito, encareceu a mao de obra. Tem que prover agua gelada, mesa, toldo e cadeiras, banheiro masculino e feminino, e se for migrante, casa, comida e roupa lavada. Comparado com esses standards, quem cresceu em uma familia de classe media cresceu em condicoes sub-humanas!"

[86] A NR-31 exige que voce analise a qualidade da agua que vai no tanque do onibus. Se puser a agua da cidade, que todo mundo usa, nao pode!'

[87] "A pressao é insuportável. Voce tem que saber a grossura do colchao, colocar 4 por quarto, um banheiro para cada 8 pessoas, fica impraticável"

[88] "Essas exigencias sao dificeis de cumprir, pois o preço das commodities nao muda se voce dá alimentacao para os trabalhadores ou nao, se o colchao que eles dormem é densidade 20 ou 33"

farms even leased their land to these coops, while signing a contract to buy all the resulting cane. They were basing this arrangement on a law from 1994 (Lei 8.949) that modified the labor code and clarified that, for all legal purposes, members of coops are not employees. Other farms resorted to a law from 1964 (Lei 4214, "*Estatuto da Terra*") that allowed landowners and rural workers to forge partnerships ("*parcerias*").

Even though partnerships have a positive ring to it, and coops are often associated with empowered workers and democratic governance, the regulators considered these arrangements a ploy to avoid complying with applicable protective regulations (some called the coops "*copergatos*"). As stated by a prosecutor, "*it was like a fever, everybody was creating these workers' coops and naming the gato president. But we did not fall for it. Instead, we came down hard and put an end to this story*". The courts followed suit and declared that, even if these coops and partnerships complied with the letter of the law, they infringed the spirit of the law and were therefore illegal.

At roughly the same time, a large group of environmental and public health regulators and activists concerned with air pollution were pressuring farms and mills to stop burning their sugarcane fields. It is standard practice in the sector to burn the cane prior to sending the workers to the field. This eliminates unnecessary trash (i.e. dead leaves, weeds, insects, and pests) and makes it easier for workers to move in and cut the stalks. However, the burning of the fields is also a major source of air pollution and respiratory problems in nearby towns. It also kills wildlife and provokes forest fires. Environmental regulators were exerting considerable pressure on farms and mills to stop this practice, and many business owners decided to use mechanical harvesters to reap the cane green and thus solve two problems at once.

Mechanization may have solved some problems in some first-tier farms, but it worsened the plight of migrant workers and second-tier suppliers. According to industry sources, a mechanical harvesting unit (composed of harvester, fuel truck, fire truck, and mechanic) requires 3 or 4 people and replaces 70-100 workers. As a result, mechanization increased labor surplus and decreased the competitiveness of small farms vis-à-vis their larger competitors. As explained by a human rights activist, the prosecutors and inspectors had, unwillingly, provoked a polarization of the industry:

> *"Nowadays, the mills are genuinely trying to improve. With regards to their own farms, they do a fairly good job. The real problems are at the independent sugarcane suppliers, which are submitted to an imperialistic regime, and end up squeezed to the bone. Their cost is high and their revenues are low... [as a result,] they often resort to gatos to recruit and manage the workforce at the lowest possible cost. And migrant workers are often willing to work under any condition, so there you have a recipe for trouble."*[89]

Prosecutors and inspectors continued conducting surprise inspections and exerting pressure on farms and mills, and whenever they found violations of labor laws they invoked TST-331 and attributed the violation to the mill that was buying the cane.

Eventually, the larger enterprises resigned themselves to this situation and started sending their own people to the Northeast to recruit migrant workers directly. This required some learning, but the mills soon mastered the challenge and even found a silver lining:

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[89] "Hoje, usinas estao tentando melhorar. Na cana propria, eles estao cuidando bem. O problema esta com os fornecedores, que estao submissos a um regime imperialista, ficam muito apertados. O custo é alto e a receita é baixa. A ORPLANA representa os grandes plantadores, e é a ORPLANA e as usinas que decidem o preço da cana. Aqui em Piracicaba e regiao, sao 852 fornecedores de cana, e 700 sao pequenos, com menos que 30 ha. Se ele nao colherem sua propria cana ganham ainda menos, entao sao eles que usam gato, para recrutar e gerenciar seu pessoal com baixo custo. O fornecedor quer colher sua propria cana, pois senao fica com preco muito baixo. Esse é o nó, o preco da cana para o fornecedor. E o migrante aceita condicoes mais degradantes"

"In the old days, workers traveled by themselves and knocked on our doors looking for jobs. We ended up hiring people with bad backs or other problems. Four years ago we started to recruit workers directly in the Northeast. Now we travel in five people, two go first to select the candidates, and the other follow later to help with the procedures. We have good contacts with the local unions and the municipal governments. The local unions are very helpful, they lend us their office and advertise the vacancies. And by having friendly relations with them we avoid trouble with other social activists. We also have good relations with the municipal governments; this is important because in those towns they are the only ones that have internet, so we often use the mayor's office to check our email and stuff. After selecting the workers, we sign and notarize the contracts as mandated by law, and we send memos to the highway patrol to inform of our itinerary. We notify the prosecutors, the Ministry of Labor, and health department of the location of the dorms. The laborers leave their hometown with a contract and a salary. We get the best workers, and then, by doing everything by the book, we get extra credit with the labor inspectors. If there is any complaint, they call us first and ask what's up."[90]

Naturally, smaller farms do not have the administrative structure or capacity to travel so far to recruit, register, transport, and house their workers. They tried to resist and many still resorted to *gatos*, but prosecutors and inspectors kept up the pressure and eventually the smaller farms had to relent. As stated by the manager of a large mill:

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[90] "Antes, os trabalhadores viajavam por conta propria e vinham pedir emprego aqui. Ai acabavamos pegando gente com hernia, com doenca de chagas. Uns quatro anos atras resolvemos ir lá, ver quem era, e fomos aprendendo. Vou buscar funcionarios no NE, vou nas feiras recrutar o pessoal, no interior do NE. Se recrutar na cidade, vem os 'baianos vagabundos', no 2º dia eles ja buscaram outro emprego nos hoteis e bares da cidade. Descobrimos que nao dá para contratar em Ilheus, todos catam caranguejo e limpam pasto de tocos, entao tem hernia. Agora, a gente vai em cinco pessoas, o chefe do RH e mais quatro funcionarios. Dois vao antes, fazer a triagem. Temos contato com os sindicatos locais e com a prefeitura. Os sindicatos ajudam, emprestam o escritorio para a gente usar, anunciam a nossa chegada. Nos envolvemos o sindicato para evitar confusao com as igrejas, etc. E a prefeitura é importante, pois nesses lugares so tem internet na prefeitura. Registramos os funcionarios no MTE de Vitoria da Conquista, na Bahia. Avisamos a policia rodoviaria sobre o transporte. E avisamos o procuradoria, MTE e vigilancia sanitaria dos alojamentos. O cara ja sai de la registrado e recebendo. E ao fazer tudo certinho, ganho credito com o MTE, se tem alguma denuncia, eles ligam para mim e perguntam: 'o que houve?'"

"Our cane suppliers did not want to formalize their contracts with workers, and would not allow us to send our workers to harvest their cane. They would say that we charged too much for this service. But then the labor inspector would come to the mill, ask for our list of suppliers, visit them, and fine us both. As a result, the supplier would get into trouble and we would get into trouble. Nowadays, suppliers without the money to formalize their workers and pay all the legal benefits request that the mill send laborers to harvest their cane. That's the only way to avoid legal trouble."[91]

Another outcome is that mills started to develop monitoring programs to check whether their suppliers were complying with applicable labor laws. As explained by the manager of a mill:

"Either we harvest the cane at our suppliers' land, or we monitor their labor conditions. Even those farms that bring the cane to our door, we monitor everything they do. We also teach them how to comply with the law; we do not want them to be fined for any labor violation".[92]

Still, regulators have not been successful in all their endeavors. For instance, they would have preferred that rural workers be hired on a fixed salary and not on a minimum wage plus performance pay, as is the case now. But mills and farms have been resisting fiercely, and workers resist as well. So far, this has been a thankless battle for the regulators, and they have moved on to fight on other fronts. As explained by a prosecutor, *"one of the sources of the labor problems in sugarcane is the fact that workers are paid on a piece rate system. It is tough, but it is legal."*

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[91] "O fornecedor nao queria registrar o trabalhador ou deixar a usina cortar a cana dele. Dizia que a usina cobrava muito caro. Mas ai o fiscal vem na usina, pega lista de fornecedores, visita eles, e multa os dois. O fornecedor fica com problemas para conseguir financiamento, e nos tambem. Hoje em dia, quem nao tem dinheiro para pagar os encargos, pede para a usina assumir o corte. Com isso, se livra das acoes trabalhistas"

[92] "A gente colhe a cana na terra dos fornecedores, ou faz vistoria naqueles que trazem a cana ate a usina. Ensinamos como cumprir a lei, como nao ser multado. Somos responsáveis pelo fornecedor, precisamos fiscalizar tudo. Mesmo aqueles que trazem a cana na esteira, a gente fiscaliza. Ensinamos eles a nao ser multados."

Ultimately, this case shows how the prosecutors and inspectors have relentlessly used TST-331 to drag the larger mills to the table and to force the mills to pay the costs and shoulder the risks associated with compliance. This is different from what happened in other cases, in which the costs, risks, and benefits ended up being distributed to a wider range of public, private, and non-profit entities. This is also different from the outcome observed in the charcoal industry, in which charcoal suppliers still remain separate businesses monitored by smelters and the *Instituto Carvão Cidadão*. In the present case, the smaller sugarcane farmers have been giving up harvesting the cane, and mills do it instead. Nevertheless, the central features, i.e. the realization that neither punishment nor education were likely to work, the search for institutional partners, and the reassigning of the costs, risks, and benefits associated with compliance to those most willing or able to take it, are all in-line with the features of the other three case studies.

2.3 – Stitching a solution together

When analyzed in such detail, the trajectory of these four industries may seem quite disparate and unrelated. Like other agents engaged in complex tasks, the prosecutors do not always succeed, and by looking at real cases I saw snapshots of prosecutors who were at all possible stages of success, failure, and in-between. This setup does not make for a simple or neat comparison, so rather than propose a formula, general theory, or give policy advice, I identify and describe the most important features and patterns that cut across all these cases.

All these cases share several important features. To begin with, they are characterized by an industry that, on one hand, generates important economic activity, but, on the other hand, produces negative externalities such as labor abuse and environmental degradation. Yet, to eradicate these negative externalities is anything but easy. Whenever forced to comply with the

law, targeted firms say: "*either I comply with all these labor and environmental regulations or I stay in business and generate jobs, pay taxes, and produce income.*" Moreover, in most cases the ones actually committing the infractions are small, scattered, informal and relatively powerless operations. They lack capital, technology, administrative structure, and other essential business capabilities. In fact, in many cases their only competitive advantage is the ability to resist (or ignore) regulatory enforcement. Making matters worse, these industries are often beset by collective action problems, split incentives, incomplete markets, asymmetrical information, 'worse-before-better' traps, and high transaction costs[93] that prevent compliance or render standard forms of regulatory enforcement utterly ineffective.

In these situations, none of the recognized "styles" of enforcement is likely to work. So some prosecutors, in some circumstances, step out of their routines and attempt something else. Instead of trying to impose ever harsher punishments, which are likely to cause tumult, unemployment, and decrease the firms' ability to compete; or trying to educate the firms into complying, which is likely to be ineffective, these prosecutors engage in an open-ended search for alternative solutions (MacDuffie 1997, Sabel 2007).

Prosecutors use their legal powers, professional status and legitimacy to reach out to other public and private institutions and compel them to contribute, according to their respective capacities, to a solution.[94] In some cases, these entities are already devoted to the task. In other cases, they must be dragged in through legal threat. And in other occasions, the technical staff is willing to contribute, but these individuals need the support of the prosecutors to confront a boss who opposes the engagement. Prosecutors themselves are a moving piece in this larger puzzle.

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[93] See Akerlof 1970, Hausmann et al 2002, and also Cohen and Winn 2007.

[94] The fact that there is lots of overlap / redundancy in government gives prosecutors plenty of raw material to work with: if one agency is standoffish, they can seek help elsewhere.

As needed, and according to their own constraints, they reinterpret applicable regulations, grant minor exemptions, and extend deadlines.

Once a tentative course has been charted, prosecutors play another crucial role: they use the laws and legal precedents in an instrumental way to split and reassign legal rights and duties so as to reapportion costs, risks, and benefits of compliance to those most willing or able to afford (or benefit from) the burdens associated with the change. And then, closing the deal, prosecutors grant an informal (but effective) seal of legality to the final arrangement, shielding it from further legal challenge. These arrangements can be embodied in a TAC, in a non-binding "letter of intentions" ("*termo de compromisso*") or in a network of formal and informal side agreements and contracts. Interestingly, the specific nature of the instrument (i.e. whether it is binding or not) does not seem to make a big difference in determining whether the deal will succeed. As stated by Lon Fuller (1999):"*It has been remarked by experienced attorneys that when a contract has been carefully negotiated and drafted it can usually be filed away and forgotten*" – this because "*the parties come to share an understanding of the problems each of them faces in the performance of his side of the undertaking*" and this understanding "*functions as a basis of order between the parties without reference to the written contract, and often better than the written contract would.*"

These prosecutors are solving what Richard Locke has likened to the "*press a balloon problem.*" According to this metaphor, the enforcement of protective regulations is like trying to pop a long, half-inflated, convoluted air balloon: "*you press here and it escapes over there, and they you press somewhere else, and it escapes again ... to pop this balloon, one must cover all bases at the same time, and this is very difficult to do.*" This type of action is not easy to capture in simple words. The prosecutors involved in the cases above are obviously not simply

"punishing" or "educating" the violators. Likewise, they are not applying "carrots" and "sticks." In different opportunities, I have described their actions as brokering, mediating, making deals, building coalitions, or solving problems. Eventually, I settled for a term that prosecutors themselves sometimes use: they say they are '*stitching a solution together.*' Another way to say it is that they are acting as Coasean agents[95] who identify and then help eliminate various types of transaction costs. Even though this type of intervention has not figured in the international development / regulation literatures, variations of it can be found in the literature on legal professions; community policing and community prosecution; structural reform litigation (including prison reform, civil rights litigation, and white-collar crime) in the United States; and some writings on investment banking and the engineering of complex business deals. I will return to this topic and explore it at length in the conclusion of this paper.

Interestingly, this type of action seems to have a beneficial effect that goes beyond compliance and enhances business competitiveness. As described in some of the cases above, prosecutors and their allies have forced the sugar and pig-iron industries to eliminate unnecessary intermediaries and thus they have helped flatten / integrate these supply chains. Prosecutors have also encouraged pig-iron smelters that formerly cared only about quantity (or weight) of charcoal to start caring about the quality of their inputs. Once they were forced to dispose of their refuse in an environmentally sound (and somewhat expensive) way, granite quarries in Santo Antonio de Padua started caring about decreasing overall wastage, and started transforming granite fragments that they discarded as rubbish into marketable gravel. Shrimp farmers, which are prone to a variant of the tragedy of the commons, could have prevented the onset of harmful diseases if there had been more regulation. And in all cases, sudden upsurge of

[95] I thank my friend Jason Jay for this insight and formulation

regulatory enforcement has prompted targeted firms to create and/or revive their business association, which then moved on to tackle other matters of collective concern.

Some may dismiss this kind of innovative action by a law enforcement official as a matter of individual proclivity. One could say that, in any large group, some people will be too energetic, too enthusiastic, too creative, too committed to be bound by prevailing structures and conventions. According to this view, the prosecutors that I have been studying are exceptions and therefore there is not much one can learn from them. Of course, I disagree, and the data I have collected during my fieldwork suggests that this problem-solving behavior is not an exception, but produced in a systematic (even if backhanded and somewhat disguised) way by the organization. In other words, this mode of operation is rooted in an organization, emerges from an organization, and survives and is carried along within an organization. The next two chapters examine this system to understand how this practice emerged and to identify the formal and informal organizational features of the *Ministério Público* that allow for it to exist and thrive.

3 – THE MAKING OF THE NEW MINISTÉRIO PÚBLICO: A REASSESSMENT

The previous chapter identified a modus operandi – which I termed "stitching solutions together" – that differs significantly from other regulatory enforcement styles and strategies described in the literature (see Chapter One for a literature review). Regulators who engage in "stitching" do not limit themselves to adversarial or conciliatory approaches. Likewise, they are not restricted to engaging with one enterprise at a time and in the absence of other mediating variables or institutions. Instead, these agents mobilize a variety of institutional actors to change the environment in which the regulated enterprise operates so as to make compliance feasible, even desirable, for all involved.

As the case studies described in Chapter Two illustrate, this type of action is labor-intensive, information-intensive, context-specific, and exceedingly risky. To engage in 'stitching' prosecutors must leave their desks, learn about technical (non-legal) minutiae of the industries being regulated, participate in numerous meetings and negotiations, and openly engage with politically-charged themes while being subject to the critical scrutiny of the public and the press. And, of course, there is no assurance that their effort will pay off in the end.

Naturally, it is not the case that all prosecutors, on all occasions, engage in "stitching." In fact, the majority of the time, most Brazilian prosecutors are likely to stay within the typical bounds of the profession and simply indict-and-move-on. So then why do some prosecutors on certain occasions take the difficult and risky task of stitching a solution together? Personal preferences probably play a role, but the behavior of prosecutors is eminently an organizational phenomenon. In other words, this modus operandi emerges from, subsists, and roots itself in an

organization. To understand what prosecutors do and why they do it, we must examine the organizational setting in which they operate.

This chapter examines the recent history of the MP. It aims to explain how the organization became what it currently is, and why the MP adopts certain policies, incentives, structures, and constraints but not others. The trajectory of the MP is quite remarkable. Until the 1980s, prosecutors were subordinate and the agency was prone to political meddling. Nowadays, prosecutors are mature professionals and the MP is so influential that some analysts place it next to the Executive, Legislative and Judiciary as the "fourth sphere of government". Different from the prevailing history that emphasizes continuity and implies internal harmony and cohesion, I suggest that the MP that exists today was forged through internal struggles, the introduction of a disruptive institutional innovation, and a subsequent compromise. Ultimately, this portrayal allows for a better understanding of a consequential mismatch: while prosecutors have acquired powerful legal tools and embraced ambitious goals, they have also housed themselves in an organization whose formal and explicit features encourage a narrow, reactive, and conservative case-by-case approach.

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A methodological note: this chapter describes the history of the Sao Paulo (SP) branch of the *Ministério Público*, and portrays the history of the larger MP as seen from SP. It is based on my interviews with prosecutors; transcripts of interviews conducted by others and made available by the *Memorial do Ministério Público* from Rio Grande do Sul; and a range of papers, books, and pamphlets written by prosecutors throughout the 1980s and 1990s, mostly for internal circulation.

3.1 - The first wave of transformation

For most of their history, Brazilian prosecutors were low-status civil servants, and technically bureaucrats. Governors appointed, transferred, promoted, and assigned prosecutors based on political convenience. The head of the procuracy, nominated by the governor, often used the powers of the office to tell prosecutors how to decide on their various cases and which arguments to use. Judges checked on prosecutors' attendance in court. There was no clear career path, i.e. a junior but well-connected prosecutor could leapfrog a more senior colleague. And prosecutors themselves, who were allowed to act as private lawyers on the side and were also responsible for prosecuting tax evasion, continuously jostled with one another for the most desirable posts within the organization.

As is common in these cases, prosecutors wanted to increase their profile and become professionals (Starr 1984). There are two different accounts on how this happened. One account, brought up by Rogerio Arantes (2002), is that prosecutors benefited from the Brazilian dictatorship's desire to keep a semblance of democratic order. Throughout its existence (1964 to 1985), this regime allowed for elections for minor posts throughout the country. To keep wayward politicians and activists from causing trouble, the dictatorship empowered the *Ministério Público* to challenge the legality of local laws and to crack down on cases of subversion, petty corruption, and other crimes. Thanks to this (admittedly not always friendly) collaboration between the dictatorship and the MP, prosecutors gradually acquired the higher status and the professional prerogatives that they had always wanted.

The other account, advanced by prosecutors themselves and favored by Rogerio Arantes (2002), is that prosecutors gradually pursued judge-like functions with an eye towards accruing

judge-like privileges. As explained by a prosecutor: "*We wanted the same rights and prerogatives as judges, so we strived to acquire the same functions as judges.*"[96] In practice, they lobbied for, and acquired the right to be, *custos legis* defending the *hipossuficientes*. At first, I had some difficulty understanding what it meant for a prosecutor to fulfill this duty. Prosecutors speak about it with certain reverence and explain that the Latin term "*custos legis*" means "custodian of the law." Prosecutors seem to take pride in how they protect those who are "less than able" to protect themselves. Still, I could not understand what these prosecutors actually did, and how, in an adversarial legal system, they could guard the law when judges were the ones deciding on disputes between private parties.

According to the account advanced by prosecutors themselves, the MP has been intermittently engaged in *custos legis* since at least 1871 when prosecutors were given the duty to ensure, as determined by the *Lei do Ventre Livre,* that the offspring of enslaved individuals would not be enslaved themselves (Macedo 1999). However, it was in 1973, when Brazil enacted a new code of civil procedure (*Código de Processo Civil*), that prosecutors formally and unambiguously acquired the right and duty to act as *custos legis*.

In practice, this means that the prosecutors would write non-binding *amicus curiae* briefs (suggestions on how a judge should decide a case) whenever a dispute involved someone deemed "less than able" to protect himself or herself, such as orphans, widows, the legally insane, indigenous people, and others, as determined by law. This task was inconsequential but convenient and quite agreeable. Prosecutors assigned to *custos legis* spent their days writing briefs and discussing jurisprudence and legal philosophy, they interacted with judges on a daily

[96] "Faziamos isso porque o MP queria fortalecer-se, queria equiparacao com o Judiciario, entao buscava atribuicoe tipicas do Judiciario".

basis, had legal interns and law clerks to help out, and could work in their own personal schedules, sometimes even from home. It was a great job. As stated by one prosecutor:

> *"To act as 'guardian of the law' conferred very high status to prosecutors. Those individuals interacted with respected private lawyers and handled interesting legal matters in a variety of topics. Colleagues looked up to them."*[97]

Even better, the prosecutors' tag-along plan seemed to be working, and by the early 1980s prosecutors affiliated with MPSP had plenty of professional prerogatives. They were admitted through an entrance exam and were allowed to decide cases based on their best legal reasoning (*independencia funcional*); the head prosecutor was selected from within the ranks of the agency; the MP decided on its own internal policies and organization; and prosecutors commanded a relatively high salary.

Still, progress had been uneven across the states, and corporatist advances in any given state could be rolled back by unfavorable federal laws. Moreover, prosecutors were not conspicuous actors in the Brazilian public scene. They were not in the headlines, were not powerbrokers, and did not engage in policy-making. During the 1980s, this situation changed radically and prosecutors both consolidated their professional status (there is even a chapter devoted to this in Brazil's Constitution) and became protagonists in a series of public debates and controversies throughout the country.

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[97] "Atuava como fiscal da lei, e isso dava status. Por exemplo, falencia. O promotor interagia com advogados importantes, tratava de questoes juridicas bonitas, e lidava com assuntos variados."

3.2 - A second wave of transformation

According to prosecutors and Brazilian scholars, the MP as it exists today is the product of a single, continuous, and self-initiated process of reform. As posited by Rogerio Arantes (2002, p.30), "*the institutional reconstruction of the MP should be seen as the history of the gradual expansion of its ability to intervene in civil cases*".[98] This account performs some obvious functions, i.e. it helps explain MP's power, independence, esprit de corps, and even its grand mission. It implies that the *Ministério Público* is internally homogeneous and coherent; that all prosecutors share the same vision, agree on how this mission should be pursued, and that all the pieces of the organization fit together nicely. However, my examinations of the organization suggests otherwise.

Like most public sector organizations, the MP is riddled with internal strife and is anything but coherent. It is true that prosecutors often refer to themselves as *members of a family* and regularly say that they are all *in the same boat*. Still, on many occasions their metaphors suggest the existence of tension which is demonstrated when they say that the MP is like a *cortiço* (a tenement), in which gossip is a way of life and squabbles abound. In public, prosecutors emphasize their shared destiny and public mission, but in private they claim that many colleagues are lazy and avoid hard work at all costs. As stated by a senior prosecutor:

> "*One of the biggest problems faced by the MP, and the courts, is indolence [vagabundagem]. It is an ugly word, but it is true. The majority simply avoids any*

[98] "A história da reconstrução institucional do MP deve ser vista como uma história da ampliação das hipóteses de atuação no processo civil"

hard work and does as little as possible. Most prosecutors are mediocre; neither good nor bad, just acceptable."[99]

"*As my grandmother used to say, is he your friend? So inherit property together, and then we will see whether you are friends. Or, as stated by a colleague of ours, the Ministério Público is like a big family: plenty of obnoxious in-laws*".[100]

To account for these apparent idiosyncrasies, I suggest a different story of institutional transformation, one that emphasizes disagreements, disruption, and culminates with an uneasy (and temporary) compromise between the conservative and reformist wings of the *Ministério Público.*

The emergence of a reformist wing

During the 1970s and 1980s, Brazil embarked on a gradual process of democratization. During those years, environmental concerns rose in prominence, the central government decreased its repressive activities and started lifting the censorship of the press, and a range of civil society groups, including NGOs, unions, and church groups started to emerge throughout the country. At the same time, some prosecutors were becoming frustrated with their traditional tasks. One prosecutor explained, "*We used to write briefs, file motions, and engage exclusively with the courts. Formal judicial proceedings were our alpha and omega, but we achieved little or nothing.*"[101] Prosecutors wanted to do more, and were actively looking for ways to be more engaged and proactive. An opportunity arose in 1984 when a barge spilled a large quantity of oil off the coast of Sao Paulo. As reported by a local newspaper at the time:

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[99] "Um dos maiores problemas do MP, e da magistratura, é a vagabundagem! A palavra é feia, mas é verdade! A maior parte quer se livrar do servico e fazer o minimo possivel. Maior parte é mediocre. Nao é bom, nao é ruim. Apenas passavel."

[100] "Como dizia a minha avó, é seu amigo? Herda junto [i.e. discute divisão de herança] para ver se é seu amigo mesmo". "Ou, como dizia o Marcos Ribeiro, o MP é uma grande família, mas tem cada cunhado !"

[101] "Era atuacao juridical formal, que esgotava-se nos autos. O negocio do procurador era processo e audiencia, um parecerismo"

"This past Monday another ecological disaster shocked our shore: 550 tons of oil leaked from the Gisela barge ("Barcaça Gisela") and contaminated the already polluted estuary. Fire, panic, losses, and dead fish everywhere. The mangroves were gravely hit, and local fishermen fear for the bleak, pitch-black future that lies ahead for them."[102]

The head of the *Ministério Público* (MPSP) at the time, Paulo Frontini, asked two of his prosecutors to examine how the MP could bring this case to the courts. The urgency was clear and the "*locality was already incredibly polluted and the environmental agency could only impose insignificant administrative fines.*" Prosecutors had no precedent to guide them, and legal provisions authorizing them to intervene were scant. In response, prosecutors improvised. As explained by one of these officials:

"*We did not have subpoena powers for civil cases yet (inquérito civil) so we started a criminal inquiry (inquérito criminal). And then, once we had gathered the data, we based our claim to jurisdiction on an environmental law that had just been passed in 1981. To our satisfaction, it worked.*"[103]

From that moment on, progress was swift. In 1985, these same prosecutors created a formal unit within the MP devoted to pursuing environmental cases. In that same year, these prosecutors partnered with a budding environmental NGO named Oikos to sue 23 large petrochemical plants for polluting the municipality of Cubatão which *"was a big deal. It was an*

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[102] "Segunda-feira passada um desastre ecológico chocou toda a Baixada. Foram 550 toneladas de óleo que vazaram da barcaça Gisela e contaminaram o já poluído estuário. Incêndio, pânico, prejuízos e peixes morrendo em vários pontos. Os manguezais atingidos seriamente e os pescadores artesanais temerosos diante de um futuro cada vez mais negro. Literalmente negro." Published in *A Tribuna* em 16 de setembro de 1984, available at http://www.novomilenio.inf.br/cubatao/ch103.htm

[103] "O primeiro caso foi derrame de óleo no litoral, o caso da barcaça Gisela. Até então, não havia recuro judicial, a única punição eram multas administrativas de valor irrisório. O PGJ, Paulo Frontini, pediu caminhos jurídicos para levar isso ao Judiciário. Baseamos nossa acao na lei da politica nacional do meio-ambiente, que exigia a reparacao do dano mesmo que nao houvesse culpa e começamos a usar instrumentos classicos do processo civil. Nao havia inquérito civil ainda, entao usamos inquerito criminal. Propusemos uma acao de responsabilidade, e tivemos sucesso. Os promotores envolvidos e propuseram a criacao do Nucleo de meio Ambiente, com o apoio dos processualistas"

immense and complex lawsuit, and the law creating the public action suit had not even been passed yet."[104]

Towards the end of 1985, and thanks to an intense lobbying effort by the MP, the Brazilian Congress passed a law creating a new legal instrument: the *Public Civil Action* Law (*Lei da Ação Civil Pública - ACP*). Drafted by prosecutors, this law empowered certain public and private institutions, including the MP, to sue on behalf of a variety of societal interests, including environmental preservation (Gidi 2003). The creation of this instrument was a major boost for the reformist prosecutors. According to one member of this group, *"the MP was already at the forefront of important public debates, and the public civil action law multiplied our impetus and propelled us forward."*[105] Several colleagues concurred: *"from then on, progress was swift and steep. We were on the cutting edge, trial judges were deciding most cases in our favor, and there were lots of positive feedback."*[106] They continued, *"Anything we did landed us in the headlines, everybody was paying attention, and success was latent and obvious."*[107]

These prosecutors had invented something truly new and powerful. In their own words, they claimed that *"the MP has changed: from working exclusively through judicial proceedings, the institution is now responsible for finding solutions to the many problems within its purview."*[108] Ultimately, the MP was becoming a regulator-of-last-resort, arbiter of all kinds of public disputes, and the gatekeeper of the judicial system for a wide range of societal interests.

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[104] "Em 1985, com o apoio da ONG Oikos, fundada por Fábio Feldman, iniciamos acao contra 23 empresas em Cubatão. Essa ação foi marcante pelo tamanho, e ainda nem existia a ACP."
[105] A Lei de ACPs deu ainda mais força ao MP, que já era ponta de lança
[106] A partir dai, explodiu. Era um setor de ponta, dava repercussão, os juizes de primeira instância estavam acatando muita coisa.
[107] "Qualquer ação dava 1ª página no jornal, o sucesso era óbvio e latente"
[108] "O MP, assim, que antes esgotava sua atuacao numa atividade puramente processual, passa a assumer a responsabilidade pela solucao (nao necessariamente processual, nem mesmo judicial) dos problemas e questoes de

Still, many prosecutors did not agree that the institution should engage in this type of innovative, pro-active, and pragmatic problem-solving. Luiz Antonio Marrey, a prominent prosecutor from SP explained:

> *"The first time this idea came up, that the MP should be a defender of democracy, was at a meeting organized by the Sao Paulo Prosecutors' Association, in 1981 or 1982. A prosecutor, who is now a Justice at the Supreme Court, suggested it, and our more conservative colleagues reacted badly. They said: 'this sounds like an institution fit for Cuba or the Soviet Union!' The idea was not well-received, and at that time there was a lot of disagreement."*[109]

Antonio Viscontti, who participated in these events, adds to this account:

> *"We held a meeting at the Prosecutors' Association, and someone suggested that the MP claim, as part of its enabling legislation, that it was the guardian of the democratic order. We voted on this proposal and it was a tie, either 47 to 47, or 37 to 37, I am not sure. So the head of the association had to step in, and he voted for it. That is how this motion got approved. The division within the MP was deep, and many prosecutors still clung to a traditional vision, in which the institution was linked to the state."*[110]

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sua alcada. Em outras palavras, assume a responsabilidade pela defesa direta e imediata dos interesses confiados a sua tutela" Ferraz and Lopes Junior, 1992

[109] "...A primeira vez que se ouviu, aqui em São Paulo, pelo menos, a idéia de um Ministério Público defensor do regime democrático, foi em uma assembléia da Associação bastante agitada, em que o então promotor de Justiça e hoje Ministro do Supremo, José Celso de Melo Filho, inspirado no texto da Constituição Portuguesa, propôs que defendêssemos a idéia de um Ministério Público defensor da legalidade democrática, isso, pelo que me recordo, foi no ano de 1981 ou 1982. É curioso, porque me recordo que a essa idéia, houve uma reação de colegas mais conservadores que diziam: "Isso é coisa de Cuba, da União Soviética", para mostrar o clima em que se vivia." Luiz Antonio Marrey, transcript

[110] "Então, os assuntos começaram a se desviar e, lá pelas tantas, o grupo traz (a Liliana Buff de Souza e Silva e o Cláudio Brocchetto Filho eram os primeiros signatários, conforme a ata) a proposta de que o Ministério Público passasse a pleitear na sua legislação a condição de guardião da legalidade democrática. Essa proposta empatou 37 a 37, ou 47 a 47, quem presidia a assembléia era o presidente da Associação, o Cláudio Alvarenga, que desempatou pelo voto de Minerva, favoravelmente à proposta. Havia uma divisão muito grande, ou seja, o Ministério Público estava mais ou menos na sua linha tradicional, ligado ao poder." Antonio Viscontti, transcript

Forging an internal compromise

To move forward and continue raising the profile of the organization, prosecutors of different persuasions and with different preferences regarding the future of the organization would have to find some common ground among themselves. By the mid 1980s, Brazil was getting ready to shed two decades of military dictatorship and transition back into democracy. The landmark event would be the drafting and adoption of a new Constitution, scheduled for 1988. All kinds of lobbies and groups had been mobilizing to try to influence this important document, and prosecutors were no exception. They had already achieved various victories in their struggle to increase their professional status, but progress had been uneven across the states. To move forward, and to ensure that advances could not be easily rolled back, they would have to create a unified front and strive to include some of their desired prerogatives in higher laws- preferably the Constitution itself. Naturally, this kind of achievement required a lot of ground work. One leader of the movement described:

> *"Our demands were not easy, and each Ministério Público had its own representatives in Congress. If the MPs had been divided, we would not have achieved anything. It was crucial that we arrive at the Constitutional Convention with a united front, and we started to put it together during the early 1980s. It was very tough. At that time, the MPs were very different from each other. We held endless meetings and national conventions; we tried many different approaches, and engaged in plenty of give-and-take."*[111]

[111] As demandas nao eram faceis e cada MP tinha sua propria delegacao. Se estivessemos divididos, seria impossivel conseguir o que queriamos. Precisavamos que o MP chegasse na constituinte com um discurso unificado, e isso comecou no inicio dos anos 1980. Foi bem dificil. Naquele momento, os MPEs eram muito distintos. No RJ eles advogavam, e o governador nomeava o chefe de livre escolha. Fizemos muitas reunioes, Congressos Nacionais, tivemos muitas experiencias fracassadas ate chegar na carta de Curitiba. Mas a partir dai, foi embora, o MP conseguiu tudo o que queria, foi o lobby mais bem sucedido da Constituinte

There were many hurdles to overcome, and internal disagreements that needed to be patched over. In certain states, prosecutors were allowed to act as private lawyers and they wanted to retain this privilege. In other states (and at the federal level), they were responsible not only for prosecuting common crimes but also for defending the government against civil suits and for collecting taxes, and they also wanted to retain these assignments. And then, while prosecutors wanted to achieve parity with judges, they also strived to prevent police chiefs (i.e. *delegados*) from tagging along and weighing down the prosecutors. Several congressmen were also debating whether Brazil should have an Ombudsman's Office to defend the public interest, while others suggested that this function should be assigned to an existing institution, such as the MP.

Amidst this maze of conflicting and overlapping interests, reformist prosecutors soon realized that to advance their claims, they would have to bring their colleagues on board. Prosecutors downplayed the novelty of this invention and recast it as if it was a natural extension of what preceded:

> *"...there is no surprise that we are defending society; the MP has been a protector of society since the inception of the organization. That is why criminal accusation is an exclusive prerogative of prosecutors and not of the victim."*[112]

The claim that the MP was a defender of society allowed prosecutors to distance themselves from a discredited state and to side with the soon-to-be empowered civil society. As shown by Fabio Kerche (2007), the prevailing trend of the time was one of devolution, or the assigning of public functions to entities outside of the state. Prosecutors recognized this historical opportunity and positioned themselves accordingly. More precisely, they started to assert that

[112] "...Nao ha nada ai de surpreender, pois é em nome dos interesses indisponíveis da sociedade que a ação penal nao foi deixada ao arbitrio da vitima e foi confiada ao MP" Frontini et al 1985

"*the Brazilian state has failed its mission ... [therefore] the MP must detach itself from government and defend society, particularly against the failings of the state itself.*"[113] More forcefully, they claimed that "*the MP is the armed wing of society, located within the state but directed against it.*"[114]

Eventually, all prosecutors realized that the reformists had developed a powerful weapon that could help the whole class achieve the recognition and status that they had always wanted. As stated by a leader of the reformist prosecutors: "*the public civil action law worked so well that we did not even have time to think; it was like a wildfire, it was being adopted everywhere.*"[115] And another leader concurs: "*at that time, the image of the MP was very favorable, and our success defending societal interests opened the doors for our subsequent legislative victories during the Constitutional Convention of 1988.*"[116]

In the end, the MP achieved its united front, took advantage of this historic opportunity, and succeeded majestically: "*we formally reached consensus on how to move forward at a meeting in Curitiba, in 1986. From then on, we scored several victories, and during the Constitutional Convention we achieved all our goals, the MP ended up being the most powerful lobby within Congress at that time.*"

The prosecutors' streak of Legislative successes continued for a few more years, and their legal powers grew considerably. By the early 1990s, prosecutors had clear legal authority to

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[113] "No Brasil, o poder publico nao vem cumprindo sua finalidade... o Mp devera efetuar a defesa do interesse social, sobretudo em face da propria administracao publica... essa circumstancia acabou por determinar...a necessidade da evolucao do MP no sentido do seu distanciamento do poder executivo" Ferraz 1992

[114] "O MP é um braco armado da sociedade contra o Estado, inserido dentro do proprio aparelho estatal" Antonio Araldo Ferraz dal Pozzo, cited by Ferraz & Guimaraes Jr 1992

[115] "Em 3 anos, a Lei da ACP de 1985 deu tao certo que nao deu tempo nem de pensar, ja foi adotada na hora"

[116] A imagem do MP era muito favoravel, e o sucesso dessa atuacao em interesses difusos abriu o caminho para o sucesso que tivemos na constituinte de 1988.

protect individuals with disabilities (Lei 7.853/1989); small investors (Lei 7.913/1989); children and youth (Lei 8.069/1990); consumers (Lei 8.078/1990); and to prosecute alleged cases of public-sector corruption and administrative malfeasance.

3.3 – Stunted reform

Prosecutors were ecstatic with their accomplishments, but the members of the reformist group recognized that new laws would not produce concrete results unless they were backed by an appropriate organizational structure. In this context, they started advocating for additional reforms, and their first move was to reject the view, long-accepted and often-repeated by prosecutors of all stripes, that the Brazilian MP traced its roots to ancient times. According to the reformists:

> *"The correct interpretation of MP's social function has nothing to do with tracing our professional roots to the King's Lawyers (avocats du roi) in Medieval France. This lineage may explain our administrative origins, but sheds no light on the functions that the MP will perform next."*[117]

And then, they stated that their previous strategy – to be like judges – had run its course:

> *"For many years we insisted that prosecutors are like judges and thus should be treated like judges. This strategy worked fine, but it has also produced a regrettable side-effect: it steered the Procuracy into becoming a mirror-image of the Judiciary, with similar administrative structures, career paths, and internal policies. In the end, it robbed us of our soul."*[118]

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[117] *"A correta exegese da funcao social do MP dispensa maiores preocupacoes em situar a origem do orgao em meio aos procuradores do rei. Essa pode ser a genese administrativa do orgao, irrelevante porem para compreensao de sua atual estatura politica"* Paulo Frontini et al, 1985

[118] "...estrategia de crescimento consistente em afirmar um perfil de semelhanca e equiparacao a Magistratura. Essa era, certamente, a estratégia possivel e mais adequada para aquele periodo histórico (tanto que atingiu satisfatoriamente sues objetivos), embora tenha apresentado um grave inconveniente: a assemelhacao ao Poder

Reformist prosecutors were dissatisfied that, like judges, members of the MP were trained and encouraged to be reactive, formalistic, and tackle one case at a time, preferably in the order in which they come in. In atypical straight language, they voiced their concern: "*for want of a proper organizational structure, the MP seems destined to squander the ambitious mission assigned to it by the Constitution.*"[119] The institution urgently needed a new structure: "*the only solution is for the MP to conduct an unrestrained process of organizational overhaul.*"[120]

In practical terms, reformist prosecutors wanted an organization that helped its members identify and understand important problems and solve them. In this sense, they were following Malcolm Sparrow's (2000) lesson for all regulators. To this end, prosecutors wanted databases, support staff, personnel devoted to planning and evaluation, the development of performance indicators, merit-based pay, and that prosecutors find ways to work collaboratively with their colleagues to address problems that cut across their respective jurisdictions. In their view, these reforms were within reach, and "*the transition to the new model could be fast and easy, even if outcomes are profound (and positive).*"[121]

In the document: "*A new management model for the Ministério Público*" (Ferraz et al, 2003), reformist prosecutors presented a step-by-step plan on how the MP could be converted into a problem-solving organization (see chart below). In essence, they proposed that the MP shed superfluous functions (such as the writing of non-binding *amicus* briefs) and use the newly

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Judiciario, que se refletiu em sua organizacao administrativa e de carreira, em sua postura funcional, na natureza de suas atribuicoes, provocou um fenomeno que se poderia chamar de despersonalizacao do MP"

[119] "O MP, por falta de um sistema adequado de engenharia politica e organizacional, caminha, inexoravelmente, para a inviabilidade pratica do avancado perfil institucional previsto na Constituicao da Republica" Ferraz et al 2003

[120] "A unica solucao parece residir na profunda alteracao do modelo de gestao administrativa em vigor, que aqui designamos reengenharia institucional" Ferraz et al 2003

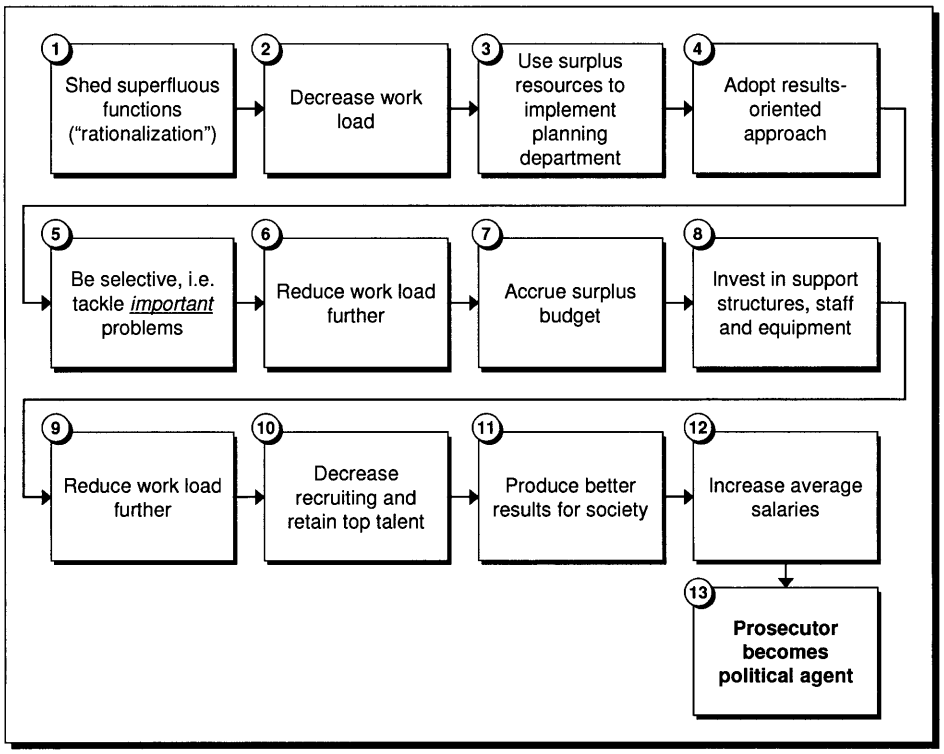
[121] "A transição do atual para o novo modelo de gestão poderia ser feita de modo extremamente rápido e simples, ainda que venha a produzir profundas (e positivas) alterações no MP." Ferraz et al 2003

available resources to produce concrete results. And these results would free even more resources that would allow prosecutors to produce even more results. In their words:

> *"It is imperative that we ration our services. Not only to reduce the excessive and inhuman workload to which most prosecutors are subjected to, but also to create some surplus capacity that can be put to better use in other assignments"*[122]
> (Cosenzo, 2002)

Ultimately, they were suggesting that the MP adopts continuous process improvement, i.e. that it operates on a *work-smarter* mode, as described by Repenning and Stearman (2001).

Chart 3.1 – Steps to implement the proposed management model



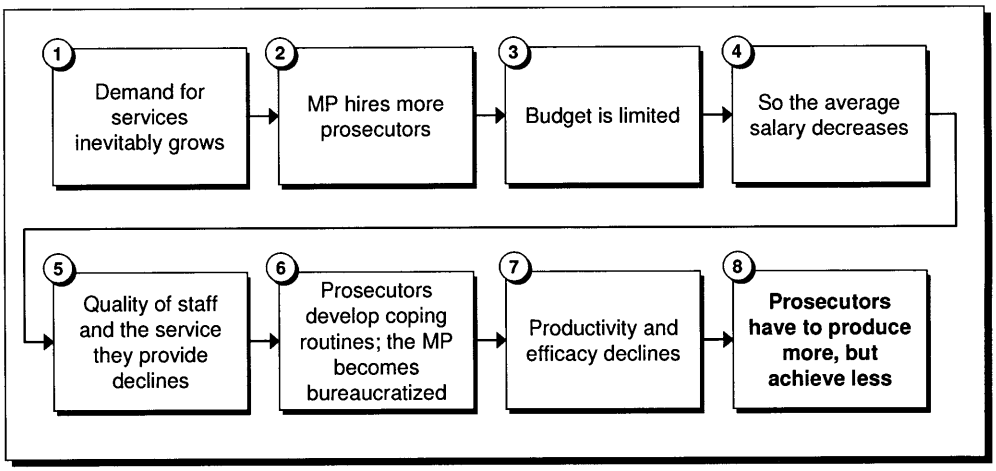
Source: Translated from Ferraz et al 2003

At the same time, reformist prosecutors feared that the organization would embark on a different route. In their own words, *"either the MP will act selectively, or it will become another*

[122] "É impositiva a racionalização dos serviços, nao apenas para reduzir a carga excessive e desumana a que estão sendo submetidos a maioria dos membros da Instituição, mas também para criar possibilidades de aproveitamento em outros setores, daqueles cujos serviços foram reduzidos racionalmente" Cosenzo, 2002

bureaucracy."[123] In plain terms, and tacitly following Lipsky (1980), they were afraid that prosecutors would be overwhelmed by a demand for services that was much larger than what they could supply. If this happened, prosecutors would adopt pre-established routines, stereotypes, and other coping devices, start acting reactively, and entangle themselves and others in a maze of legal formalities. Reformist prosecutors were afraid that the MP would fall victim to what Michael Lipsky (1980) described as the fate of all street-level bureaucracies. They even drew a chart that illustrates this vicious cycle, reproduced below:

Chart 3.2 – The Vicious Circle



Source: Translated from Ferraz et al 2003

The alliance falls apart

By the early 1990s, reformist prosecutors were trying to steer the organization towards a virtuous cycle, as indicated in chart 3.1 above. At the same time, they wanted to avoid falling prey to a vicious cycle, in which an ever growing demand for services would force prosecutors to keep their heads down, concentrate on legal technicalities, and ultimately be unable to pursue the goals they wanted to achieve, as indicated on chart 3.2 above.

[123] "Ou atua de forma seletiva, ou burocratiza".

Yet, to steer the organization was easier said than done. The group of prosecutors who had successfully lobbied the Constitutional Convention had disbanded, and the temporary alliance between committed reformists and the rest of the organization came apart. Luiz Antonio Fleury, the head of CONAMP (the national prosecutors' association) during the Constitutional Convention left the MP to be the Secretary of Justice for Sao Paulo State, and was subsequently elected governor himself. He brought several prominent prosecutors to work with him in the government.

The prosecutors who had helped invent the public civil action and were committed into transforming the MP into a relevant problem-solving organization tried to occupy prominent positions with the MP itself, but were unable to achieve much. Without strong support from the top, internal opposition grew and prevented further change. One of the leaders of this group described his surprise when colleagues rebuffed their proposal:

> *"Our idea was for the MP not to be everywhere and do everything for everybody. We wanted to intervene only in those problems that are truly important. You should have seen the resistance! João Lopes presented this idea in an Annual Congress and was almost booed from the stage. He felt like he was coming down the wrong way in a one-way street, suggesting that we decrease our scope of action when everybody wanted to increase it."*[124]

The leaders of this reformist movement ended up taking refuge in the research department (*Departamento de Estudos Institucionais*) of the Sao Paulo Prosecutors' Association (APMP), and over the past several years they have published a number of studies defending their position. They have scored a few victories (for instance, the MPSP has scaled down its *custos*

[124] "A ideia era nao atuar em tudo, so no que importa. Mas houve uma resistência enorme. O Joao Lopes apresentou essa tese no Congresso e foi apedrejado, ele sugeriu que reduzissemos o escopo de atuação enquanto todos queriam aumentar o escopo"

legis role), but in their view, their worst fears have come true: "*in the end, the MP became a bureaucracy*" [125], and this means that it became an organization overwhelmed by paperwork, simplifying routines and stereotypes, manned by unmotivated officials, and in which means have replaced legitimate ends.

Indeed, this is the picture painted by many observers of the MP. One federal prosecutor based in Sao Paulo depicts the state-level Sao Paulo MP as "*conservative, sluggish, bureaucratized, and gigantic.*"[126] And he is not alone. At a training held for new prosecutors in Sao Paulo, newly-hired officials were being instructed on the different forms that they had to complete, the departments to which each of these documents had to be sent, and how the various carbon copies should be archived. Being an ethnographer, I was taking careful notes of everything and at the end of the day several junior prosecutors approached me to say, half-jokingly, that they were so overwhelmed with the paperwork that they would call me to ask for help to fill out all those documents. One went so far as to complain that "*all the interesting work will be done by my interns while I will be busy handling the red tape.*"[127] An experienced prosecutor concurs: "*the MP still has a lot of credibility, but from within you can see that we achieve less than 10% of the goals we set out to achieve, and this is very disheartening.*"[128]

Despite all this criticism, there is much more to the MP than red tape. As indicated on Chapter Two, some prosecutors, in some occasions, depart from business-as-usual and take extraordinary action to identify important problems and to strive to solve them. Even more important, this kind of action is not a fluke or the sole and isolated initiative of a few unusual

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[125] "No fim, acabou acontecendo a burocratização"
[126] "O MPSP é, de forma geral, conservador, lento, burocratizado, e enorme - sao mais de 2000 promotores em SP, com 900 no MPF no Brasil inteiro"
[127] "Trabalho mesmo de promotor são os estagiários que vão fazer! Nós vamos cuidar da burocracia".
[128] "O MP tem credibilidade, mas de dentro dá para ver que conseguimos menos de 10% dos resultados almejados, dá um desalento"

individuals. As I argue on Chapter 4, both types of behavior – the conservative, formalistic, and reactive case-by-case, and the proactive, pragmatic, and creative 'stitching solutions together' – are rooted in and emerge from an organization that purposefully generates them.

3.4 – A mismatched organization

In this chapter, I challenge the existing account on how the MP evolved into its current form. Throughout most of the 20th century, the MP was a subordinate organization with a limited scope of action. Prosecutors were mostly bureaucrats, who did the billing of those occupying the states' governorships or the country's presidency. For many decades, prosecutors strived to raise the profile of their organization and to become professionals; they wanted to be able to exercise their best legal opinion independently of the opinion of others. Success came mostly during the 1980s. Throughout that decade, prosecutors accumulated a series of legislative victories that increased their powers and transformed them into true professionals.

The prevailing account – advanced by prosecutors and a range of Brazilian scholars – suggests that this march had started many years, even decades, back. Over time, prosecutors invoked the attribution to write non-binding legal opinions on a variety of cases involving *hipossuficientes*: individuals less-than-able to protect themselves, such as orphans, widows, and the legally insane. As prosecutors accumulated this judge-like function, they also acquired judge-like privileges. During the 1980s, prosecutors then expanded their scope of action even more. Instead of representing only individuals, they started to represent whole segments of society, such as consumers, children and youth, and those affected by environmental degradation. Together with this move, a continuation of what came before, the MP transformed from an entity of the state to an entity of civil society.

This account explains both the upward trajectory adopted by the MP and the unified external front presented by the organization. Moreover, it provides prosecutors with a shared language and a shared sense of mission. This is crucial insofar as the organization remains engaged in a constant and bitter fight to prevent its advances from being rolled back. Less visibly, the MP remains engaged in a fight to prevent potential challengers, such as a Public Defenders' Office, to rise up and dilute MP's powers. In fact, CONAMP, the prosecutors association, is based in Brasilia and devotes itself to lobbying Congress on behalf of the prosecutorial class.

Yet, the prevailing account of transformation fails on two important counts. First, prosecutors may present a unified external face, but behind this curtain lays some degree of animosity and heated internal disputes. And second, while prosecutors are proud of their lofty mission, they have housed themselves in an organization that favors reactive, conservative, and formalistic case-by-case behavior. To explain these apparent paradoxes, I interviewed prosecutors, read many of the papers, pamphlets, and books that they have written, and ended up seeing a different story of transformation than the one that prosecutors so eagerly repeat.

During the late 1970s and early 1980 a group of reformist prosecutors emerged and proposed something truly new: instead of confining themselves to staying behind their desks, reacting to crimes and other violations that had already occurred, and handling one case at a time, prosecutors started to leave their offices in an attempt to identify important societal problems and solve them. This type of initiative had an immediate impact, and was adopted by many prosecutors throughout the country. Yet, others within the organization disagreed that this was a suitable way for prosecutors to act. Eventually, these two camps reached a compromise. They started downplaying the claim that the MP would be a self-propelled and pragmatic

problem-solver, and that it could act through established Judicial channels and also negotiate settlements on the side. Instead, prosecutors started claiming that this new type of action – to protect society – was a natural continuation of the old "*custos legis.*" This discourse helped unify the prosecutors around a common cause, and ultimately allowed them to achieve an impressive streak of legislative victories. By the early 1990s, prosecutors had increased their powers and jurisdiction, and their professional privileges were guaranteed by a chapter in the Constitution.

Reformist prosecutors were aware that laws are translated into action through organizations. Once the laws had been passed, these prosecutors started advocating that the organization had to be overhauled. In their view, the organization was at a crucial crossroad: either the MP acted selectively, i.e. shed some minor functions so it could divert resources to the areas with larger social impact, or the MP would become, in their words, "another bureaucracy", meaning an organization concerned with means and that pursues no discernible end. To the reformists' dismay, the internal alliance that had propelled them to their legislative victories fell apart and the MP ended up not adopting the organizational structures and policies that would allow and encourage prosecutors to pursue their grand goal.

In the end, the process of transformation gave prosecutors imposing ambitions and many of the powerful legal tools they needed to find important problems and solve them. Yet it did not provide them with the incentives or information to do so with success. At present, the reformists are disillusioned and admit that they have failed. Indeed, this pessimistic outlook finds resonance in the literature. First, the fact that the MP became "another bureaucracy" confirms Michael Lipsky's (1980) prediction that street-level bureaucracies are inevitably overwhelmed by a demand for services that is much larger than what the officials can supply. In response, prosecutors adopt coping routines and end up concerning themselves with irrelevant means while

forgetting the valuable ends. Second, this outcome also resonates with Repening and Stearman's (2001) prediction that organizations operate *either* in what they call the 'work-harder loop', *or* in the 'work-smarter loop.' This outcome confirms a problem originally identified by Mauro Cappelletti in 1975 (as cited by Arantes 2002). Cappelletti listed three main reasons why procuracies should not be responsible for protecting collective interests. First, they tend to be mirror-images of the courts and thus they lack the necessary dynamism to defend collective causes. Second, procuracies tend to be too closely linked to the state – a frequent infringer of collective rights – and thus are not credible defenders of society. And finally, in most cases prosecutors do not have the necessary technical knowledge or support structure to be effective litigators in cases of this nature.

In my understanding, these predictions and interpretations are (partially but significantly) wrong. The case studies depicted in chapter 2 illustrate what prosecutors can do, and those cases are not exceptions. The next chapter explains how the MP is composed of two systems of action that compete for primacy within the organization. More concretely, it is true that prosecutors throughout the country are hard pressed to find, within the MP, the incentives, structures, and support that they need to find important problems and solve them. Instead of succumbing to bureaucratic lethargy, many of them partner with NGOs, unions, social movements, church groups, public bureaucracies, and other public and private entities to create a parallel, covert, and overlaid organization that recruits, supports, and rewards those prosecutors who act proactively, pragmatically, and effectively. Ultimately, these two logics of action not only coexist, but even monitor and reinforce each other.

4 – THE ORGANIZATIONAL BASIS OF CREATIVE LAW ENFORCEMENT

What do Brazilian prosecutors actually do every day when they go to work, and what determines their behavior? According to the Brazilian Constitution, the mission of the *Ministério Público* is to "*defend the rule of law, the democratic order, and those individual and collective rights that cannot be traded or given away.*"[129] This mission is admirable but vague, and therefore prosecutors can implement it in a wide range of ways. As stated by James Q. Wilson (1989), "*when mission is vague, circumstances become important.*" This means that in order to understand what prosecutors do, one ought to examine the setting in which they operate.

All organizations adopt structures, internal policies, incentives, and constraints that make certain actions relatively easy while others are difficult. This chapter reports on the inner-workings of the MP and aims to shed light on the circumstances of prosecutorial work. It is divided into four parts. Part one analyzes how prosecutors are recruited, trained, apprenticed, assigned, and promoted. Part two examines a prosecutor's typical workload. These chapters show the different ways through which the MP, like so many prosecutorial agencies around the world (Silbey 1980-1981, Davis 2007), encourage prosecutors to act in a narrow, reactive, and formalistic way. Those prosecutors who adopt a tough-on-crime and indict-and-move-on attitudes are likely to minimize both their workload and the probability that they will get into trouble for failing to achieve outcomes that are difficult to measure and specify in advance.

Naturally, not all prosecutors adopt this mode of action. A previous chapter showcased a series of examples in which they have adopted a proactive, pragmatic, and creative problem-solving posture. Those individuals were intensely committed to producing concrete results and

[129] "Art 127 O Ministério Público é instituição permanente, essencial à função jurisdicional do Estado, incumbindo-lhe a defesa da ordem jurídica, do regime democrático e dos interesses sociais e individuais indisponíveis."

did not hesitate to replace standard operating procedures for innovative actions that promised better outcomes. The MP has a cadre of people who regularly leave their offices, identify important and controversial social problems, and strive to solve them, adopting an approach to regulatory enforcement that I have been calling "*to stitch solutions together.*" Not surprisingly, many analysts, including prosecutors themselves, dismiss this behavior as an exception. Or in the words of Dean Rusk, "*organization seldom stands in the way of good people and seldom converts mediocrity into excellent performance*" (cited in Warwick 1975).

My examination of the inner-workings of the MP suggests that there is an organizational logic and an institutional foundation to this type of action. The third part of this chapter argues that while striving to solve important societal problems, these prosecutors and their institutional allies, such as NGOs, social movements, and mid-level government bureaucrats, have also been building an informal, covert, and overlaid organization that recruits, supports, and rewards those who engage in '*stitching*'. The fourth part indicates how in the end the *MP* is composed of two organizational logics or systems that coexist and compete under the same roof. Even more, these systems keep each other in check, and ultimately strengthen the organization as a whole.

4.1 - The formal and explicit organizational environment

This section examines the formal and explicit incentives deployed by the MPSP – its recruiting, support, and reward structures – that help determine why prosecutors behave the way they do. Ultimately this section concludes that the apparent features of the organization encourage prosecutors to act in a cautious, reactive, and formalistic manner.

Who decides to be a prosecutor? It is difficult to delineate the profile of the typical aspiring prosecutor, and to the best of my knowledge there are no comprehensive surveys trying

to compile these data. The following arguments are based on my personal observations, and they indicate that few prosecutors were committed activists prior to joining the MP. Instead, most of the prosecutors seem to have chosen this career out of serendipity and through a process of elimination.

In general, incoming prosecutors have been full-time students all their lives, without much professional experiences besides legal internships. It is true that many senior prosecutors express a deep commitment to the MP and claim that they would not consider pursuing any other career. Moreover, in several cases it is a family affair where young prosecutors are the offspring of older prosecutors. But the common career path, represented well in my various interviews, seems to involve a combination of serendipity and process of elimination:

> "*How did I decide to become a prosecutor? To be honest, I only learned about the MP halfway through law school. First I interned at a law firm, but did not like it at all. Then, I heard about an internship opportunity at the procuracy and even though I did not know exactly what prosecutors did, I decided to try it out. In the end I really enjoyed the experience and could see myself becoming a prosecutor. But the admissions exam for all these public careers is incredibly difficult, so I signed up for and tried my luck in all exams that came my way. I would have moved to a different state if I gad been admitted to the MP or the Judiciary there. Fortunately I was admitted to the procuracy in my home state, and here I am.*"

Also important, starting salaries for judges and prosecutors and to a lesser extent for public defenders and police chiefs (*'delegados'*) are fairly high. For comparison's sake, a junior prosecutor's starting salary is roughly seven times the salary of a young associate in a prestigious law firm. Moreover, lawyers in public careers have many other benefits that increase the job's attractiveness. They receive tax-exempt double pay when on assignment outside their home

office ('*diárias*'), can take paid-leave to pursue graduate studies, have 60 days of vacation per year while most Brazilians have 30 days, can take up to 30 days of paid leave per year to care of a sick family member, and are entitled to a variety of other perks that increase the appeal of the job.

However, it is true that their salary progression is not very steep, i.e. in Sao Paulo a senior prosecutor at the top of the career makes roughly twice what a new entrant makes (MJ 2006), while a partner in a prestigious law firm can make much more than that. Moreover, young prosecutors (and judges) must work for several years in smaller (and therefore less attractive) towns. Still, over a 20 or 30 year span, the prosecutor's compensation package is exceedingly attractive, not only for those individuals answering a calling, but to anyone that can get such a position.

How are Brazilian prosecutors selected and admitted? In Brazil, prosecutors are admitted through a competitive admissions process, composed of written and oral exams, plus an interview and other tests. In Sao Paulo, the whole process starts approximately one year before the expected admissions date, and over the past several years roughly 7,000 people have been competing for approximately 50 vacancies.[130] In practice, two selection criteria stand out: aspiring prosecutors must demonstrate extensive knowledge of Brazilian law and they must conform to a narrow set of expectations on how a prosecutor ought to look, think, and behave.

To be considered for the job, candidates submit their resumes, letters of recommendation, and a negative criminal history report. Then, they take an exam composed of 80 multiple choice questions on Brazilian law. Those who are approved in this first round take a second exam, in

[130] Precise numbers vary, but the proportion of candidates per spot has remained fairly constant.

which they write a legal motion and an essay. In 2008, the list of subject matter for these exams contained almost 300 items, and most candidates study for more than a year – sometimes even two or three years – to prepare. In fact, a large number of them quit their jobs and study full time. Many also attend a special preparatory course to brush up on their legal knowledge. I interviewed the owner of one of these preparatory schools, and he was upfront with his advice:

> *"I tell them on the first day of classes. Do you want to be approved in the exam and become a prosecutor? So you will have to change your life style. First thing, no more weekends or holidays. To be approved, you must study all the time. By the day of the exam, you must have full command of at least 30% of all the core legal topics, and have a good command of all the peripheral legal topics. To get there, it takes, on average, two years of study."*[131]

Successful candidates are then called for an oral examination, in which they answer legal questions, including many that are tricky, controversial, or simply arcane, asked by members of the admissions panel. These examinations are held over several days at an auditorium and many of the other candidates also attend to gauge what is ahead for them. The actual oral examination lasts only 10 minutes, but many describe it as a nerve-wracking experience.

Soon after the oral exam, candidates are invited for a personal interview with the members of the panel, and the official purpose of this private meeting "*is to assess the candidate's personality, aptitude, and cultural, social, and moral values.*"[132] According to a prosecutor familiar with these proceedings:

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[131] "Ele disse que no primeiro dia de aula já diz aos candidatos: quer ser promotor? Entao vai ter que mudar seu estilo de vida. Primeiro, não há mais fim de semana ou feriado. "Para passar, voce precisa se preparar muito, conhecer pelo menos 30% da materia que sempre cai, e uma nocao geral de tudo o que tem caido. Para chegar nesse ponto sao necessarios uma media de 2 anos de estudo."

[132] "Art. 30. A entrevista pessoal destina-se ao contato direto da Comissão de Concurso com cada candidato, para apreciação de sua personalidade, cultura e vida pregressa, social e moral, e tem caráter reservado e sigiloso"

"In the interview, they ask very indiscreet questions. Say, 'if you work and your husband works, who will take care of the kids?' Or 'if we transfer you to a small town way beyond the boonies, would you go?' Or, 'you are the prosecutor, and a judge hits on you. How do you respond?'"[133]

"The correct approach is not to be defensive, and to give straight, short, and simple answers. For instance, say 'my mother-in-law will watch the kids.' Or say 'I will tell the judge to respect me because I am the prosecutor."[134]

Candidates that have made it so far take a psychological exam, and then a physical exam. Most important, throughout this process, candidates are being assessed not only on their command of Brazilian law, but also on their 'aptitude' for the job, and whether they conform to tacit expectations on how a prosecutor ought to look like and behave. The owner of the preparatory school confirms that candidates only stand a chance of being admitted if they fully incorporate the prosecutor's demeanor and mindset:

"I tell them, you are being evaluated from the get-go; you are in line to submit your application and the examiners are watching you. A peculiar gesture, an inappropriate demeanor, the examiners are taking notice."[135]

"The admission's committee is made of prosecutors. And they are looking at your clothes, whether your shoes are shiny; whether your shirt is neat; whether your necktie is nice and not too loud; for women, they are considering whether you are

[133] Perguntei com eram essas entrevistas, e ele disse que fazem perguntas muito indiscretas: Voce trabalha e seu marido trabalha. Entao quem vai cuidar das criancas? Se for enviada para xiririca da serra, a sra vai? Voce é promotora e o juiz te dá uma cantada, como vc responde?

[134] A atitude correta é não dar respostas agressivas, e ter uma resposta simples e direta, como por exemplo, minha sogra vai cuidar das criancas. Ou, diz para o juiz, me respeite como promotora.

[135] Perguntei como o MP detecta se algum candidato é homossexual ou nao. Eu digo pros meus alunos "voces sao examinados já na fila de inscrição - qualquer comportamento físico diferente já é anotado"

well dressed, but not over the top. Please, do not dress up like a Christmas tree, covered in bling. You will never be approved if you do."[136]

In order to be seriously considered candidates must:

- Be physically non-descript (e.g. men have short hair, wear conservative suits and ties, and no earrings, unorthodox glass frames or visible tattoos; women wear longer below knee-length skirts and circumspect make-up)

- Not be openly homosexual, or suggest homosexual demeanor

- Hide political affiliations; and demonstrate unwavering respect for authority and "lawyerly values" addressing examiners with the proper formalities and titles as the case warrants, e.g. 'your Honor' or 'your Excellency'

- Have flawless Portuguese; and pronounce Latin legal jargon with utmost accuracy . For instance, an experienced prosecutor described an episode in which a candidate mispronounced a Latin word during his oral examination:

> "*He said capút instead of cáput [stressing the wrong syllable]. And he did it twice! It was such a terrible mistake. The room froze, and, needless to say, he was immediately disqualified. Next year, he did it again. It was terrible. He passed on his third attempt, because he mentioned the paragraph. Still, he became known among colleagues as capút, a fact that irritated him profoundly.*"[137]

[136] A comissão de examinadores é formada por promotores. Eles analisam: Vestimenta; Sapato engraxado; Camisa bonitinha; Gravata com belo nó, sem ser espalhafatosa; Se tiver barba, que seja bem aparada; E se for mulher, bem vestida, mas sem exagero. Não pode aparecer como árvore de natal (i.e. cheia de enfeites).

[137] "Isso me lembra de um erro terrível, baixou um gelo, o cara foi reprovado pois falou capút ao invés de cáput. E isso aconteceu duas vezes. Em outro concurso foi igual. E ele só foi aprovado no terceiro concurso pois mencionou o paragráfo. Mas ficou conhecido na carreira como capút. Ele ficava caputérrimo quando falavam isso"

In the end, and the huge demand for this job notwithstanding, it is not uncommon for several vacancies to remain unfilled. The difficulty of getting admitted to the MP weeds out most candidates who are not thoroughly committed to a public legal career, but the admission process does not select prosecutors based on public-mindedness, relevant prior experience, creativity, "street-wisdom", pro-activeness, ability to work well with others, or any of the other practical skills or traits that indicate a propensity to engage in 'stitching solutions together'. Rather, successful candidates tend to be disciplined, fluent in all aspects of Brazilian law, and ready to conform to conservative organizational expectations and utterly blend in.

How are newly-hired prosecutors trained? Prior to being sent into the field, prosecutors hired by the MPSP undergo an intensive, two-week training course, with classes six days a week, for more than 10 hours a day. During this period, they reside in a hotel next to the training center and attend lectures and practical classes from early morning to evening. The course is composed of two modules: during the first week, incoming prosecutors are introduced to the institution. They learn about the history of the *Ministério Público*, its different departments and internal policies, and receive practical advice from senior colleagues on how to handle the intricacies of the job. During the second week, they are instructed on criminal prosecution, including supervised practical classes in the field. Throughout the next year incoming prosecutors are supposed to go back to training, to learn about civil cases (*custos legis* / the writing of *amicus* briefs) and collective affairs (*tutela coletiva*, including public civil action lawsuits); although in previous years these modules have gone unfulfilled.

In 2006, and inspired by John Van Maanen's (1973) article on the making of a policeman, I interviewed the director of the prosecutors' training center and asked for permission to attend the course. Permission was granted, and at that time I expected that newly-hired

prosecutors would be encouraged to be proactive, creative, and instructed on how to go about finding important societal problems and striving to solve them. To my surprise, the whole program emphasized formality and officiousness, and the prevailing advice was for prosecutors to be cautious-- they should not trust anyone but their fellow prosecutors. The following quotes and observations, collected during the prosecutors' training program, illustrate these three points:

(a) Formality - The whole training was rather formal, and students were asked to wear business attire everyday, including Saturdays. They were also asked to stand up whenever a lecturer entered or left the room, and everybody addressed everybody else using "*o senhor*" or "*os senhores.*" Even the lecturers addressed the audience using these formalities (or apologized whenever they slipped into the informal "*vocês*") and newly-hired prosecutors were directly instructed to make this habit second-nature. As stated by the head of Internal Compliance Office:

> "*Avoid calling senior prosecutors who are members of the senior committee [Conselho Superior] by 'você' or by a nickname. Whoever does that may be hit with a warning. A hefty dose of formality is healthy for our institution, particularly in official ceremonies, events, and hearings.*"[138]

The newly-hired prosecutors also received specific and straightforward guidance on how they ought to behave in a variety of fronts:

> "*Dress code: men must wear suit and tie, period. Women, drop all the creativity, the audacity, and the avant garde designers. Forget cleavages, naked shoulders, and low cut pants. You are going to visit jails and prisons; can you imagine an inmate chatting you up? If that happens, you are in a bind. Either you punish the inmate for something you provoked, or you ignore the pass and lose face. It is*

[138] "Evitem chamar membros do grupo superior (órgãos superiores de admin do MP) por "você" ou por apelido. Isso pode até dar uma representação contra o falante. Uma certa formalidade é saudável na nossa instituição, em solenidades, eventos, audiências"

better to avoid the whole embarrassment. Dress conservatively, with skirts that go well below the knees."[139]

"*Social networks on the internet: Do not expose yourself, avoid jokes of bad taste, avoid acid criticisms or ironies, and avoid foul language. Orkut, MSN, and chat rooms are not the proper media to discuss internal matters pertaining to the Ministério Público.*"[140]

"*Your office: it is OK to give it a personal touch, but do not exaggerate. For instance, do not affix a huge crucifix, a massive insignia for your soccer club, or worse of all, the red flag of the Landless Peasant Movement [MST]. Do not let your personal opinions show. Keep your office a neutral space. You may have a flower, a small picture of your family, and that's it.*"[141]

"*Your prosecutor's ID: its purpose is not to get you into the movies for free. The worst thing that a prosecutor can do is to get himself into a bind, and then use his ID to try to get out. Do not do anything stupid. But if you do, do not try to ID your way out!*"[142]

The central thrust of all this advice is for young prosecutors to keep their heads down and blend in. As summarized by one of the lecturers:

"*Irreprehensible behavior is not something you save for your court appearances. It is for life. Prosecutors must comply with the highest ethical standards.*

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[139] Vestuário -> rapazes, terno, gravata e ponto final. Mulheres -> nada de criatividade, ousadia, estilistas modernos. O estilo deve ser clássico: vestido, tailleur, terninho. Esqueçam decotes, ombros de fora, cintura baixa. Afinal, voces vão visitar cadeia, presídios, imagina se ouvem gracejo de um detento? O que vao ter que fazer? Ou puni-lo por algo que voces provocaram ou ignorar e perder a autoridade. Melhor evitar o constrangimento todo. Enfim, sempre clássico, e saias devem ter comprimento adequado.

[140] Comunidades na internet -> não expor a intimidade, fazer brincadeiras de mal gosto, tecer críticas ácidas ou irônicas, usar palavreado chulo -> orkut, msn, chat não são meios apropriados para debater nossa instituição e as dificuldades por que o MP venha a passar

[141] Gabinete -> é OK dar um toque pessoal, mas sem exagero (por exemplo, crucifixo enorme, bandeira do corinthians, ou do palmeiras, ou pior ainda, do MST). Não extravasar opiniões pessoais. Voces devem manter a neutralidade no gabinete. Pode colocar um vaso de flor, um porta retrato, mas é isso.

[142] Carteira Funcional: não foi feita para entrar no cinema de graça. A pior coisa que um promotor pode fazer é fazer alguma besteira e usar a carteira para tentar sair. Não faça besteira. Mas se fizer, não dê carteirada!

Remember, to be a prosecutor is not a transient status. It is intrinsic to our identities and public images. We are prosecutors 24x7."[143]

(b) Caution - Even if prosecutors kept their heads down and tried to blend in, they would still have to make consequential decisions within their respective jurisdictions, exposing them and the institution to a certain amount of risk. What if a prosecutor makes the wrong decision and tarnishes the reputation of the MP? Senior prosecutors constantly warned their junior colleagues that the world is a minefield; everybody other than a prosecutor is likely to be unscrupulous, and traps and cons are everywhere. Yet, while General Patton reportedly encouraged his troops to embrace "*l'audace, l'audace, toujours l'audace*", senior prosecutors insist that junior colleagues avoid all risks, keep their guard up, and be cautious above all else. The following quotes, collected during training, illustrate this point:

"*Always be careful when assigned to a new post in a new town. Watch out for praise and compliments, always be wary. You do not know the people. You do not know who is a good lawyer and who is a trickster. You do not know if the judge is friends with the mayor, what kind of interests they are beholden to. So be careful not to get entangled into some major controversy because of a minor slip.*"[144]

"*Avoid any proximity with people or enterprises of dubious reputation. Watch out whom you rent your house from. Make sure your landlord is a reputable person.*"[145]

"*Avoid having meaningful conversations over the phone, because the caller may be taping you. Always have people come to your office.*"[146]

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[143] Conduta ilibada não é só no fórum, mas em toda nossa vida. Devemos pautar nossa vida pelo que a moral considera adequado. Não estamos promotores, somos promotores 24h por dia!

[144] "Enfim, tenham sempre cautela, pois não conhecem as pessoas, não sabem quem é o advogado bom, quem é o advogado ruim. Cuidado com os elogios, sejam sempre desconfiados. Ao chegar numa comarca não sabem se juiz tem relação co o prefeito, se está próximo de alguma facção, etc. "Tomem cuidado para não ser envolvidos numa situação por bobagem, então busquem orientação dos promotores mais antigos"

[145] Evitem aproximar-se de pessoas físicas ou jurídicas de duvidosa reputação, por exemplo, cuidado com quem alugam um imóvel, para que seja pessoa ilibada.

"Always keep your door open, so everybody can see what is happening inside your office. A defense lawyer came to talk to you about some case? First thing, prop the door open and keep it open."[147]

"You will be besieged by people making all kinds of complaints. The right thing to do is to be careful and to make sure you know what is going on, so you are not used by someone without even knowing that it is happening."[148]

"Sometimes police officers will ask that you authorize an undercover operation, so they can infiltrate a drug ring. You know what? They may have already infiltrated the group and they may even be in cahoots with the drug traffickers. They are asking for your authorization because something has gone amiss, and either their illegal operation is about to blow up, or they want to extract more bribes from the dealers. Be careful when handling this kind of request."[149]

"Organized crime is complicated, it may involve the police, politicians, and other local authorities. Still, do not panic. Invite the whistle-blower to your office, but have a witness next to you. You can tape the conversation, with a tape recorder in plain sight. You are part of the conversation, so you are allowed to tape it. What if someone meets with you in private and then say that you asked for a bribe? You want a witness, and you want a tape."[150]

"In your personal life, watch out for the parties you are invited to. Do you want my advice? Do not go. Let's say you go, and something happens, someone is smoking pot or a minor is drinking alcohol, or whatever. Either you close your

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[146] "Nao atender ninguem por telefone, para nao ser gravado. Atende sempre no forum"
[147] "Sempre mantenha sua porta aberta, para que todos possam ver o que esta acontecendo la dentro. Advogado de defesa veio conversar com voce, mantenha a porta aberta."
[148] Voces vao ser assediados por denunciantes, é bom tomar cuidado, para saber o que está acontecendo (se não está sendo usado sem consentimento)
[149] Infiltração de organização criminosa: normalmente o resultado é nenhum, eles [policias] fazem isso [pedir autorização para infiltrar] para regularizar algo que já estava ocorrendo, p.ex. tráfico de drogas. Então muito cuidado ao analisar esse tipo de cautelar.
[150] Não entre em pânico - atenda as pessoas, mas com testemunha, ou com um gravadorzinho sobre a mesa. O cara sai da sua sala e diz que voce pediu $$. Muito cuidado, desconfie [mais caution]. Não entre em pânico. Consulte colegas. Risco é parte da profissão. Voce é interlocutor, então pode gravar a conversa. Segurança: é bom ter, mas não prometa. Diz que vai investigar, que vai apurar. Crime organizado envolve policia, politicos, autoridades.

eyes, and this is dereliction of duty, or you have the person arrested and ruin the party. So it is better not to go, not even to VIP rooms."[151]

"*Let's say you are the prosecutor in some tiny town in the sticks. You play soccer with your subordinates and you are friendly with them. Still, be wary, because they may be tempted to double-cross you. If you are too close, they may use your name to tell other people 'I'm friends with the prosecutor, and he asked R$15 to dismiss your case'. Always keep your distance.*"[152]

"*The Ministério Público is like a big family. Everybody likes everybody else, and everybody gets along. But people are tricky. So when you are assigned to a new post, do not trust your colleagues to tell you what the attributions are. Some prosecutors may try to unload their own backlogs on the new guy. To avoid problems, always read the official job description yourself.*"[153]

Caution was portrayed as a remedy for everything:

"*Everything will depend on your feelings, your nose for what is right. There will be an infinite number of unforeseeable situations. So have a good dose of common sense and caution. After all, this is what justice is all about: common sense. You are experts in legal theory, so the only thing you need is common sense and caution. If you have these two, nothing bad can happen.*"[154]

In fact, caution loomed so large that newly-hired prosecutors were instructed to be cautious even when this very attribute was unlikely to prevent the mishap:

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[151] "Cuidado com festas na comarca. Meu conselho? Nao vao. Pois se vao e tem crime, ou voce faz de conta que nao viu e prevarica, ou manda prender e acaba com a festa. Nao vao nem em camarote"

[152] 'Voces sao autoridade 24h por dia. Digamos que voce esta no pontal do paranapanema, voces estao la ha 5 meses, a assessoria esqueceu voces la (risos). Voce joga bola com os funcionarios, conhece ha tempos, ainda assim, é sempre doutor, para eles nao venderem voce. Ele vai dizer 'sou chegado do promotor, ele pediu R$15 para arquivar seu processo'. Entao fora do servico, sobriedade.

[153] "Lembrar o seguinte, MP é familia, tode mundo se gosta, se da bem, mas por trote, ou brincadeira, eles aprontam. Verificar atribuicoes da promotoria. Nunca confie no colega, de uma olhada no documento, que foi homologado pelo conselho. Tem colega que vai folgar e dizer que a atribuicao é de voces e nao deles. Eu sou amiga de todos eles, mas minha irma, quando foi designada para uma comarca, acabou virando substituta de todos eles."

[154] "vai tudo depender do feeling de voces. Vao ocorrer n x pi! situacoes. Tenham bom senso e cautela. O que é justica? É bom senso. A teoria voces ja sabem, entao é bom senso e cautela. Se voces tiverem isso, nada de mal vai acontecer"

> *"Once a drunkard came to my office and claimed he was beaten up. I asked, 'how did they hit you?' And he dropped his pants to show me the bruises. Oh my. My intern turned green, a police officer came over, arrested the guy for contempt, it was a mess. There was no reason for the whole mishap, he was just drunk. The lesson? Be cautious."*[155]

(c) *Esprit de corps*: Interestingly, all of the emphasis on formality and risk-aversion was tempered by a strong sense of camaraderie and identification with the organization. In addition to encouraging prosecutors to be formal and uptight, and to be thoroughly cautious and risk-averse, the training also instilled a strong sense of camaraderie and *esprit de corps* among the new recruits. In fact, the Brazilian *Ministério Público* seemed to be deploying practically all the organizational devices that Herbert Kaufman (1960) famously identified as generating cohesion among US forest rangers. Sacrifice was a common theme:

> *"To work for the Ministério Público is to sacrifice oneself for an ideal; we are engaged in a permanent struggle for justice, and even if we know that there will be setbacks, we will never loose our drive."*[156]

> *"You will have a lot of work ahead of you. If you want to be a real prosecutor, you will have to take it personally and call the responsibility to yourself. What we do not need or want are nine-to-five bon-vivant bureaucrats who delegate everything to their interns."*[157]

As indicated by Kaufman (1960), this type of downgrading of expectations tends to heighten the resolve and motivation of the new recruits. But even more important, this pitch prepared the terrain for the *coup de grace* that came next: the world is hostile and the work is

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[155] "Veio um bebado dizer que me bateram. Onde? Ele tirou as calcas, a estagiaria ficou verde, chamei o PM, era desacato e tal. Nada, ele esta bebado. Entao tenham cautela!"
[156] Trabalhar no MP é sacrificio por um ideal, embatem luta constante por justiça, admite que teremos revezes, mas sem desânimo!
[157] "Voces terao muito trabalho pela frente. Quem quer ser promotor mesmo, terá muito trabalho, e vai ter que vestir a camisa. Não queremos funcionários públicos, promotor que delega tudo para o estagiário."

tough, *so prosecutors should trust no one other than their fellow prosecutors.* This theme surfaced in various ways. Throughout training, all lecturers insisted on calling newly-hired prosecutors "colleagues." Senior prosecutors made themselves available in case anyone had questions about the job, and most of them wrote down their personal contact information on the classroom board. As stated by one of the lecturers: *"when I joined the organization, I called senior colleagues all the time. Instead of making a mistake, I suggest you pick up the phone and ask for guidance."*[158] The general point, as stated by several different prosecutors, is that "*the MP is like a family, even if it is inordinately big, it is still a family, in which everybody talk to everybody else, and we all exchange experiences.*"[159]

The MP has institutionalized many of these organizational features that instill and facilitate internal cohesion. For instance, it has a department devoted to Public Relations, so those prosecutors who do not feel comfortable talking to journalists can redirect inquiries to this division. As stated by the head of the PR department (a prosecutor himself): *"you are free to talk to the press as you see fit... but if you are not comfortable talking to journalists, you can refer them to us and we will take care of everything for you."*[160]

Another department, the "Institutional Defense" [*Defesa Institucional*], devotes itself to protecting prosecutors' rights and privileges. The individual in charge of this department (also a prosecutor) described this department as follows:

> *"The MP has a department devoted to protecting prosecutors' prerogatives, and there is always someone on call 24x7. We are not corporatist fixers. Our goal is*

[158] "Quando eu entrei no MP, eu ligava muito para os promotores. Não errem, liguem mesmo"
[159] O MP é uma familia, apesar de grande é uma família, todos conversam com todo mundo, trocam experiências
[160] "É preciso autorização para dar entrevista? Não! Foi-se o tempo. Houve uma insurreição e hoje o MP é inteiramente democrático. Voces tem liberdade e autonomia para falar como acharem melhor. Mas cuidado, pois jornalismo é ficção, são poucos os jornalistas que respeitam a palavra como ela é falada."

to ensure that the rights and powers of the prosecutors are observed by other authorities. If you find yourself in any kind of trouble, call us. For instance, you probably know about that prosecutor who was accused of killing his wife. He was arrested, and we went there, not to get him out, or to tell the police what to do, but to make sure that all rights afforded to prosecutors were respected."[161]

Even the Internal Compliance Office [*Corregedoria*] claims that its role is not to identify and punish infractions, but to instruct prosecutors – especially newly-hired ones – on how to perform their jobs better. As stated by the head of this division:

"Every single one of you will have been visited by the Internal Compliance Office by the end of the year, not only to check on you, but also to provide guidance and answer questions. [...]For the Internal Compliance Office, guidance is more important than punishment. "[162]

To sum up, the underlying thrust of the training was to ensure that junior prosecutors blend in and avoid doing anything that could tarnish the stellar reputation of the organization. Throughout the course, speakers emphasized three interrelated themes: prosecutors ought to be (a) formal, (b) cautious, and (c) trust no one other than their fellow prosecutors. This setup ultimately generates high levels of cohesion and identification with the procuracy, but instead of encouraging recruits to be bold, proactive, and innovative, it encourages them to avoid risk and to always act in ways that prevent criticism or embarrassment.

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[161] A assessoria de defesa institucional tem um celular disponível 24 horas por dia, 7 dias por semana. A função da assessoria de defesa institucional: se promotor sentir que houve um gravame no exercício de suas funções, e aí não estou falando, e esse é um exemplo hipotético, da carteirada que não deu certo, pode pedir que a gente tenta ajudar. Então, o papel da defesa institucional é garantir prerrogativas. Não é um quebra-galhos corporativista. Mas sim um mecanismo / instrumento para preservar que os direitos assegurados aos promotores sejam respeitados pelas demais autoridades. Por exemplo, talvez voces conheçam o caso daquele promotor que tentou matar a esposa. A assessoria de defesa institucional foi até lá, mas não para resolver ou apaziguar, ou dizer o que o delegado tinha que fazer. Mas sim para garantir o cumprimento da lei orgânica: promotor não pode ser indiciado, mas sim apresentado imediatamente ao PGJ.

[162] Todos vão receber uma visita de inspeção até o final do ano, até mesmo para orientá-los... Orientar antes de punir

How prosecutors are apprenticed: For the first two or three years on the job, prosecutors are considered "alternates" (*promotor-substituto*), and this means that they have no permanent posting or jurisdiction. Instead, they travel throughout the state to fill vacancies and temporarily replace senior colleagues who go on vacation, take a leave of absence, or need an extra hand. This period acts as an apprenticeship, in which young prosecutors are exposed to a variety of jobs and work environments and operate alongside different senior colleagues. During this period they learn how to issue solid legal decisions on a wide variety of cases while respecting all the applicable deadlines.

Crucially, these prosecutors are being closely monitored by the Internal Compliance Office, and even if it is extremely rare – perhaps unheard of – for a prosecutor to be fired for failing his or her duties during the apprenticeship, newly-hired prosecutors are terrified of committing any slip that could imperil their permanence on the job. In fact, throughout the training prosecutors joked that I was not a researcher but a spy from the Internal Compliance Office (*espião da corregedoria*) sent by the MP to check on their behavior. Whenever we had drinks after class, the junior prosecutors would teasingly request that I look the other way when they ordered another round, and they regularly asked that I refrain from taking notes on any extravagant behavior.[163]

Indeed, the Internal Compliance Office is a permanent source of concern during a prosecutor's initial years. As stated by the head of Internal Compliance on his lecture to newly-hired prosecutors: "*from now on, everything that happens in your lives is of interest to us*".[164]

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[163] Donald Warwick (1975) observed a similar pattern in the US State Department, and devised a theory linking elite status, esprit de corps, and risk-averse behavior. According to him: "*the greater the eliteness or prestige of an organization, the more the member will identify with it; the greater the identification, the greater the desire to stay in it; the greater the desire to stay in, the greater the fear of being thrown out.*"

[164] "À partir de agora, tudo o que acontecer na vida de vocês é de interesse da corregedoria"

Yet, this pronouncement cannot be entirely true. No office can check everything, and by necessity some issues will take precedence over others.

Officers, who are themselves prosecutors, from the Internal Compliance Office (*corregedoria*) read copies of all briefs, motions, indictments, and transcripts of hearings issued by junior prosecutors. They check whether the arguments are solid, use of language accurate, and deadlines met. They also keep track of prosecutors' vacations, leaves of absence, outside lectures, and whether they are attending mandatory internal meetings.[165] They check the log-books registering legal settlements, civil public action initiatives, and criminal proceedings; read the reports of the periodic mandatory visits to police precincts, detention centers, prisons, morgues, forensic departments, and half-way houses.[166] And they conduct surprise inspections in-situ to check whether junior prosecutors are keeping all their professional records as mandated by internal regulations, whether their offices are clean, and their clothes are appropriate. In a speech, the head of Internal Compliance related an anecdote that drove this point home:

> *"In one of our visits we caught a prosecutor taking advantage of that North American habit, the so-called 'casual day', not wearing a suit and a tie on a Friday. Can we work without having a jacket permanently on? Of course we can. But a prosecutor's office is a formal setting, and our job is a formal job, and thus to receive the public and to hold meetings are formal activities that require formal behavior and formal attire. To do it differently is an infringement of the disciplinary code."*[167]

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[165] Férias, licenças, assunção de cargo ou função, magistério, remessa de atas de atividades externas, eleição de secretário da PJ, reuniões mensais

[166] Registro de acordos extra-judiciais, Registro de interesses difusos, Livro-registro de procedimentos criminais, tudo em 4 copias. Pastas trimestrais, livros, visitas obrigatorias a delegacias, distritos policiais, carceragens, policia cientifica (IML e Inst Criminalistica). Escrever atas e relatorio das visitas. Cadeia publica e casa dos albergados - visita mensal

[167] Corregedoria não avisa quando faz visita de inspeção e já encontramos promotores sem gravata, às sextas-feiras, fazendo uso daquele costume americano, o casual day. Podemos trabalhar sem paletó? Claro que podemos, mas

It makes sense that the Internal Compliance Office pay attention to written opinions and associated formalities, as these are relatively easy to check and assess. Yet, in a type of goal-displacement, this emphasis directs junior prosecutors to pay attention to inputs (such as complaints received) and outputs (such as indictments issued) while ignoring whether they are achieving outcomes and results.

How prosecutors are promoted and how the organization staffs its posts: In Sao Paulo and soon after being vested (*vitaliciados*), prosecutors are assigned to a small town (*entrância inicial*), in which they handle all kinds of legal controversies. Over time, they will be promoted to a mid-sized town with more specialized attributions (*entrância intermediária*) and eventually to a larger town or the capital of the state (*entrância final*) and be responsible for an even narrower legal topic but in a more densely populated territory.

To award promotions (*promoção*) and to fill vacancies through horizontal transfers (*remoção*), the MP relies on a decentralized system in which prosecutors apply for the job. Formally, 50% of these openings are to be filled on merit and 50% on seniority, but in Sao Paulo prosecutors readily admit that in practice, merit is too controversial and difficult to measure so all posting are filled on seniority.[168] The decisive variable is that the organization keeps separate seniority lists for each of its three levels, and prosecutors who have been promoted go to the bottom of the new list. This system creates a complex and decentralized game: a prosecutor in an unpleasant but not horrible town may request a promotion to a slightly improved posting and

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gabinete é ambiente formal. Nossa atividade é eminentemente formal, e o gabinete é um ambiente formal, então receber o público é ato formal por excelência (i.e. exige comportamento e postura formal).

[168] There are plenty of controversies in those states where the procuracy awards promotions / transfers on merit – in these places, prosecutors often complain of favoritism and call the practice "kangaroo", alluding to this animal ability to 'jump' over its colleagues

return to the back of the new list, or stay longer at the current posting in the hope that a better posting (at the same or superior level) will open up soon.

This system empowers prosecutors and minimizes intra-organizational conflict, but it practically ensures that talent will be misallocated, i.e. prosecutors passionate for certain areas of the law (such as environment, poverty, or public interest) are likely to end up at postings devoted to totally different areas (such as petty crime or jury trial) in more desirable cities.[169]

In other words, there is no centralized system trying to maximize the use of in-house talent, or trying to assign the more committed, energetic, and creative prosecutors to postings in which these individuals can have the largest possible positive impact. Even more damning, a select group of the most experienced prosecutors are eventually promoted to a fourth level (*procuradores de justiça*) in which they stop handling entry-level cases and engaging with facts, and instead start devoting all their time to handling appeals, developing sophisticated legal arguments, and managing the organization. These positions are highly coveted because they grant prosecutors flexibility (many of them work from home), allow them to engage in esoteric legal arguments, and encourage them to engage with high-status appeals and Supreme Court judges. In effect, the organization is identifying some of its most experienced and capable individuals and purposefully removing them from the line of action.

Other incentives and disincentives: Prosecutors are granted a series of constitutional prerogatives that were designed to ensure their independence and allegiance to the rule of law

[169] I saw many instances of this misallocation, in which prosecutors passionate about one theme or form of action end up at a post that directs them to act in other fronts. Still, some of them, acting tactfully, find ways to do reframe and expand their responsibilities so they can do whatever they wanted to be doing anyway. In one occasion, a restless and socially-conscious prosecutor responsible for reviewing court injunctions [*"mandado de segurança"*] inside an office was also conducting inquiries and public hearings into municipal policies towards the homeless. She said that no other prosecutor had been taking these cases, so she was not intruding into anyone's turf.

over parochial interests. Yet, if analyzed under an economic prism, these prerogatives seem tailor-made to ensure not creativity or innovation, but apathy and conformity. Prosecutors have a very high-level of job security (*vitaliciedade*), cannot have their salaries reduced (*irredutibilidade de vencimentos*), cannot be transferred against their will (*inamovibilidade*), are promoted on seniority, do not accrue any bonus related to performance, are entitled to act on their best legal opinion (*independencia funcional*) and cannot have their caseload cherry-picked or diverted elsewhere.

Moreover, the MP has always been tightly coupled to the Judiciary, so prosecutors' offices are located next to (sometimes inside) a courthouse, the MP provides prosecutors with interns to help them draft legal opinions, and with support staff to shuttle case files back-and-forth from the notary and judges' chambers. To sum up, the MP provides all the help that prosecutors need to deal with litigious legal proceedings, paperwork and little else.

4.2 – Managing the workload

According to Michael Lipsky (1980), street-level bureaucrats, overwhelmed with a demand for services that is much larger than what they can supply, are destined to adopt stereotypes, coping devices, and simplifying routines that make their tasks more manageable. In many ways, this prediction describes the Brazilian *Ministërio Público*. As described below, prosecutors must cope with a crushing workload and thus prosecutors often try to systematize, routinized and simplify their practices. The organization pushes them in this same direction, and encourages prosecutors to pay attention to inputs and outputs but not to outcomes.

Throughout their careers, prosecutors are supposed to fill out a monthly report with 250 fields indicating their activities. Although not all of them do it every month, so the data is

underreported, the Internal Compliance Office still compiles these data and publishes aggregate figures, as reported below:

Table - Report of Activities – MPSP

Regular Activities	**MPSP** (2005)	**Per Prosecutor** (*)
Judicial cases[170]	8,868 million	6,204
Hearings and trials	931 thousand	665
Briefs, motions, indictments, and others	986 thousand	704
Personal meetings (in-office)	391 thousand	280

Source: Corregedoria MPSP 2005

Collective Affairs	**MPSP** (average 2002-2005)	**Per prosecutor** (*)
Initial inquiries[171] (PPICs)	4,7 thousand	3.3
Official inquiries (ICs)	4,3 thousand	3.1
Judicial settlements (TACs)	1,9 thousand	1.4
Public civil action lawsuits (ACPs)	2,6 thousand	1.9

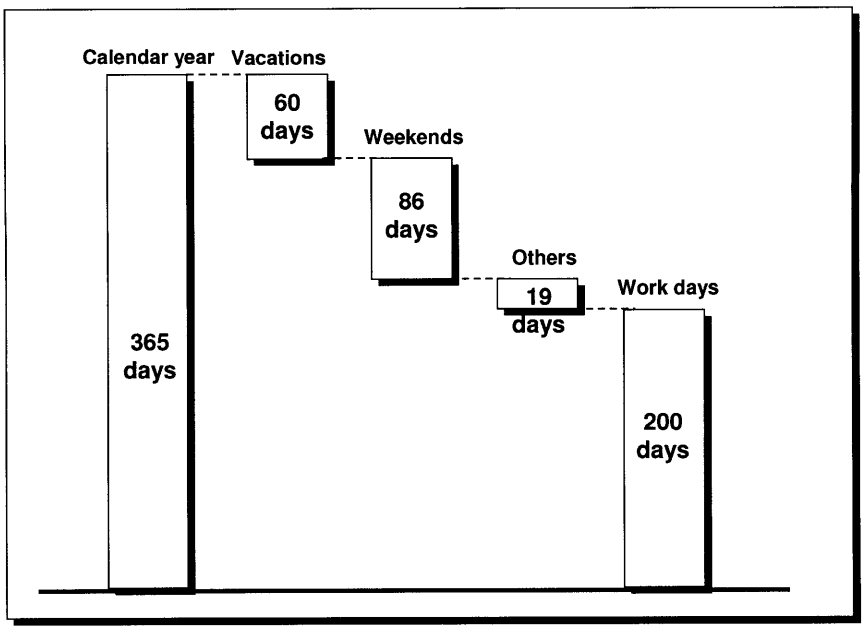
Source: Ministério da Justiça 2007

(*)There are almost 1700 prosecutors in Sao Paulo state. However, roughly 200 of these officials work solely at appeals levels, and roughly 100 are assigned to support positions running the organization. I estimate that 1400 prosecutors are assigned to the frontlines

To make these figures more intelligible, I calculate the average workload per day. A calendar year has 365 days, and prosecutors have 60 days of vacation, so they are available ~300 days of the year. Of this total, 214 are weekdays. Considering that Brazil has several official holidays and that prosecutors are afforded a variety of leaves of absence, I round this number down to 200 workdays per year.

[170] Headings, in order: autos judicias recebidos; Audiencias realizadas e plenários do Juri; Ações, pareceres, alegações finais, memoriais e recursos + denuncias e representacoes + arquivamentos e remissões; Pessoas atendidas
[171] Procedimentos preparatórios de inquérito civil; Inquéritos Civis; TACs assinados; ACPs ajuizadas

Chart – Work Days per year

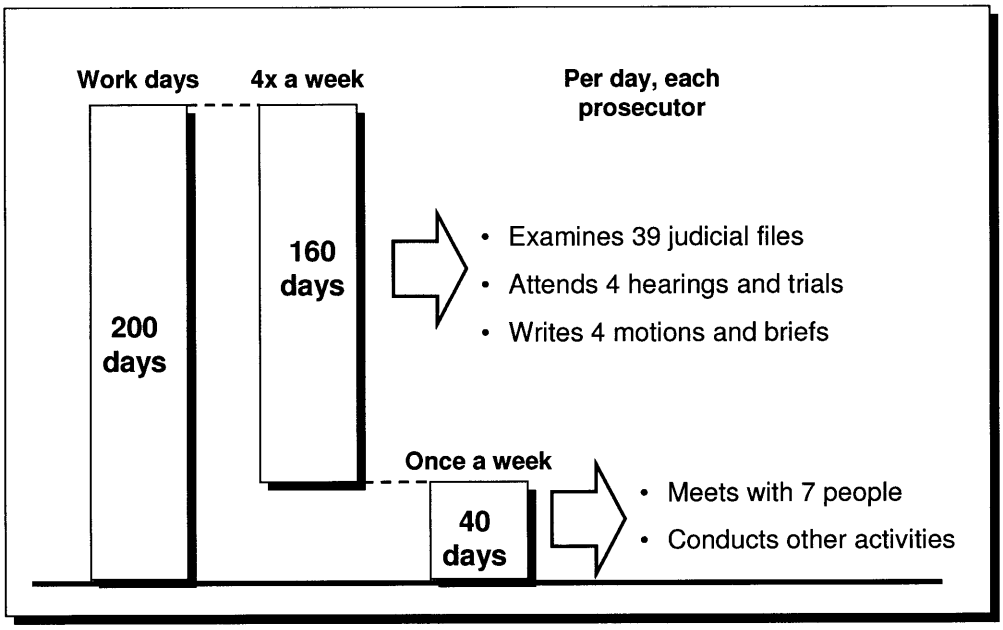


Next, I assume that prosecutors set aside four days per week to process cases, attend hearings and trials, and handle the associated paperwork. They have 160 of such days per year, and in each of them they must process 39 cases; attend four hearings and trials; and write four briefs and motions. If each of these activities consumes 12 minutes, prosecutors will need almost 10 hours of uninterrupted work per day to discharge all their responsibilities.

According to this model, prosecutors have set one day a week aside for other activities. On this day, they must receive citizens, lawyers, journalists, researchers, and others who come to their office. Based on the calculations reported above, they have 40 such days per year, and on any of these days they must meet with seven people. Prosecutors must also visit prisons, police precincts, and other establishments, and attend a variety of formal and informal meetings. These activities will keep them thoroughly occupied for the whole week.

And then, prosecutors may also conduct investigations on violations of the public interest, send requests for data, and initiate civil public action suits. According to a report published by the Brazilian Ministry of Justice, on average, prosecutors affiliated with the MPSP have been initiating a total of 9.7 inquiries, settlements, or lawsuits of this nature per year.

Chart – Daily Activities – Average MPSP



This workload indicates that unless prosecutors are exceedingly efficient in reading their case files (one prosecutor compared these files to a novel, "*but with the pages shuffled*"), delegating a significant number of tasks to well-trained subordinates, and working long hours themselves, they will have very little time for anything other than case-processing. As one would expect, prosecutors have developed a series of routines and simplifying practices to help them process this workload.

Prosecutors must meet court-mandated deadlines, so one of the first things they learn is to recognize urgency based on the color of the folder holding the files. If the folder contains a red

stripe the defendant is currently detained (highest priority); a green stripe indicates that defendant is detained under another case; blue means that defendant is a minor; and black indicates that prescriptive period is about to expire (also high priority).[172] The use of colored stripes may seem trivial or irrelevant, but this rudimentary but effective technology shows that the organization cares about procedure and that meeting deadlines comes first.

Another occupational tool that prosecutors prize enormously – during the orientation course, newly-hired prosecutors celebrated with relief once they received their copies – is the prosecutors' manual and the CD-ROM containing electronic templates for the various types of arguments, briefs, and motions that they must write. These templates are an essential piece of a prosecutor's work routine. As stated by an experienced prosecutor, "*the manual of procedures is our bible, a guide that must be always at hand.*"[173] Moreover, these templates and how-to guides embody the MP's legal philosophy, as they indicate which violations are worth prosecuting and how. By using these pre-determined devices, prosecutors save time, avoid the internal risks associated with trail-blazing, and deflect any negative response to their action towards the organization. As stated by a prosecutor, "*these how-to guides depersonalize one's initiatives and shield the prosecutor from criticism.*"[174]

A prosecutor explained how she manages her own workload, and how case-processing takes precedence over everything else:

> "*To start with, I organize my case files on separate piles, depending on whether they need to be initialed, read carefully, remitted elsewhere, or whether I have to write a motion. Next, I organize each pile based on the deadline, with the urgent*

[172] Tarja vermelha - reu preso; verde - reu preso em outro processo; azul - reu menor; preto - proximo de prescricao
[173] "O manual de atuação funcional é nossa bíblia, o livro de cabeceira"
[174] Fazemos "roteiro pratico de atuacao" - é uma orientacao, mas o colega pode agir de outra forma. Acao coordenada despersonalzia, e isso protege o promotor.

cases on top. Then, I resort to my library of forms and templates. This way of doing things saves me a lot of time, and then I can try to fit other activities in."[175]

The bottom-line is that prosecutors ought to process cases as fast as they can, and prioritize. As stated by another prosecutor: "*we are like jugglers who try to keep all the balls in the air.*" Changing metaphors, she proceeded: "*and yet, our blankets are always too small to cover both our heads and our feet, so some things will inevitably fall by the wayside. The trick is to identify what is urgent and act on what is urgent.*"[176]

Still, speed alone is not enough. To make it through the day, prosecutors need to keep it simple. Several prosecutors emphasized this point, and described some of the 'tricks-of-the-trade' that they use, including role-playing and strict adherence to pre-established routines:

"*The victim is in your office and wants an indictment. You don't think it is the case and try to explain it to her. The victim will not understand and will insist. You will argue back, and you will get upset. The row will go on and on, it will take up all your time, and you will fall behind in processing your other cases. Just avoid the whole quarrel altogether. Indict the suspect anyway so the victim feels vindicated, she leaves peacefully, and you dismiss the case later.*"[177]

Another prosecutor, assigned to the Juvenile division, made a similar point:

"*Let us say a juvenile is sitting in front of you, and you try to teach her a lesson. Yet, she confronts and offends you. So you get mad and argue back. Do you know how this ends? Badly. It ends with the parents issuing a complaint against you*

[175] "Como lidar com o expediente: separar os processos, aquels que pedem ciencia, vista, cota, pecas. Prestem atencao nos prazos, aprendam a priorizar. Manter a par das coisas, organizar suas pilhas por prazo. Criem um acervo de modelos para aliviar o servico, e ai voces podem se dedicar a outras coisas"

[176] "A gente trabalha como malabarista, o cobertor esta sempre curto. Precisa ver o que é urgente, e tratar o que é urgente"

[177] As vezes, voce recebe a vitima, tenta explicar porque vai arquivar, mas a vitima nao vai entender voce, ai voce vai se aborrecer e nao vai adiantar, e seu expediente vai ficar para o dia seguinte ; Vitima quer representar. Voce acha que é caso de arquivamento, mas deixa representar e arquiva depois. Nao arquiva na frente da vitima, deixa ela matar a vontade, e arquiva depois."

with the Internal Compliance Office. Stick to the script and avoid unnecessary trouble."[178]

On another occasion, a relatively inexperienced prosecutor in a small town was confronted with what seemed like a difficult situation: a popular annual street festival was about to take place in his town, but the police had claimed it would be unable to provide security. Unsure on how to proceed, this prosecutor sent a request for guidance to the MP's Superior Council. The inquiring prosecutor relayed: "*If I let the festival go on without the police, there might be a tragedy. But if I prevent the event from taking place, it will be a scandal.*"

The senior prosecutor who received this request responded in an impulse: "*does the noble colleague have a beach house somewhere? Go there for the duration of the festival and make sure your cell phone is turned off.*"[179] After indulging in this revealing joke, he suggested that the junior colleague send a formal notification to the police, pointing out that it is the police's job to ensure public safety. This response, albeit more appropriate than the initial one, conveys the same message: lower your head and move on; a prosecutor cannot hope to handle all problems afflicting all people all the time.

I interviewed several prosecutors who are critical of this approach but still recognize it as prevalent. In their words:

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[178] "Voce tenta dar uma licao, o adolescente afronta, voce fica bravo, comeca a bater boca com o menor, e acaba representado na corregedoria pelos pais dele. Melhor evitar a confusao toda"

[179] PM diz que nao vai conseguir dar seguranca. Promotor escreve para o Conselho Superior pedindo ajuda. Se proibir, vai dar repercussao. Se deixar, pode ter algum acidente. O que fazer? Colega tem casa na praia? Fala para ele ir para lá e desligar o celular.

"A prosecutor's duty is to write briefs on time. We have no responsibility over outcomes, whether crime is going down, whether bankruptcies are going down, whether families are keeping up."[180]

"Most of my colleagues adopt a formalistic posture and are not worried about achieving results. They write briefs and meet deadlines, but are not committed to identifying problems and solving them. There are some exceptions, but most prosecutors shuffle paper and that's that."[181]

"Prosecutors are obsessed about legal technicalities, and that is how it has always been. We are assessed on whether we meet the deadlines and whether our legal pieces are well argued. Nobody cares about the results we achieve."[182]

"A prosecutor may be good, average, or bad, it does not change our career prospect a bit. Those who work hard are fools. The incentives are upside-down, and the system favors the cunning, the well-connected, and the self-promoting".[183]

The bottom line is that the *Ministério Público* adopts a series of explicit and formal practices, devices, incentives, and constraints that encourage prosecutors to adopt a cautious, reactive, and formalistic case-processing attitude. This behavior is the product of two complementary forces. On one side, a range of internal policies, including those related to recruiting, training, apprenticeship, evaluation, staffing, and promotion, consistently point towards this direction. On the other side, and emphasizing this tendency further, prosecutors are subjected to a heavy workload that requires that they adopt simplifying routines and other coping mechanisms. In this sense, it is no surprise that, in their own parlance, a prosecutor's primary

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[180] "Promotor era responsavel por dar parecer no prazo. Ele nao tinha responsabilidade por reducao do crime, reducao das falencias, dos divorcios"

[181] Ele tende a adotar uma postura burocrática e não uma postura comprometida com resultados - cumpre prazos, emite pareceres, mas não atua como agente político pleno, comprometido com problemas e soluções - sempre foi assim, e continua sendo, com algumas excecoes.

[182] "E o judiciario e o MP? Qual a legitimacao e o estimulo? É algo proximo de zero. A unica cobranca é juridico-formal, como sempre foi. Verifica prazo, conteudo, mas nao o resultado"

[183] "Promotor pode ser bom, médio ou ruim, que não muda nada na carreira - quem se mata é um trouxa. O que existe é um contra-estímulo, o sistema favorece o malandro, o bem relacionado, o bom político"

duty is to *"lower the pile of cases."* Many prosecutors also refer to those colleagues who are good at it as *"tractors, surefire and cow catchers"*[184], implying that in order to fulfill their duties prosecutors ought to move forward on their designated tracks, processing cases no matter what.

In reality, instead of explaining how the organization allows for, or even propels, some prosecutors to engage in proactive problem-solving (and 'stitching it together'), the visible and formal structures and incentives described above only deepen the puzzle. To find an answer one must look beneath the surface and examine the makeshift practices and structures that prosecutors and their allies have built and that operate in a covert, parallel, and overlaid fashion with the organization described above.

4.3 – The organizational basis of innovative law enforcement

The previous two sections have described how the formal structures, policies, incentives and constraints put forth by the *Ministério Público* encourage prosecutors to adopt a reactive, formalistic, and risk-averse case-processing approach. This tendency is reinforced by the overwhelming nature of the workload, which forces prosecutors to routinize and simplify their practices. Together, these pressures create a certain *'business-as-usual'* attitude that is prevalent in the organization and requires that prosecutors pay considerable attention to legal proceedings while overlooking whether they produce meaningful results.

Still, one who observes prosecutors in action readily sees many instances of deviance from this norm. Chapter two discussed four of these cases at length, and during fieldwork I collected many more examples of prosecutors departing from *'business-as-usual'* and striving to

[184] Surefire translates as *"nao nega fogo"*; A *cow catcher* is a device attached to the front of a train in order to clear obstacles off the track

'*stitch solutions together*'. Prosecutors themselves promptly recognize this variation. Those who favor the latter mode of action refer to colleagues who are reactive, formalistic, and risk-averse as 'office-bound' (*promotor de gabinete*) or 'public servant' (*'funcionario público'*) prosecutors, while those who are proactive, creative, and results-oriented are 'real' or 'good' prosecutors' (*promotor de fato* or *bom promotor*).

When prompted to explain this terminology, they point out that "*public servant prosecutors are those who delegate all their responsibilities to the intern, so they can go home early*".[185] They "*arrive at 2PM and leave at 4PM, and during this period they shelve all cases that come their way*"[186]. Some critics claim that these prosecutors are "*aloof and disrespectful of the citizens; they are like those public servants whom you hate on principle, even before they do anything.*"

Conversely, "*a good prosecutor is one who delivers actual results.*"[187] Moreover, "*good prosecutors go beyond being good interpreters of laws; rather, they know how to negotiate good outcomes.*"[188] Or, more extensively:

> *'The good prosecutor is proactive, ready to leave her office, does not acquiesce to the status quo, and uses her position to empower allies in civil society. Moreover, she does not lose her spirit when a court strikes her down; a good prosecutor knows that to lose a case is different than to lose the war.'*[189]

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[185] Não queremos funcionários públicos, promotor que delega tudo para o estagiário.
[186] "O risco é do promotor virar servidores público, que chega às 2 e vai embora as 4, e vai arquivando tudo o que passa pela frente"
[187] Bom promotor é aquele que traz resultados [o bom promotor].
[188] "Um bom promotor não é o bom interprete de leis, mas aquele individuo que sabe fazer uma boa mediacao"
[189] Bom promotor (1) Sair do gabinete (se querem matar o MP de 88 fiquem no gabinete esperando que os casos cheguem); (3) Promotor também deve mobilizar, usar poder para fazer com que a sociedade civil se organize, pois isso facilita o trabalho. Sem ONGs o promotor é obrigado a entrar com ACP. Com ONGs ele atua como custos legis.; (5) Inovador. Não há bom promotor que seja conformista. Alias, deviamos testar isso no concurso, se não aceitam a situação, a jurisprudência, como está [this is statement is anything but conservative]; (6) Nao desanimem

This kind of variation begs an obvious question: what prompts some prosecutors, in some occasions, to disengage from '*business-as-usual*' and adopt this kind of proactive and creative problem-solving approach?

Observers often claim that this variation emerges from the personal preferences of prosecutors themselves. In their own words, '*it is all about the individual.*' This is a very common response, but it is rarely accurate (Wilson 1989). As explained below, this type of creative engagement emerges from and is rooted in an organization. Even if this organization blends into the background of prosecutorial action and goes unnoticed by those immersed in it, it still exists and makes certain types of action easy while others are difficult. Naturally, the former are bound to prevail, and it is through this subtle but forceful mechanism that proactive, creative, and risk-taking regulatory action emerges and thrives.

The different modes of action and their respective organizational requirements

At its core, and in its most restrictive view, a prosecutor's job consists of attaching legal labels to real-life occurrences. In a household analogy, they are like a homemaker storing trinkets: '*what is this and where does it go?*' The challenge is one of categorization, and all a prosecutor needs to perform it effectively is a detailed and trustworthy report of facts, plus a thorough knowledge of the law. In terms of organizational support, these prosecutors may stay in their offices, interact exclusively with the courts and the police, and process cases one at a time.

Naturally, '*to stitch solutions together*' is a totally different endeavor. To use another household analogy, they are like a home cook deciding on a meal: '*what can I do with the*

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com derrotas no processo. Isso vai acontecer. As vezes, voce perde o processo mas ganha a causa [exemplos???], por exemplo despertando os tribunais, a doutrina, todos aqueles em situação de infração.

ingredients that I have? And what else should I buy so I can cook the meal that I want?' Prosecutors who '*stitch solutions together*' engage in an open-ended search that requires specialized skills and resources that they do not always possess. More specifically, they need context-specific information about the problem at hand, possible solutions and their respective costs and benefits, and potential partners and their respective tolerance to risk and willingness to pay. This kind of undertaking requires a totally different type of organizational support.

As explained in chapter three, reformist prosecutors have been unable to overhaul the *Ministério Público* so that it fully encourages and supports this second type of regulatory engagement. Unfazed, these prosecutors have been creating alliances with NGOs, social movements, church activists, labor unions, universities, and sympathetic factions within otherwise unresponsive public bureaucracies. Together, these allies have been building an adaptable, covert, and overlaid organization devoted to recruiting, training, supporting and rewarding the kind of action that they favor.

A senior prosecutor explains how this partnership between reformist prosecutors and their civil society allies has come about:

> "*After 1988, we [prosecutors] realized that we needed help from the social movement to implement all those laws that had empowered us. These laws had been very ambitious, they had granted prosecutors a lot of power, and we had to put these powers to good use otherwise we would lose them. It was a moment of transition, and of deep uncertainty. We did not know how to move forward. At the same time, church activists were not itching to partner with prosecutors, but they*

had to. It was a matter of convenience and opportunity for both of us. By the late 1990s we had struck a strong alliance with the leftist parties and groups."[190]

Another senior prosecutor advances a similar story:

"The Constitution of 1988 generated two outcomes: first, the society discovered the MP; and second, the MP discovered society. Before, prosecutors used to chase nickel-and-dime thieves. Now, prosecutors feel valued when they are sought after by workers, inner-city folks, church activists. Progressive priests come to me all the time to tell me how things have improved."[191]

Nowadays, reformist prosecutors promptly admit that they are "*the lawyers for civil society*", [192] and a particularly well-articulated prosecutor elaborates on this view further:

"The enforcement of protective regulations is a political-juridical struggle. To have laws and legal evidence is not enough. If I act by myself, issuing subpoenas, indictments, or civil lawsuits, my chances of success are slim. Likewise, political action is not enough either. The way forward is to establish alliances. It is thanks to my alliances with social movements, unions, and NGOs that we have been moving forward. The State is filled with contradictions and internal cleavages, so

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[190] Sindicatos, igreja, movimento social, todos procuravam o promotor. E após 1988, o MP precisava do movimento social, senao nao implementava as conquistas todas. Nas palavras do Ulysses Guimarães, "nós estamos entregando à vocês [mp] um cheque em branco" O MP foi nomeado defensor dos direitos do consumidor, estatuto da crianca e adolescente, idosos -> esses são os instrumentos. E o MP precisava exercer esses poderes, por esses instrumentos em prática, ou iria perdê-los. Era um período de incertezas, não sabiamos como fazer, como defender esse pessoal. "Nós fazemos para depois conseguir amparo legal" [agora nao entendi - se fazia antes de conseguir o amparo legal, entao já sabia como fazer, nao? Se conseguia o amparo legal antes, entao precisava aprender como fazer] "Igreja não se aproximava do promotor porque gostava, mas porque precisava - era uma questão de conveniência e oportunidade" Até o fim do mandato do FHC, o MP tinha uma aliança com os partidos de esquerda.

[191] A constituição de 1988 gerou dois resultados: primeiro, a sociedade descobriu o MP, e depois o MP descobriu a sociedade. Antes o promotor só corria atrás de bandidinho. Depois, ele ficou incumbido de fazer a lei funcionar. Hoje, promotores se sentem valorizados por serem procurados por um grupo de operários, por gente da periferia, pelo padre. Os padres me dizem, que desde 1988 mudou muita coisa.

[192] "Somos advogados da sociedade civil, temos que trabalhar em parceria com a sociedade"

we go about finding these spaces and taking advantage of them. This is how we achieve results, and I learned it from reading Gramsci." [193]

Many government officials and representatives from civil society share the perspective that alliances are crucial. For instance, a leader of the Brazilian Labor Inspectorate points out that "*the labor inspectors and prosecutors are joined at the hip; we are crucial partners in performing the job and obtaining results.*"[194] The head of a prominent environmental NGO concurs: "*the Ministério Público is our most trustworthy ally, always on call.*"[195]

This alliance between prosecutors and NGOs, social movements, church activists, government bureaucrats, and others faces a series of organizational challenges. More specifically, it must recruit, train, support, and reward the kind of innovative and result-oriented action that they favor.

Recruiting and training: As explained in an earlier section, newly-hired prosecutors tend to be fairly young and they bring almost no professional experience to the job. In many ways, they are not fully formed yet, and thus they are rather malleable. As stated by an experienced

[193] "Para terminar com as queimadas, precisamos criar o ambiente para que as pessoas concordem que é preciso terminar, e para isso vamos compondo, articulando. Mas nao vamos compor com as empresas, pois sao nossas inimigas. Nao fazemos aliancas com as grandes empresas, e nao temos aliancas com instituicoes de fora do pais, seria esquisito. O MST tem, mas nos nao. Nossos aliados sao os movimentos sociais, os sindicatos, e as ONGs de direitos humanos. O MP age em conjunto com outras forças para construir uma sociedade justa e igualitaria. "É uma luta politico-jurídica, e assim conseguimos enfrentar o poder econômico. Se minha ação é isolada, entrando com inquérito, com ação, recorro, a minha chance de sucesso é remotíssima. Ter leis, provas a favor, nao adiantariam nada. Mas só a mobilização política tambem nao resolve. A coligação é essencial. São essas alianças que permitem o avanço. O estado é cheio de contradições, e nós vamos explorando essas contradições, abrindo espaços."

[194] "A PF esta la para dar seguranca, mas MPT e MTE sao socios essenciais na conducao dos trabalhos e obtencao dos resultados."

[195] MP é nosso aliado de plantão.

prosecutor, *"most prosecutors mature professionally on the job. It is here that they learn about their power and how they can use it to promote social change."*[196]

To steer this process, reformist prosecutors and their allies reach out and strive to lure in new recruits the day they are admitted to the MP:

> *"We have to find those prosecutors who have this gift, this desire to connect with local communities and then engage in prevention and mediation. And all these, of course, while handling a regular caseload."*[197]

Another prosecutor, now retired, describes the same phenomenon:

> *"Half the prosecutors do not really care about progressive causes, but the other half is very active. This is not something that they bring to the job; rather, they acquire one orientation or the other after they start ... when a new prosecutor starts at the job, she may be recruited by the progressives and hence she acquires this social awareness. In some cases this recruitment takes place through a study group; in other cases a junior prosecutor needs help with a complicated case, consults a senior colleague, establishes a connection, and it goes from there. But there are others who are concerned solely with punishing crime and that's what they do for the rest of their careers."*[198]

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[196] A maior parte das pessoas amadurece profissionalmente com os anos de profissao, é aqui no MP que, aos poucos, o promotor vai aprender sobre todo o poder que tem e como fazer para usa-lo da melhor forma, como agente de transformação social. Mas isso demora anos de amadurecimento pessoal.

[197] "Temos que encontrar quem tem esse dom no MP, esse desejo de ligar-se à comunidade e de fazer trabalho preventivo e de mediacao, sem prejuizo das atribuicoes normais, entao é como se fosse uma atuacao pro-bono."

[198] "Ai eu disse que muitos promotores eram classe media e nao estavam acostumados a falar com gente pobre, nao tinham gosto por isso nem interesse. Ele respondeu que é metade-metade. Metade dos promotores nao esta nem ai, mas a outra metade é bem engajada. Os promotores sao classe média, ganham muito bem, tem muitos benefícios, e um poder enorme. A carteirada de um promotor é muito forte. Ai perguntei se eles entram com essa visao social, ou se ganham ela lá dentro. Ele acha que ganham ela lá dentro. Primeiro, existe a sensacao de participar de um grupo de elite, como o Itamaraty, o ITA, de certa forma até a FGV. Somos membros de um grupo especial, melhor que os outros, que sabe mais que os outros. Ai, quando entra o novo promotor, se for arrebanhado pelo grupo social, adquire uma consciencia social. Mas tem uns que ja entram com uma mentalidade mais voltada para a area penal, e por ai ficam, sem ambicoes sociais. Como é feito esse arrebanhamento? Por exemplo, atraves dos grupos de estudos. Ou, as vezes, é fortuito: o promotor chega, tem um caso pendente, ele precisa de ajuda, consulta alguem, estabelece esse contato, e por aí vai."

In some cases, senior prosecutors who identify with this mode of action volunteer to mentor and guide their younger colleagues. An experienced prosecutor, who is proficient in "*stitching solutions together*," described his personal development and evolving commitment:

> "*How did I learn to negotiate these deals? It was not in law school or the orientation course for new prosecutors. I did not have this background prior to joining the MP, and my tenure as an alternate-prosecutor did not give me this either. I learned it on my current posting, because I needed it. At that time, I called the environmental support office (CAO) and asked for help, and I talked to the head-prosecutor (PGJ) and asked that he assign my predecessor, Armando [pseudonym], who had moved on, to come back every so often to coach and tutor me. Both Armando and I had been admitted to the MP in the same year, but he had always worked with collective affairs so he had this experience that I lacked. He spent almost two years tutoring me, and it was great, but the PGJ had to approve this assignment, it was an official assignment so Armando was getting paid extra, and he came to important meetings, and taught me how to handle certain cases. He is the one who taught me how to do these things.*"[199]

Reformist prosecutors also strive to create permanent channels and structures that help them recruit and train new colleagues. One of these structures is the 'study group', and one of the prosecutors I interviewed explains how these groups may come about and the effect that they have:

> "*The leading figure in strengthening environmental activism within the MP was Antonio Herman Benjamim, a senior prosecutor who was the head of the*

[199] "Perguntei: como aprendeu a negociar? Teve algum tutor ? Alguma experiencia especial? Na faculdade nao foi, nem no curso de adaptacao, e nem na epoca de substituta e experiencias previas tb nao ajudaram. Aprendi foi em Cubatao mesmo, quando precisei. Entao eu entrei em contato com o pessoal do CAO e pedi ajuda, e tambem com o PGJ e pedi que ele designasse o Icaui (?) que era o meu antecessor em Cubatao - ele é da minha turma do MP, mas sempre trabalhou na area de difusos e meio-ambiente, entao tinha experiencia que eu nao tinha - para me auxiliar. Ele tinha sido promovido de Cubatao para Sao Vicente, e passou quase 2 anos me auxiliando. O PGJ tinha que autorizar e designar, pois ai ele ganhava para isso, e vinha nas reunioes, me ajudava em alguns processos, foi ele que me ensinou."

Environmental Support Center (CAO-UMA). He instituted environmental study groups, and invited prosecutors from throughout the state to attend. In these sessions we discussed innovative modes of regulatory enforcement, and all one had to do was show interest and he would formally request your presence in these meetings. Thanks to this formal request, you could leave your post and travel to SP under the auspices of the MP. You even got a travel allowance to cover costs. These sessions encouraged me to pay more attention to environmental affairs, and many of my colleagues say it did the same for them."[200]

To strengthen these connections, prosecutors also organize congresses, training courses, and workshops:

"*State-wide congresses are another means through which prosecutors are trained and information is disseminated – we have a range of specialized congresses, for prosecutors interested in the environment, in urban planning, and more*"[201]

"*Environmental prosecutors form a tight-knit community, we know each other and talk often. The main forum of exchange is our annual meeting. Not all environmental prosecutors favor settlements and negotiated solutions, but all those who attend this meeting do. We even joke that the same people come back every year.*"[202]

One of the most significant structural resources that helps prosecutors connect, interact, recruit, and train those interested in this problem-solving mode of action is the *Ministério Público Democrático (MPD)*, a prosecutor-only NGO inspired by and modeled on the Italian

[200] E esse tipo de atuacao, tem um momento fundador, tem um patrono? Ela disse que sim, que é o Hermann Benjamin. Na epoca que ele era coordenador do CAO, ele criou os grupos de estudos ambientais, e aqueles promotores que queriam vir para sp para participar, avisavam ele e eram convocados, entao podiam largar o servico e ainda recebiam diaria. E foi nesses grupos que eu me interessei por meio-ambiente, e tambem varios de meus colegas. O Hermann Benjamin foi o patrono do meio ambiente no MP. E agora ele foi para o STJ.

[201] "Congressos estaduais tambem sao meio de disseminacao e treinamento - ha congressos especializados, meio-ambiente, urbanismo"

[202] "Perguntei se eles, os promotores ambientais, tem uma comunidade, se eles interagem entre si. Ela disse que sim, que se conhecem, se comunicam, e que o principal forum é o congresso anual do MP ambiental. Nem todos os promotores ambientais privilegiam a mediacao e o acordo, mas os que vao no congresso tem esse perfil. Eles ate brincam que sao sempre os mesmos."

Magistratura Democratica. Founded in 1991, the MPD has more than 300 members spread throughout Brazil:

> *"Not all prosecutors are engaged or passionate about politics, but many are, and some of us have even been members of the 'partidão' [colloquial name for the Communist Party]. They get to know each other through participation in the Ministerio Publico Democratico (MPD). The MPD is like an internal political party, created to oppose the political current that had been leading the MP for many years. The MPD succeeded right away and managed to place its candidate as head of the Sao Paulo MP, and then it sort of lost its focus and some of its purpose. Eventually it found a new niche, to support progressive action by prosecutors; it represents the leftist inclinations within the MP. Many prosecutors don't really understand the MPD and do not agree with it or its existence. They say 'why do we have an organization called 'Ministerio Publico Democratico' when the whole of the MP is democratic?' The MPD acts as a forum that congregates people who think alike, such as Marcio, Vera, and Cecilia [fictitious names]. You meet a lot of people early on in the career, thanks to the orientation course and that time one spends as alternate, going from office to office all the time. But eventually the career slows down, and one does not have as many opportunities to meet new people. The MPD serves this purpose."*[203]

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[203] "Ele me disse também que desde pequeno tem militância política, sempre foi engajado, militante mesmo. Perguntei se muitos promotores sao assim, e ele disse que nao sao muitos, mas é um numero considerável, e que tem muitos promotores que foram até do partidão (PC). Eles se conhecem pelo MPD. O MPD foi criado para ser a oposição ao fleury-quercismo no MP, que na época liderava o MP, na pessoa do Araldo Dal Pozzo. O MPD logo teve sucesso, e conseguiu emplacar o Marrey como PGJ, entao a organizacao perdeu sua função, ficou meio desarticulada, e depois achou uma nova missao que é apoiar a ação politica dos promotores, engajada socialmente, é o MP de esquerda. Tem muitos promotores que nao entendem, que nao gostam, ora, pq ter um MPD se todo o MP é democrático? Ms o MPD serve essa funcao de juntar pessoas que pensam de forma semelhante. O Airton, a Fernanda, a Jaqueline. Nesse momento, eu estava tentando descobrir como sao as redes internas no MP. Disse que imaginava que cada promotor conhece aquelas pessoas com quem fez o curs ode adaptação junto, e depois conhece aquelas pessoas com quem trabalha junto, e que na época de substituto, por circular bastante, acaba conhecendo bastante gente, mas depois, ao se aquietar em um só lugar, acaba perdendo esses contatos. Ele disse que isso é verdade, e que com a diminuicao da velocidade da carreira, as pessoas estao tendendo a ficar muito tempo em um só lugar e conehcer cada vez menos gente. Mas no caso dele, por ter sido coordenador do CAEX, conhece muita gente, é figurinha carimbada. E tem também o MPD, lógico. Perguntei como faz para saber quem sao os pontas-firme, aqueles que se comprometem em vir até Parelheiros dar um curso de orientadores juridicos populares num sabado de

In some cases the recruitment and training of these prosecutors occurs from the outside-in, thanks to the efforts of NGOs, social movement, and other institutions. A prosecutor explains how he was recruited and trained into this mode of action:

> "*It was my first posting, in this small coastal town, and a religious lady came to see me in my office. Right off the bat she said: 'you are not one of those 'promotorzinhos' [little prosecutors] who come to the office, sign on the dotted line and go home, are you? Let's visit the homeless shelter, the halfway house, and other institutions'. I had no clue what she was talking about, but I went anyway. In my mind, I wanted to work on environmental affairs, but I ended up devoting a lot of time to prison reform. At some point she showed me how a low-security prison in the region was not doing a good job in offering jobs to its interns, so we set out to help it build a brick kiln, to employ the inmates. We talked to the local judge, we met with different local dignitaries and businesspeople, and we eventually found a suitable plot of land, got the money, and pulled it all off. It was not easy, but I'm very proud of the results.*"[204]

<u>*Reaching out, gathering information, and assembling a network:*</u> Prosecutors have plenty of legal power and public authority. As stated by an interviewee, "*whenever a prosecutor calls, people answer.*" And yet, if they are to produce productive, sustainable, and lasting results, they must be able to gather detailed, context-specific information about the problem at hand, consider the various possible courses of action, and attract institutional allies willing to share the costs, risks, and benefits associated with the change.

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manha - ele disse que conhece essas pessoas da epoca de militancia politica interna no MP, do MPD, da eleicao do Marrey.

[204] "Fabrica de blocos para prisao semi-aberta em Caraguatatuba. Moca religiosa, "voce nao é daqueles promotorzinhos que dao despacho e vao para casa, ne?". Vamos conhecer a casa do albergado, o semi-aberto, etc. Eu nem sabia do que se tratava, mas vamos la. Juntamos o terreno, juiz, empresario, etc. Nao é comum, mas acontece, e tenho orgulho de ter feito"

The importance of information becomes evident when prosecutors do not possess it. It is fairly common, when they act by themselves, without information or the support of allies, that prosecutors propose solutions that are unfeasible or even ludicrous. The representative from a national-level environmental agency provides an example:

> *"It is such a pleasure to work with prosecutors... if I could work exclusively with them and forget the state-level environmental agencies and land registries, I would be a happy man. And yet, there are some occasions, often in big and important meetings, in which a new prosecutor says something terribly stupid. It is embarrassing, and I feel like telling them 'let's go outside and I will explain the situation to you.'"*[205]

Some prosecutors recognize their own failings in this regard. An accomplished prosecutor described a similar event took place early in his career:

> *"I had just been transferred to this post, and the Ministério Público (MP) was bringing a case against a large steel maker for pollution, so I went to this meeting with all their technical people and some very expensive private lawyers. Throughout the meeting they kept saying 'the MP this', and 'the MP that', but I could not figure out what they meant. I was really confused, so after the meeting I called some friends and eventually learned that MP was not 'Ministério Público' but 'materia particulada', a pollution index."*

Examples of this nature abound, and prosecutors who favor a problem-solving approach eventually learn to see technical data and contextual information as a crucial input to doing a

[205] "da gosto de investir no MP: promotores sao os mesmos e se muda, vem alguem com mesmo perfil. Ainda mais, tecnicos ganham bem e seguem carreira, nao vao facilmente para iniciativa privada. ... Se eu pudesse fazer convenio apenas com MPs, minha vida seria maravilhosa, mas eu preciso lidar tambem com OEMA e Instituto de Terras, e aí é um inferno ... Tem vezes que o promotor fala cada besteira, da vontade de dizer, vamos ali nos bastidores, que eu conto a historia para voce"

good job. Yet, to institutionalize access to data or to provide information in an organized, centralized fashion is not easy. A reformist prosecutor explains:

> *"To produce good results, one needs resources. Technical assessments are often essential to our task, but who will pay for them? Sometimes we find an expert that is willing to work for free, but one cannot build a solid practice on this kind of volunteerism. Once we got a congressman to introduce an amendment to the state budget to establish technical support offices subordinated to the MP. The amendment was approved, but the money never came. A colleague tried to raise money with international donors, but it did not work either. We signed formal cooperation agreements with a roster of government agencies, but these agencies claimed that we had to pay for their expenses, so the problem remained. We pressed for an amendment to the state constitution making it mandatory for government agencies to provide us with technical support, but the effort fell flat. We tried to use the money from the reparations fund to pay for subsequent cases, but the courts said that these funds could only be used to repair damages, not to fund subsequent litigation. We never found a solution to this problem, and lack of money to pay for technical assessments remains a major hurdle."*[206]

In my assessment, the situation is not so dire. Thanks to the effort of reformist prosecutors, the MP has created a range of Technical Support Centers (*Centros de Apoio Operacional – CAOs*) within its own structure and their goal is to support prosecutors who work in a variety of fields, including environmental affairs, children and youth, consumer protection, citizens with disabilities, and more. These centers are headed by prosecutors and staffed by specialized technical personnel such as sanitation engineers, biologists, zoologists, architects,

[206] "Para atuar de forma seletiva, precisavamos de recursos. Por exemplo, pericia técnica era essencial, mas quem pagava os custos? Alguns tecnicos trabalhavam de graça, mas era sempre uma briga. O Ricardo Tripoli apresentou um projeto com dotacao orcamentaria para montar escritorios de apoio regionais, mas o dinheiro sumiu. Tentamos obter financiamento internacional. Fizemos convenio com Instituto Florestal, IPI, USP, tivemos uma conversa séria com o reitor, acabou virando uma briga or causa de dinheiro. Tentamos apresentar uma emenda constitucional para que órgãos públicos obrigatoriamente prestem apoio ao MP. Tentamos usar recursos do fundo de direitos difusos (que foi criado via decreto) mas nao deu certo, a justiça decidiu que so podia usar aquele recurso para reparacao de danos. Isso continua sendo um problema até hoje, e hoje é ainda mais dificil obter uma pericia do que era antes"

and others. They provide prosecutors in the field with templates and step-by-step guides to action; answer their specialized legal and non-legal technical queries; help connect different prosecutors working on the same region or on similar topics; and connect prosecutors to technical government agencies. An environmental engineer who works in one of these centers describes his job as follows:

> "*Prosecutors call us when they face a complex problem that they cannot solve by themselves. They want solutions. If I say that some problem is even more complicated than they think, or if I suggest a course of action that they consider impractical, I am in trouble. They want concrete, actionable answers.*"[207]

Of course, the MP cannot hope to have enough technical advisers on its payroll to answer all queries on all topics at all times. And consultants cannot know all contextual details of the different problems that prosecutors face. So prosecutors establish alliances with NGOs, social movements, universities, labor unions, government agencies, independent experts, and others, and use these alliances as a springboard to an even larger network of allies. Examples of these mutually beneficial alliances abound.

In some cases, these alliances are formal and visible. For instance, in the countryside of Sao Paulo, prosecutors have partnered with city-level Health Surveillance Agencies (*Vigilância Sanitaria*) to make sure that, during the harvest season, migrant sugarcane workers are lodged in appropriate, not over-crowded houses, with functioning bathrooms and kitchens. A member of the alliance explains how it works:

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[207] Ele falou que eles chamam quando tem um problema complexo, que eles nao sabem resolver sozinhos. E querem que os tecnicos tragam uma solucao, nao adianta tornar o problema mais complexo ou dar alternativas inviaveis - o promotor quer alguma resposta, e o tecnico tem que achar algo que vai satisfaze-lo. De certa forma, eles se veem como consultores para casos criticos. "Se fosse facil, eles nao nos chamavam". E "para dizer isso, eu nao preciso de voce"

"The Health Surveillance Agency is fairly weak, it has almost no enforcement power. Conversely, the prosecutor has a lot of power and can inflict the heaviest fines. Once, a prosecutor imposed a R$ 1.5 million fine [US$700,000] on a sugar mill. Our prosecutor is like that, very strict. Still, she can't be everywhere and know everything. So she has established an alliance with the Health Surveillance Agency and now they support each other. In the end, the MP has been learning a lot from the Health Surveillance Agency."[208]

In other cases these alliances are informal and involve factions of sympathetic officials within an otherwise hostile public bureaucracy. A prosecutor who is particularly apt at establishing these partnerships provides an illustration:

"You know, there is a lot of corruption in the granting of environmental licenses. And there is also a lot of political pressure, I mean, mayors want to attract industries and do not care about pollution, so they ask the governor to take the state-level environmental agency off their backs. But I have an excellent relationship with technocrats from the Forest Service [Instituto Florestal], and the state-level environmental agency [CETESB], and they keep me apprised of what is going on. Sometimes they bring me copies of their impact assessments and tell me 'this is the report I wrote. Save it, because it may change'. Other technocrats call me to tell they are being told to approve some damaging project and ask for my help. I exert some pressure from my end, and it always works."[209]

An officer with the state-level environmental agency tells essentially the same story, but from the point of view of the technocrats:

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[208] A vigilancia sanitaria nao tem forca. O promotor tem forca, aplica multas violentas, em MS ou MT, aplicou uma multa de R$ 1.5 milhões. O procurador é muito firme, mas sozinho ele nao tem braço. Fizeram uma parceria! Agora ha muita troca, o MP, p.ex., tem aprendido com a Vigilancia Sanitaria.

[209] "há muita corrupcao na area de licenciamento ambiental, e muita pressao politica. E que sao os tecnicos da CETESB e do Instituto Florestal, com quem ela tem excelente ligacao, que trazem todas as dicas. Tem casos que o tecnico traz um parecer e diz "esse foi o parecer que eu escrevi. Guarde, pois acho que no decorrer do processo ele vai mudar". Tem quem ligue, para falar que esta sofrendo pressao".

"Whenever the pressure on us grew, we called the Ministério Público. How? From my home phone! I know which prosecutors are reliable and responsive. My colleagues and I have been giving courses to prosecutors, and we have even taken some of them to visit the national parks, so they could see things for themselves. 'Tecnicos' like myself often organize field trips and invite prosecutors to come. Do you think the head of the environmental agency would care about this? Not in a million years. They hate us. In many cases our foe was the government itself, the governor wanted to please some mayor, and the head of the agency would pressure us into granting environmental licenses. This pressure can be quite intense, but then we lean on the prosecutors and resist."[210]

On another occasion, I participated of an informal conversation in which the former director of the public land registry instructed a prosecutor on the various databases that hold land registry data, the data that are available, and how she ought to phrase her requests to make sure that uninterested bureaucrats would not give her the run-around.

Institutionalizing the organization: Prosecutors interested in strengthening this mode of action often divert resources, for instance from legal settlements, to resolve other problems and to strengthen their allies.[211] A prosecutor who is particularly apt at this task provides an example of how it works:

"On one occasion, there was this massive toxic spill from a chemical industry in my jurisdiction. I started an inquiry, and the managers of this industry came to me with an assessment of the damage that went only to the boundary of their land.

[210] "Quando a pressao era muito grande, a gente ligava para o MP" Como? "do telefone de casa!" Ah, a gente conhece os promotores, ne? O Herman Benjamin criou o movimento ambientalista do MP, formou pessoas, demos muitos cursos para eles, levavamos para conhecer os parques. A iniciativa era nossa, dos tecnicos. Voce acha que os secretarios iam se preocupar com isso? Eles nos odiavam. E as vezes era briga nossa contra o governo mesmo, o governo queria atender alguma demanda de um prefeito, e ai vinha pressao. Mas a gente se apoiava no MP"

[211] This is not exclusive to prosecutors in Brazil. In the US, the EPA often requires in its consent decrees that defendants provide some public good. For instance, and as a result of an investigation on health, safety, and environmental standards in research labs, MIT has agreed to build and grant the EPA with a website devoted to controlling laboratory hazards. Other universities have made similar contributions. I thank Susan Silbey for this point.

Very funny! No way, I said to them, you will assess the damage not on your own land, but on the whole region, as indicated by the technical expert the environmental agency has assigned to the case. Fortunately, the environmental agency is very competent and well equipped; it has all the equipment and resources, because in all my settlements I get the firms to pay for gear, training, to refurbish their buildings, and thus I help strengthen and empower the regulatory and monitoring agencies."[212]

And there are plenty of examples of this same phenomenon. One of the prosecutors I interviewed described how he has helped equip the Labor Inspectorate by settling lawsuits or forgiving breaches of previous settlements in exchange of cars, SUVs, laptop computers, and portable printers that labor inspectors can take into the field. Another prosecutor described how she convinced a major oil refinery to build and install a computer system linking its industrial plant to the environmental agency, which started monitoring emissions online. In her own words:

"*One of the items we negotiated was the establishment of this link connecting the oil refinery to the environmental agency. It is an online, real-time link that gives the inspectors all the data they need to keep an eye on emissions, pollution, everything. This had never been done before, and the refinery resisted mightily, but in the end it acquiesced.*"[213]

Naturally, these settlements do not give the firms a free pass to continue infringing the law. Independent on whether a case is settled or goes to court, defendants must still comply with all the applicable regulations. The only difference is that, instead of paying a fine, defendants pay for these equipments. In fact, many even prefer it this way. A prosecutor explains:

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[212] "Engraçadinho, né? Faz avaliação de danos, de vazamento de produto quimico só até o limite do terreno. Nada disso! Vai examinar até bem depois, até onde o técnico mandar. Ah, os orgaos ambientais estao muito bem equipados, pois em todos os TACs eu consigo coisas para eles, faço as empresas infratoras pagar por equipamentos e predios e etc que vao fortalecer as agencias reguladoras e fiscalizadoras."

[213] Um ponto que foi muito dificil foi a instalacao de controle online de emissoes, um link da industria até a agencia ambiental, em tempo real. É uma coisa inedita, e a petrobras relutou muito, mas acabaram aceitando.

"You know that there is a fund specially set up to receive these fines, no? Theoretically, that is where all the money from the settlements should go. But some of my fellow prosecutors and I believe that reparations should not go to a central fund. Rather, they should be used in the place in which the violation occurred. And the firms prefer to invest locally as well. They do not like paying cash, and resist with all their will. However, if you suggest that they buy a piece of equipment, or build a new facility for the government, they agree more easily. They want to claim it as an act of corporate social responsibility, and some firms even organize a public ceremony for when they donate the equipment. I let them get away with some of it, but not too much. Sometimes they go too far and omit that the donation was part of a settlement, so I call them up and demand a correction."[214]

The resources that prosecutors extract from these firms are not always material, they can be organizational as well. One prosecutor described how she has helped create a civil society organization that she eventually partnered with:

"My colleagues and I helped create a neighborhood association. In this case, the port authority wanted to build a terminal for containers, and the people who lived in that area was furious, because they knew that they would have to deal with all the trash, infestation, prostitution, drug trafficking, and crime that comes along with this kind of thing. So they came to us to complain, and we told them they had to organize themselves, establish a legal entity, and present their grievances to the mayor. They orchestrated a protest, a sit-in, and we stayed in the background, providing them with support and guidance. At the same time, they would provide

[214] Sabe que existe um fundo de compensacao ambiental, né? Teoricamente é para lá que teria que ir o dinheiro dos acordos, mas eu, e um grupo de promotores no MP, acreditamos que o dinheiro / a compensacao tem que ser aplicada no local. E as empresas tambem preferem, pois eles nunca querem pagar em dinheiro. Tem uma resistencia enorme. Preferem comprar equipamento, construir um predio, agora uma empresa aceitou construir o predio do centro de zoonoses. Tem uma que doou equipamentos para o corpo de bombeiros, essas coisas. Eles aproveitam apra capitalizar, fazer um pouco de relacoes publicas, dizer que estao fazendo o bem para a sociedade, etc. Um pouco a gente deixa, mas nao pode exagerar, né? No caso do CEPEMA, no material interno da PETROBRAS saiu certinho, mas na revista da USP, saiu que a PETROBRAS doou o dinheiro. Ai eu mandei um email p. a pro-reitora pedindo retificacao. Imagina so?

us with data and all sort of local intelligence so we could present legal claims on their behalf through the proper channels. Ultimately they got what they wanted, and then they organized this massive celebration, with a big banner thanking us for all the support, I have pictures, it was great. And the neighborhood association is still there, going strong."[215]

And there are plenty of other examples of this same nature. For instance, a group of prosecutors have created an organization called "*Instituto de Estudos de Direito e Cidadania*" (IEDC), and others, alongside a roster of allies from the courts and other institutions, have created an NGO called "*Instituto Direito para um Planeta Verde*", devoted to defending the environment. There are many other organizations, and this trend is so pronounced that even interns at the *Ministério Público* have built formal institutions devoted to advancing their preferred mode of action. For instance, the NGO called "*Meio-Ambiente Equilibrado*" (Environment in Balance) was "*created in 2001 by the interns of the environmental division of the MP in Londrina [Paraná state] who worked in a major oil spill case*". Nowadays, this organization brings together people with a variety of professional backgrounds, and is a reference for all struggles concerning the urban environment in its home town.[216]

The strengthening of technical government agencies, NGOs, and other groups render prosecutors themselves obsolete, and let them focus on other areas that still demand their attention. Driving this point home, a labor activist explains how prosecutors have been instrumental in creating this network of allies and then moved on:

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[215] Ah teve um caso onde nos criamos a associacao de moradores e tudo. O caso é que a cidade (ou o porto) queria construir um patio de containers, e os moradores nao gostam, pois empilham aqueles containers todo, acumulam-se animais, ratos, crime, trafico, prostituicao, é uma coisa horrivel. Entao eles vieram reclamar no MP, e nos dissemos que eles precisavam se organizar, criar uma associacao, reclamar seus direitos na prefeitura. Eles acamparam na regiao, fizeram manifestacao, e nos só iamos orientando, e eles conseguiram o que queriam. No fim fizeram uma festa, tinha faixa agradecendo ao MP, eu tenho fotos se voce quiser ver. Foi muito bacana. E a associacao esta la até hoje. Ah, e foram eles que ajudaram o MP a instruir o processo, coletavam dados e tudo.

[216] Source: http://blog.ongmae.org.br/sobre/

"The prosecutor was key in building this alliance, he ensured that people would come to the meetings, he called them up, and he has always been there for us whenever we called him."[217]

"Now, when something comes up, when there are labor complains, the director of the sugar mill calls me and says 'don't let the prosecutor get involved. We can sort it out among ourselves.' Indeed, there was a case in which the independent labor contractor [gato] was not paying the workers right, they complained to us, we complained to the mill, and the director took it from there. The gato did not have any money, so the mill paid the workers and deducted the value from whatever it owed to the sugarcane farmer who had hired this gato in the first place. And everything got solved without the prosecutor getting involved. I don't think she even knows it happened."[218]

4.4 – Two concurrent organizational logics

The Brazilian procuracy is a single, unitary organization, and its prosecutors repeatedly describe the agency and themselves as pursuing a unified mission, namely *'to enforce the law'*. And yet, beneath this veneer of unity and homogeneity lies two organizations that follow different organizing logics and pursue different ambitions. One of these organizations is composed of prosecutors who embrace a cautious, formulaic, ritualistic and reactive case-processing approach. These individuals work primarily in their offices responding to cases as they arrive from other law enforcement agencies, and their main concern is to manage the case flow. In fact, this attitude is typical of many procuracies and street-level bureaucracies around the world. Intertwined with it one finds another organization composed of prosecutors who firmly believe that they should use their professional status, public legitimacy, and legal powers

[217] Quem faz o pessoal vir nas reunioes é o promotor, ele liga, dá atencao para todo mundo

[218] E quando surge algo, o diretor da COSAN me liga, e diz "Nao deixa o MP entrar! A gente resolve entre nós mesmos! Teve um caso onde o gato nao queria pagar os direitos dos trabalhadores, a usina foi la, disse que ia resolver. O gato nao tinha dinheiro, a usina pagou e descontou do fornecedor de cana. Nem precisou do promotor.

to engage in root-cause analysis and effective problem-solving. These individuals find time within their busy routines to leave their offices, engage with NGOs, social movements, labor unions, university researchers, and a variety of other social actors, and openly and purposefully search for (but not always find) viable solutions to complicated problems of regulatory compliance.

Although the existing empirical research literature on the organization of public institutions does not emphasize this kind of plurality within a single agency, theoretical models have anticipated this dialectical entwining. March (1991) referred to formalistic implementation as *exploitation of old certainties* (he also called it "refinement, choice, production, efficiency, selection, implementation, and execution"). And he described the second, more inquisitive model as *exploration of new possibilities* (he also called it "search, variation, risk taking, experimentation, play, flexibility, discovery, and innovation"). Using systems dynamics, Repenning and Stearman (2001) modeled these same practices and labeled them respectively the "work-harder" and "work-better" loops of the system.

In March's words (1991) "both exploration and exploitation are essential for organizations, but they compete for scarce resources." This is undoubtedly true for the Brazilian *Ministério Público*. While representatives from these two factions show a unified external face, they also fight with passion in a variety of internal settings. This competition shines through even in the vocabulary that they use to refer to themselves. The advocates of a proactive and innovative approach regularly claim to be '*good*' or '*real*' prosecutors, and say of colleagues that do not espouse their principles and preferences as '*office-bound*' or '*public-servant*' prosecutors. In practice, representatives from these two groups try to reshape the overarching organization –

its structures, policies, incentives, and constraints – in a way that favors their preferred mode of action.

And yet, perhaps even more striking that the competition between these two factions is the fact that these two logics tacitly support each other and the organization as a whole is better off by having both. When Repenning and Stearman (2001) modeled the two loops, which they called 'work harder' and 'work smarter', they suggested that they are self-reinforcing but exclusive. In other words, according to their model, organizations follow one of the two modes, and it is difficult to change from one to the other. March (1991), on the other hand, suggests that organizations are better off by having a balance of the two. The first mode of action, which he calls exploitation, allows for optimization of practices and short-term, immediate and certain benefits. However, it may lock the organization in suboptimal practices and outdated routines. The second mode of action, which March calls exploration, exposes the organization to higher risks, as it incurs all the costs associated with experimentation without its benefits. Results are uncertain but perhaps more obtainable in the long-run.

As stated by March (1991), "maintaining an appropriate balance between exploration and exploitation is a primary factor in system survival and prosperity." The present study of the Brazilian *Ministerio Publico* advances this theoretical model by providing both an empirically-based description of these two loops – and the types of enforcement action that each engenders – within a regulatory bureaucracy, and greater specification of what 'exploration' or 'work better' might consist. Specifically, it suggests that when enforcement agents see their work and themselves as links in a complex web of interactions and processes rather than as offices of delimited responsibilities and interests, they produce recognizably different kinds of regulation. Whether one calls this 'stitching it together', as the Brazilian prosecutors do, relational

regulation (Silbey 2009) or 'sociological citizenship' (Silbey, Huising and Coslovsky 2008), the fact of the matter is that these agents are reorganizing their work and effort, building networks of interested others, and harnessing those relationships in the service of their public mandate.

5 – CONCLUSIONS

This dissertation stems from a simple question: how do Brazilian prosecutors enforce labor and environmental laws? This query would not be interesting if prosecutors did not face a serious dilemma. On one side, it is part of the prosecutors' job to confront a wide array of violations. For instance, some firms within their jurisdictions may pollute too much, others may engage in illegal deforestation, and some may employ machines that are unsafe for workers or rely on child labor. The list of violations can be endless, but the problem of compliance with protective regulations often boils down to a matter of costs. As stated by the manager of a private firm: *"these things are expensive; if I comply I will be unable to compete."*

Many of these firms operate in poor areas and employ people that desperately need their jobs. By stating the problem of compliance as a trade-off, private firms return the problem to the prosecutor. Forced to choose between compliance and competitiveness, what do they do? This dissertation examines this question at two levels. First, it examines the prosecutor-in-action, i.e. how individual prosecutors, in practice, try to overcome this seemingly inescapable trade-off between compliance and competitiveness. To this end, it examines four concrete cases – the production of granite tiles, farmed shrimp, charcoal for pig-iron, and sugarcane – in which Brazilian prosecutors have struggled over the proper way to enforce protective regulations. Then, it uses the advances and setbacks in compliance and competitiveness in each of these cases to identify a pattern of prosecutorial action that has not been identified or described before. Appropriating an expression sometimes used by prosecutors themselves, I call this mode of action "to stitch solutions together".

And second, this dissertation examines the organization that hosts and enables this type of action. Many people, including prosecutors, attribute this type of proactive, creative, and results-oriented behavior to personal proclivities of the individuals in charge. Supposedly, some people are so committed, so enthusiastic, so devoted to a mission, that they will do whatever it takes to get things done independent on surrounding conditions and other intervening variables. These critics dismiss the importance of organizations – the formal and informal structures, policies, pressures, incentives, and constraints – that make certain actions easier to perform while others become difficult. Of course, *ceteris paribus*, the former is bound to prevail, and anyone interested in understanding how individuals within an organization behave must pay attention to these features that are so easily – but erroneously – dismissed.

5.1 - The prosecutor-in-action

There is a sizeable academic literature devoted to studying styles of regulatory enforcement, corporate social responsibility, and the reasons why some firms comply or even go beyond compliance. This literature identifies a number of styles and variables that determine compliance. Many of these concepts overlap, and one who summarizes this diverse literature identifies the following styles of enforcement / drivers of compliance:

(a) Deterrence, in which the enforcement agents impose a tax on non-compliance; they raise the cost of violating the laws, usually through fines or lawsuits, until it makes sense for firms to comply;

(b) Pedagogy, in which enforcement agents act as technical consultants, teaching firms about the laws and how to comply;

(c) Managerial approach, in which enforcement agents help firms improve their managerial systems so firms can eliminate harmful and wasteful practices and explore socially-desirable opportunities;

(d) Market-based approach, in which the government establishes entitlements and property rights and then encourages the parties and anybody who cares (such as environmentally-conscious consumers) to negotiate mutually acceptable solutions on their own;

All these approaches have their own advantages and drawbacks. In some occasions they work, but in others they can be utterly ineffective. More basically, they are based on assumptions that do not always hold. The deterrence, pedagogy, and managerial approaches assume that surrounding conditions (i.e. the environment in which firms operate) is fixed and that problems can be solved one firm at a time. Moreover, these approaches ignore market failures such as split incentives and free-riding and the difficulties of collective action. The market-based approach assumes that transaction costs are minimal or non-existent so parties will trade freely, and ignores problems such as bounded rationality, asymmetrical information, and incomplete markets.

The findings on the prosecutor-in-action

As one would expect, prosecutors often adopt one of these standard approaches, are particularly prone to deploying the deterrence mode of enforcement, which constitute their 'business-as-usual'. And yet, some prosecutors, in some occasions, depart from this mode of action and do something else altogether. They realize that, in some instances, compliance requires costly and risky changes in business practices that private firms are unable or unwilling

to undertake on their own. Rather than impose a harsh penalty, which they anticipate will eliminate jobs and undermine business profitability, or clarify the law, which they fear will be futile, prosecutors reach out, search for partners, and eventually assemble a network of institutions eager or capable to cover some of the costs and insure some of the risks associated with compliance.

In some cases, this reassignment happens strictly within the supply chain in which the harm is produced. For instance, prosecutors have used a legal precedent called TST-331 concerning the misclassification of workers to reassign the costs of hiring, providing mandatory benefits, and firing seasonal sugarcane laborers away from independent labor contractors and onto the sugar mills. In other cases, this reassignment requires the participation of other institutional actors that need to be identified and brought in. For instance, in their attempt to relocate shrimp farmers away from riparian areas, prosecutors have counted with the support of the state-level environmental agency (which conducted and paid for a census to identify eligible farmers), the land tenure agency (which identified a suitable plot of land), and the governor's office (which donated the land to the farmers).

Many institutional actors other than prosecutors can perform this role, but prosecutors occupy a position within the Brazilian legal system that makes them especially apt to do this job. First, they can use their knowledge of the laws, and the fact that legal codes are so often vague and contradictory, to claim jurisdiction over practically any controversy they want. Second, they can interpret the codes narrowly or broadly so as to split and reassign legal rights and duties and reassign costs, benefits, and risks to those most willing or able to afford them. And finally, they can grant an informal but effective seal of legality to the final arrangement, effectively shielding it from further legal contestation. Of course, prosecutors do not have to perform all these roles in

all cases for the initiative to succeed, and in some instances they do not even participate at all. But overall, and given their privileged position as gatekeepers of the Brazilian judicial system, and the absence of an active private class-action bar, they are instrumental actors in performing this type of intervention.

Theoretical implications

Throughout the course of this research I tried to find the right name, analogy, or theoretical frame for this kind of action. In different opportunities I described these activities as 'brokering', 'mediating', 'deal-making', 'coalition-building', or 'problem-solving'. At some point, I likened this type of intervention to a home cook preparing a meal. In deciding the menu, the cook checks the pantry to decide what can be prepared with the ingredients at hand. At the same time, the cook envisions which ingredients ought to be acquired so he can prepare the meal he wants. To put it briefly, these individuals are both searching for new resources and optimizing the resources that they have. Some call this mode of action "bricolage" (Cunha 2005), others call it "search routines" (Sabel 2006) or "puzzle-solving" (Winship 2008). Eventually, I accepted the terms that prosecutors themselves sometimes use; they call this type of intervention "to assemble a network" [*montar uma rede*] or "to stitch a solution together" [*costurar uma solução*].

On a larger canvass, this type of engagement conforms to the ideas advanced by the literature on "varieties of capitalism" (Schneider 2009), that in different polities economic and political institutions combine and support each other in intricate and hard-to-predict ways. This body of work also suggests that institutions come in bundles and any single practice cannot be understood or reformed on its own. Mindful of this mutual interdependence of institutions but unsure of the relative position and strength of the various links, prosecutors go about mapping

this maze (or network) of connections until they identify leverage points that allow for meaningful reform.

And yet, in many ways, the best analogy is to compare the prosecutor to an entrepreneur trying to create a business venture, an investment banker trying to engineer an M&A deal, a real-estate developer trying to build an edifice, or a producer trying to put together a movie or a play. All these agents are trying to create money where it does not exist, and to succeed they must bring together a variety of other actors – for instance, lenders, venture capitalists, patent-holders, manufacturers, wholesalers, distributors, retailers, union leaders and others – who will contribute to the joint-effort in exchange for a share of the proceeds.

If everything works, the new business venture, the M&A deal, the urban development, the play or the movie will come to life through a web or network of contracts, and lawyers are often involved. And even if these professionals are sometimes vilified as dead-weight loss to the economy, observers of the legal profession have noted that, in many occasions, and particularly when "engineering" transactions (Howarth 2004), they not only redistribute but also "create value" (Gilson 1984). Also, they act as "transaction-cost engineers" (Bernstein 1995), "enterprise architects" (Dent 2008), "facilitators" (Suchman and Cahill 1996), or "architects of social structures" (Fuller 1981, see also Hertogh 1999, Soltan 1999).

That is exactly what the prosecutors I studied do. While private transaction lawyers help their clients appropriate the largest possible share of a potential surplus, prosecutors create costs by demanding that firms internalize their negative externalities, and then redistribute these costs to an ad hoc network of agents and institutions in a way that makes compliance acceptable, sometimes even desirable, to all. Like private business lawyers, they spend their days not in

litigation, but in the engineering of transactions. The difference is that, instead of enlarging and sharing revenue, they minimize and share investments or expenditures. They are practicing an advanced version of what Susan Silbey (2009) has called "relational regulation".

This insight provides an obvious link to the work of Ronald Coase (1937, 1960). A typical description of the Coasean bargain is that, in the absence of transaction costs and as long as entitlements are properly defined, the parties involved in a negative externality will trade and redistribute costs and benefits on their own, maximizing aggregate social welfare in the process. The typical example is that of community members who pay a firm not to pollute, or the firm that pays its neighbors for the right to pollute. This may work in theory, but the real-world cases examined in this dissertation show that transaction costs are not minimal and entitlements are rarely defined in a way that allows for spontaneous trading. A variety of market failures prevent this version of the Coasean bargain from taking place, and these failures create an opportunity for the prosecutor to give the market a hand. To say it differently, they often act as catalysts of a Coasean bargain[219], i.e. they clarify entitlements, identify winners and losers, and compel the former to compensate the latter. In many cases, this bargain involves more than two parties and ends up creating a network of agents that both pay and receive, not necessarily in cash, but also in goods, services, technology, or contracts to decrease risks and uncertainty.

Over time, Coase's insight has given rise to a variety of conflictive interpretations. Some see it as an advocacy of the free market, an impetus for the abolishment of regulation, and a justification for the maintenance of the status quo. My understanding of Coase's insight and my suggestion that prosecutors are catalysts of a Coasean bargain dovetails with a different school of economic thought. According to Dahlman (1979), a correct interpretation of Coase "suggest(s)

[219] I thank my friend Jason Jay for this formulation.

employing taxes, legislative action, standards, prohibitions, agencies, or whatever else can be thought of that will achieve the allocation of resources we have already decided is preferred. The implication of status quo is simply not there: the theory says to find practicable ways of diminishing transaction costs, by whatever kind of action is necessary, including governmental action." Likewise, McCloskey (1998) suggests that "the true Coase theorem implies that one cannot in general efficiently internalize an externality by taxing / subsidizing whoever is generating the negative / positive externalities, because (in light of transactions costs) this would generally not result in the right to the resource affected going to the person who values it the most". So, "rather than implying that the state ought to get out of the business of dealing with externalities... this implies that the state ought to concentrate on defining and transferring property rights instead of taxing / subsidizing ... getting the entitlements right rather than getting the prices right" – and then, on top of that, McCloskey adds that "Ronald Coase is a postmodern economist. And his theorem, a post-modern one, is about the difficulty of knowing what is to be done". Prosecutors know all about this difficulty, and the challenges associated with the search.

Also important, what Brazilian prosecutors are doing is not necessarily unique. There is a large body of work, in the US, on structural reform litigation (Garrett 2007), regulation by prosecution (Barkow 2009), prosecutors as problem solvers (Goldstock 1991), complex litigation ("Complex Enforcement", 1981, Chayes 1976), community prosecution, and problem-solving courts. In all these instances, litigators and adjudicators detach themselves from their typical role assignments and strive to find and resolve the root causes of complex problems such as securities and consumer fraud, abuse of inmates, petty crime, unequal access to public schools, and racial discrimination.

The realization that law enforcers often perform a role that is not exactly what an uninformed observer would expect of them raises an obvious follow-up question: why do Brazilian prosecutors attempt to 'stitch solutions together' at all? What kind of organization hosts and encourages this kind of proactive, creative, results-oriented but rather risky behavior?

5.2 - The organizational roots of prosecutorial action

The second part of this dissertation examines the inner-workings of the *Ministério Público*, and tries to understand how the organization recruits, trains, empowers, supports, and rewards proactive, creative, and results-oriented regulatory enforcement behavior. This quest is composed of three segments: history of transformation; the covert, overlaid, and mostly informal organization that encourages prosecutors to 'stitch solutions together', and the mechanisms through which this behavior reproduce itself.

It was only over the past 30 years that the MP accumulated the powers, status, and legitimacy that allow prosecutors to engage in 'stitching solutions together'. While the prevailing account claims that this transformation was an internal process that produced a homogeneous organization, I suggest it depended on a tacit truce between reformist and traditional prosecutors and an alliance between reformist prosecutors and external actors such as NGOs, unions, and social movements. The result was an idiosyncratic and divided organization that empowers prosecutors to engage in 'stitching' but, in formal and explicit terms, negates them most of the support and incentives they need to do so.

Basically, the MP used to be a bureaucracy devoted to criminal prosecution while prosecutors had always aspired to becoming professionals. For decades, their strategy was to fight for the responsibility to write non-binding legal opinions in an ever-growing variety of civil

cases concerning individuals incapable of defending themselves ('*custos legis*'). This strategy produced many results, and the MP amassed powers and attributions. And then, in the late 1970's, a small group of reformist prosecutors started allying themselves with NGOs, unions, and social movements mainly around environmental causes. Soon all prosecutors discovered that these alliances, and the role of defender of society, provided them with a much better avenue for professional status.

Success was fairly swift. From the early 1980s to the early 1990s, the MP transformed itself radically, and achieved its crowning moment in 1988, when Brazil adopted a new constitution that granted a series of powers and privileges to prosecutors. Yet, by the early 1990s the agreement between a minority of reformist and all the traditional prosecutors came apart, and the organization retained its structures, internal policies, incentives, and constraints. Ultimately, the newly empowered prosecutors ended up housed in an organization that encourages them to be cautious, stay in their offices, process cases one at a time, and interact with the world mostly through adversarial proceedings in a court of law.

Neither reformist prosecutors nor their allies – NGOs, social movements, unions, and other groups – stayed still. Instead, they started to build a mostly covert, overlaid, and informal organization that recruits, trains, supports, and rewards those prosecutors who adopt a proactive, creative, results-oriented, problem-solving approach. This informal organization has managed to produce a few inroads into the formal structures and policies of the MP, and has reshaped some parts of the procuracy to support the type of action that the reformists favor. But even more important, these prosecutors and their allies – similar to regulatory agents elsewhere – purposefully build feedback loops that help strengthen this organization within the organization, for instance by using legal settlements to acquire the resources that they need.

Ultimately, the MP ended up housing two modes of action. Most prosecutors, most of the time, stick to a reactive, formalistic, and risk-averse case-processing approach. But some of them, in some occasions, adopt a totally different attitude, let go off this 'business-as-usual' and engage in a proactive, creative, and somewhat risky search for root problems and their respective solutions. Neither of these modes of action can be attributed solely to the individual preference of prosecutors. Rather, both are actively promoted by an organization in flux.

Theoretical implications

The literature on the organizational behavior of public sector organizations identifies three different visions of the front-line official at work:

(a) Michael Lipsky (1980) suggests that street-level bureaucrats are so chronically overwhelmed with a demand for their work that they have no option other than to routinize, systematize, and simplify their practices. For this reason, they always adopt a reactive, formalistic, case-processing approach (see also Silbey 1981 for an assessment of this same phenomenon at the Massachusetts Attorney's General Office);

(b) Herbert Kaufman (1960) suggests that front-line officials can be full-blown professionals who retain their discretion and use it to advance the goals of the organization. And yet, they may use their power in disparaging ways unless the organization deploys a series of well-designed structures, practices, incentives, and heuristic devices to ensure that they will behave in unison;

(c) Public choice theory suggests that front-line officials will maximize their own welfare, either by taking bribes or shirking work, unless they receive the proper incentives and face the proper constraints.

While all these theories found some resonance in the reality uncovered by my fieldwork, they all portray organizations as internally homogeneous. Contrasting with this view, my empirical examination of the inner-workings of the *Ministério Público* revealed an organization that houses at least two divergent modes of action in its midst, and both modes are stable and not likely to go away. To understand this proposition, I resort to the model of organizational behavior proposed by Repenning and Stearman's (2001). These authors differentiate between a 'work-harder' or a 'work-better' loop. The 'work-harder' loop is characterized by agents who are always overwhelmed and trying to catch up. They behave exactly like Michael Lipsky's (1980) street-level bureaucrats. And yet, albeit prevalent, this mode of action is not destiny. Rather, some organizations find ways to operate in the 'work-better' mode, which is characterized by agents who find enough slack in their daily routines to launch a process of continuous improvement. Luckily, this process systematically reinforces itself and creates additional slack, which allows for additional improvement.

While Repenning and Stearman (2001) suggest that organizations operate in *either* the 'work-harder' *or* the 'work-better' loop, the Brazilian Ministério Público maintains both in tandem, and this is likely to be a good thing. James March (1991) gave each of these loops a slightly different name – he called them the 'exploitation of old certainties' and the 'exploration of new possibilities', and unlike Repenning and Stearman (2001), he did not assume that one of these modes ought to prevail. To the opposite, March (1991) suggested that one is better off when the two modes operate in tandem. In his own words, systems that "engage in exploration to

the exclusion of exploitation are likely to find that they suffer the costs of experimentation without gaining many of its benefits. They exhibit too many undeveloped new ideas and too little distinctive competence. Conversely, systems that engage in exploitation to the exclusion of exploration are likely to find themselves trapped in suboptimal equilibria. As a result, maintaining an appropriate balance between exploration and exploitation is a primary factor in system survival and prosperity".

This conclusion clearly applies to the Brazilian *Ministério Público*. Both the reactive case-processing (which is akin to the 'work-harder' or 'exploitation' modes) and the proactive 'stitching' of solutions together (which is akin to the 'work-better' or 'exploration' modes of action) find their place within the MP. And even though these modes compete with each other for resources and primacy at both the individual and organizational levels, the performance of the overall system is increased, and the public legitimacy of the actions fortified, because of this coexistence. Of course, it is impossible to ascertain what is the existing balance or distribution between the two modes, and it is equally impossible to determine, from the outside, what would be the ideal balance. But the identification of this heterogeneity provides some hints to those willing to experiment and try to further enhance the quality of enforcement.

5.3 – Policy Implications

None of the points advanced in this dissertation are entirely new or groundbreaking. Brazilian prosecutors themselves often disguise their proactive inclinations under the generic rubric of '*I'm just enforcing the law*'. And some do not always have the concepts or vocabulary to differentiate between the case-processing and 'stitching' modes of action that they deploy. Still, it is my understanding that they tacitly know all that I have described, and hopefully will

recognize themselves and their institution in this dissertation. Moreover, the literature on the organizational behavior of the legal profession has also pointed out that some lawyers are litigators while others are more like engineers. The prosecutors I studied are no exception, and fall into these same categories.

To put the contribution of this research in its proper context, one ought to take a step back and reassess the state of international development theory and practice today. Even now, this body of knowledge all too often depicts protective regulations and the agents who enforce them as disruptive obstacles to development and creators of transactions costs. Of course, this depiction is substantiated by the occasional prosecutor who acts unreasonably and creates serious hurdles for business growth. But in many other occasions prosecutors strive to perform a much more constructive role, i.e. they try – even if unconsciously - to act as catalysts of a Coasean bargain. They search for ways in which negative externalities such as labor abuse and environmental degradation can be internalized (and therefore decreased) in a way that does not detract from the firms' ability to compete. In this sense, they are acting as "shock troops of sustainable development" (Piore and Schrank 2008), and provide a type of public intervention in the economy that has not been adequately examined or understood.

In general, whenever scholars or policy-makers think about interventions to promote development, they suggest the addition of ingredients, such as physical, human, or social capital, or the following of certain recipes, which are lists of ingredients to be added in a certain quantity and order (Sabel 2007). Both these approaches have the advantage of being scalable and reproducible. They preserve the hope that one can find either the right ingredient or the right recipe, and then disseminate it widely. In practice, these strategies often fail because they do not take context into account. As practitioners know all too well, lack of private sector development

on country A may have a different source than lack of private sector development on country B. Even within the same country, the crucial bottleneck that prevents village C from progressing may be different from the bottleneck that afflicts neighboring village D. To put it simply, it is not enough for an approach to be scalable, systematizable, and reproducible. As stated by Hausmann, Rodrik, and Velasco (2005), "the trick is to identify the binding constraint". Interventions will only work if they take context into account.

But how can an intervention be simultaneously scalable so it can be reproduced and context-specific so it actually works? This research suggests that, instead of paying attention to ingredients or recipes, development scholars and practitioners ought to pay attention to those public agents who are out in the field, using their discretion to reshape businesses practices along more equitable and sustainable lines. In addition to being the long arm of the state and "shock troops of sustainable development" (Piore and Schrank 2008), they are also architects and engineers of experimentalist organizations (Sabel 2006) that can become the engine of a new developmental state.

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