CENTRE FOR BRAZILIAN STUDIES

UNIVERSITY OF OXFORD

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Rogério B. Arantes

Working Paper Number
CBS-50-04

Centre for Brazilian Studies
University of Oxford
92 Woodstock Rd
Oxford OX2 7ND

* Paper presented to conference, 'Promoting Human Rights through good governance in Brazil' June 2003, Centre for Brazilian Studies, University of Oxford. Conference held at St Antony's College.

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Rogério B. Arantes
Professor of Politics, Pontifícia Universidade Católica de São Paulo

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Abstract

This paper reviews the origin and development of the Ministerio Publico (Public Ministry) in Brazil in terms of its constitutional prerogatives, internal ideology, organization, and relations with other branches of government, society and politics. The new ideology of political voluntarism and the increasing impact of a new generation of independent prosecutors in Brazil are compared to institutional arrangements in other democracies. Original survey data and interviews provide new evidence about the character of federal political institutions and democracy in Brazil since the 1988 Constitution.

Resumo

Este trabalho apresenta resultados de pesquisa sobre a origem e desenvolvimento do Ministério Público no Brasil, focando as prerogativas institucionais estabelecidas pela Constituição de 1988, sua ideologia própria, sua independência organizacional e as suas relações com os outros poderes governamentais como também a sociedade e o processo político. Uma nova ideologia de voluntarismo politico e o papel de uma nova geração de procuradores são fatores críticos para entender o processo politico brasileiro recente, como também as suas diferenças com outras democracias novas.

What is the Ministério Público?

Ministério Públicos (Public Ministries) are government agencies whose main role is to conduct criminal prosecution. Comprising a special group of lawyers reporting either to the judiciary or executive branch, such agencies sometimes act as an independent body. Although not the only players in criminal action suits, they play an important role in the operation of criminal justice. The names of these institutions reflect a variety of constitutional definitions and legal attributes, though they share the same penal function: the *Ministère Public* in France, the *US Attorneys* and *District Attorneys* in the United States, the *Ministério Fiscal* in Spain, the *Pubblico Ministero* in Italy, the *Public Prosecution Service* in Canada, the *Crown Prosecution Service* in England and Wales, and the *Ministério Público* (hereafter MP) in Brazil, a name which is also adopted in Portugal and in several Latin American countries such as Argentina, Chile, Costa Rica, Ecuador and Peru.

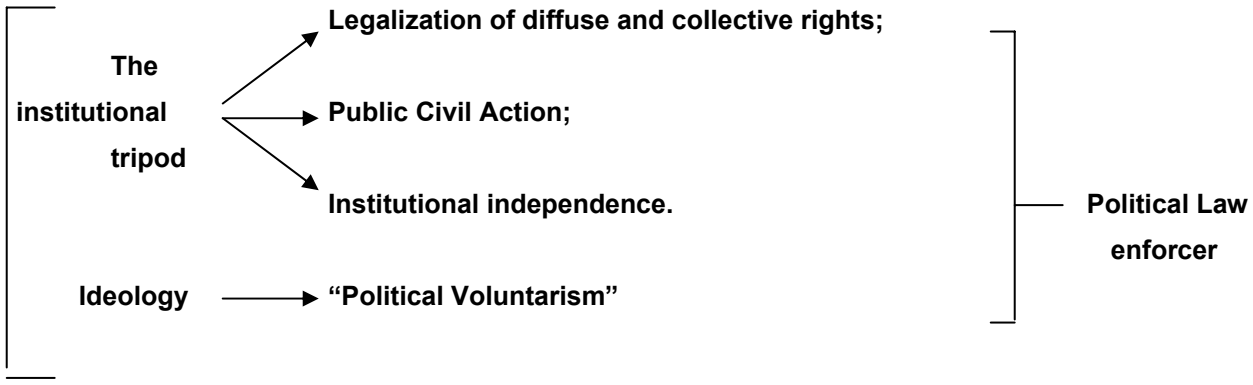
The scope of the MP in Brazil is not limited to criminal prosecution, but also includes two additional features: first, a broad range of attributions within the civil sphere and second, a marked institutional independence from other branches of government. The Brazilian MP has undergone important changes in the last 30 years and can be considered the main institutional novelty in Brazil since the return to democracy. The MP has actively promoted the protection of diffuse or collective rights, such as environmental rights, consumer relations, historical and cultural heritage, children and adolescents, senior citizens, handicapped persons, public property, and control of public policies. The MP has also played a significant role in fighting corruption and, of late, organised crime. The MP has today around 9,000 members and operates in all of Brazil's 27 states, acting in general courts and, at the federal level, in specialized courts (federal, labour, and military).

Understanding the MP's process of institutional reconstruction since the 1970s

The Brazilian MP extended the scope of its operations in the civil sphere through three legal/institutional innovations motivated by a strong ideological component which I call “political voluntarism” (see figure 1). The resulting model gave rise to an institution with a great deal of independence and discretionary capacity to act on behalf of society, yet deprived of accountability mechanisms. The combination of such elements (discretion to act and “represent” society, which are typical of political bodies on the one hand, and a law enforcement function, on the other hand) has led me to describe the Brazilian MP as a

"political Law enforcer", with all the potentials and contradictions such an expression may contain.[1]

Figure 1. Main factors of MP's process of institutional reconstruction



Legalization of diffuse and collective rights

While certain prior laws initiated the process of acknowledging trans-individual rights, it was the Public Civil Action Act [Lei da Ação Civil Pública] of 1985 which opened the doors for new legislation designed to defend diffuse and collective rights. Broadly speaking, trans-individual rights may be defined as those indivisible in nature, whether the persons holding title are indeterminate (diffuse rights) or a group of individuals linked in some kind of legal relationship (collective rights)[2]. After enactment in 1985, environment, consumer relations, and historical and cultural heritage started to be defined as diffuse and collective rights and the subject matter of class action law suits, brought by civil associations and chiefly by the Ministério Público. The main novelty represented by the Public Civil Action Act lies, therefore, in legitimising, in procedural terms, public and social players to defend, before justice, rights which previously could only be remedied by individual action brought by the people who had been harmed[3]. Three years after this important development, the

[1] For analysis of this process of institutional reconstruction by the Ministério Público and the ideology of 'political voluntarism,' see my: *Ministério Público e Política no Brasil.* São Paulo: Ed. Sumaré/Educ/Fapesp, 2002.

[2] For more detailed definitions see Mancuso, Rodolfo C. *Interesses difusos: conceitos e legitimação para agir.* 4ª ed. São Paulo, Ed. Revista dos Tribunais, 1997.

[3] According to the Civil Public Action Law of 1985, this type of suit may be brought by 1) civil associations which have, amongst their organisational purposes, the protection of specific diffuse and collective rights; 2) the Ministério Público and 3) federal, state and municipal governments and other government agencies [autarquias], government-owned enterprises, foundations, and government-controlled companies [sociedades de economia mista].

1988 Constitution confirmed the trend toward ordering trans-individual rights, constitutionalising those already established in the ordinary act of 1985 and setting the way for the appearance of new types of rights. Since 1988, the Constitution has proved a generous framework for building a legal subsystem which is characterised by the appearance of new acts that replace individual titles with supra-individual title of rights and by which means the Ministério Público has become society's tutelage body. New laws created since 1988 that recognise diffuse and collective rights and ascribe a special role to the Ministério Público include: [the] handicapped persons [Act] (1989); [the] Statute of Children and Adolescents (1990); [the] Consumer Protection Code (1990); [the] administrative improbity law (1992); [the] Law on breaches of economic order (1994); Biosafety and genetic engineering techniques law (1995) and the Fiscal Liability Law (2000). Opening up the legal and constitutional ordering to these new kinds of rights is one of the main reasons why the Brazilian judicial system has turned into an arena for the solution of collective conflicts (many of which are political in nature), distinguishing Brazil among recently (re)democratised countries.[4]

Public Civil Action

Concern in legal doctrine with diffuse and collective rights gained momentum in the 1970's, under leadership of the Italian *proceduralists*, especially Mauro Cappelletti.[5] The core issue at the time lay in the procedural reform required to broaden access to justice to protect such rights. By 1975 this issue had acquired a more or less clear outline and Cappelletti was able to proceed with his criticism of existing experiences. He argued that the two most common solutions were insufficient. On the one hand, there was the solution of placing the defence of collective interest in the hands of one of the harmed individuals

[4] In the case of Central and Eastern Europe, for instance, the fall of communism led most countries to design new constitutions, as an important part of the political transition effort to democratic regimes. However, none appear to have considered and designed judicial system as in Brazil. Analysis of the constitutions of Hungary (1989), Bulgaria (1991), Czech Republic (1992) and Slovakia (1992), Elster [et.al.] show that all contain a comprehensive list of collective and social rights, yet they do not ascribe prerogatives to the judiciary to enforce such rights: "True, they [social rights] do not have the force of judicially enforceable entitlements; but they are not merely political declarations without any legal significance either. They are declared outright as requiring legislative action (and administrative implementation), and this sets them close to the French model of constitutional rights. One of the consequences characteristic of the constitutions under study is the less important role of the judicial branch of government. This is consistent with the continental European tradition which had more trust in the parliaments than in the courts as the defenders of the rights and interests of the individuals." Elster, Jon, Offe, Claus, Preuss, Ulrich K. *Institutional Design in Post-communist Societies.* Cambridge University Press. 1998, pg. 107.(grifo meu)

[5] Cappelletti's seminal article on the topic was published in Italy in 1975 and was titled "Formazioni sociali e interessi di gruppo davanti allá giustizia". Published in Brazil in 1977, it strongly influenced the legal debate around the measures necessary to opening access to justice for collective rights. Cappelletti , Mauro. "Formações sociais e interesses coletivos diante da justiça civil." Published in *Revista de Processo*. São Paulo, No. 5, Jan-Mar 1977.

so that through self-defence others would benefit. The limitation of such a strategy, according to Cappelletti, was obvious, especially because in collective conflicts, isolated individuals are at great disadvantage, as in the case of consumer relationships. On the other hand, there was the *public* solution, that is, the one in which the Ministério Público was given the defence of society's general rights. Cappelletti rejects such a solution and points out serious flaws in the Ministério Público. First, similarities with the judge often renders the prosecutor unable to pursue the legal defence these new rights require. Second, connections between the MP and the executive branch disqualify the former from protecting interests that are often harmed by the latter. This reality of conflicting interest was the most incisive criticism against the Ministério Público. Third, the prosecutors lacked sufficient training and technical knowledge to face new problems brought by collective conflicts and the Ministério Público as a whole was usually ill-equipped to adequately represent and defend civil interests amidst complex social and economic phenomena.[6]

In *Access to Justice*, Cappelletti and Garth conclude, in short, that the "sad finding is that both in *common law* countries and in countries where the Continental European system are in force, the governmental institutions which, due to their tradition, should protect public interests, are, by their very nature, incapable of doing so. The Ministério Público in the continental systems and their analogous institutions, including the German *Staatsanwalt* and the Soviet *Prokuratura* are inherently linked to restricted traditional roles and are not capable of taking the defence of recently arisen diffuse interests in its entirety."[7]

Cappelletti's assessment led to split opinions in Brazil. On the one hand, jurists linked to the issue of collective access to justice agreed with the lessons of their Italian colleague and strongly rejected the attribution of legitimacy to the MP to act on behalf of society. On the other hand, public prosecutors tried to disqualify the proceduralist's criticism and show how the Ministério Público had every capability to act as the ideal representative of new diffuse and collective interests. During the early 1980's intense debate ensued on this issue and two different bills were submitted to the lower house, one sponsored by jurists who favoured greater participation by civil society and the other sponsored by public prosecutors favourable to the prevalence of the Ministério Público. Under severe criticism and suspicion on the part of the former group, the bill submitted by the Ministério Público was passed by congress after well articulated lobbying. This law

[6] Cappelletti, Mauro. "Formações sociais e interesses coletivos..." pg. 139.
[7] Cappelletti, Mauro and Garth, Bryant. *Access to Justice: the Worldwide Movement to Make Rights Effective. A General Report.* Milan, Dott.A.Giuffrè, 1978.

granted the MP significant institutional advantages over civil associations, in terms of the tutelary representation of diffuse and collective rights. Thereby arose in Brazil, in 1985, the procedural instrument through which such rights could be the subject matter of legal appraisal: the Public Civil Action. Paradoxically, this law was passed during a period of harsh criticism of government institutions and demands to open the legal order for representation of rights by society's organisations. Nonetheless, the Ministério Público showed political skill by skirting such criticism and passing a bill – with support from the federal executive – which not only confirmed its already existing role but also broadened prerogatives which granted it a privileged position in the legal defence of collective rights.

The Ministério Público's institutional independence.

The 1988 Constitution allowed the MP to take a final step towards becoming a "Political Law Enforcer": it gained independence from the other branches of government. Under the previous constitution, the MP was subordinated to the executive branch and acted according to its objectives on the federal and state levels. With the 1988 Constitution, the MP achieved independence in two dimensions: external and internal. Externally, the MP attained functional autonomy and self-governing tools, combined with an absolute lack of vertical or horizontal mechanisms of accountability. Internally, MP members enter through public examination and are entitled to benefits such as career tenure and guaranteed income, granting them a high level of functional independence and policy control. The autonomy of public prosecutors in Brazil equals the autonomy enjoyed by judges. Indeed, the isolationist model, typical of the judiciary, was extended in Brazil to include prosecutors. Since 1988, a peculiar definition of 'functional independence' has emerged among prosecutors who perceive themselves subject only to 'the law and their own conscience'.

The only instance of external interference is the selection of the head of the agency. At the level of state government, governors select the Attorney-General from a shortlist of three names, prepared by direct election among state members of the MP. At the federal level there is no shortlist. Instead, the president selects the Attorney-General from among officers in the MP, subject to approval by the Senate. Nevertheless, the MP's internal independence means that the impact of these appointments is greatly reduced.

This autonomy led to arguments that the MP could have become a "4th branch of government." The Brazilian Ministério Público model distinguishes itself, therefore, from its counterparts throughout the world because it combines a wide array of functions in

defending society's collective rights with high levels of institutional independence and discretionary powers to act.[8]

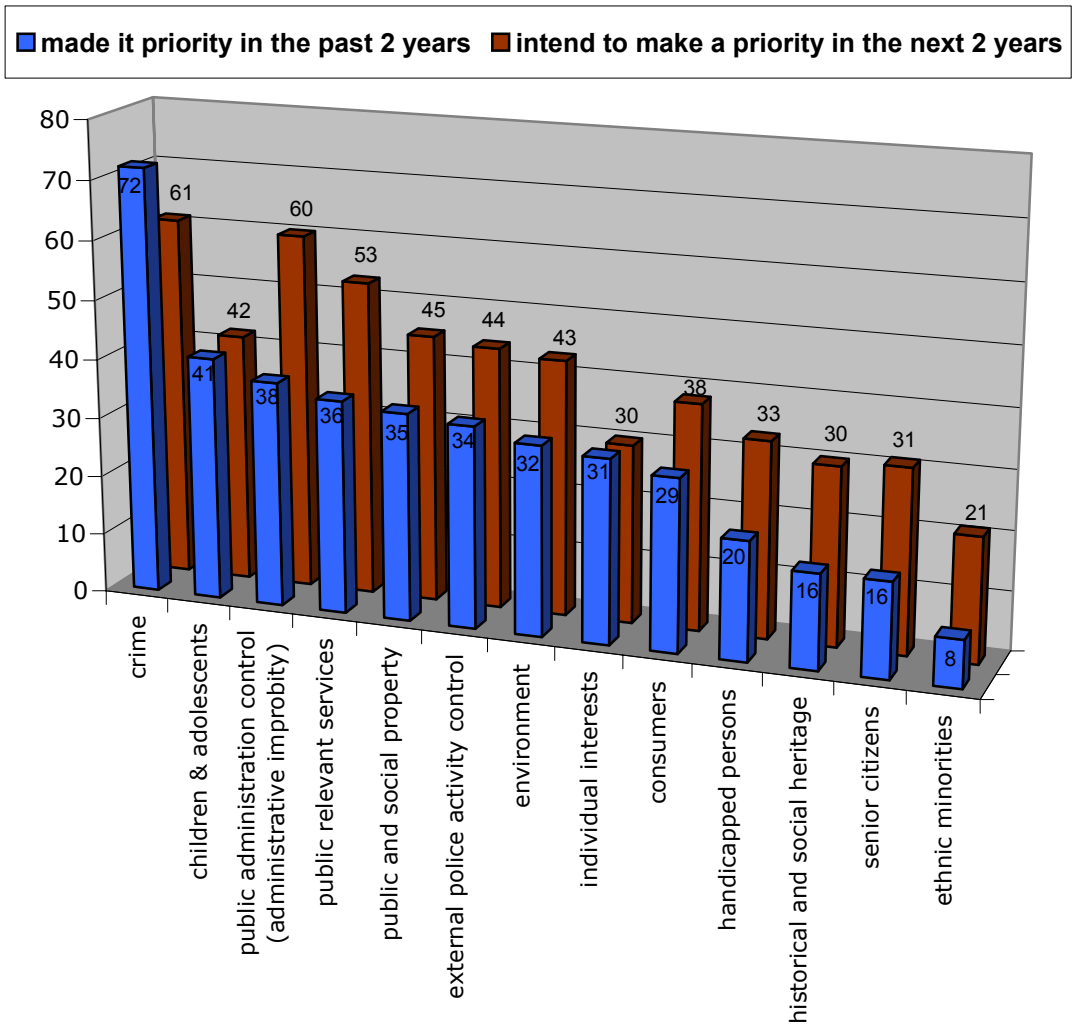
The Ideology of "political voluntarism"

In addition to the institutional tripod (collective rights, Public Civil Action and institutional independence), to understand the profound changes the MP has undergone it is essential to consider the ideological component that led the institution to claim status of "Political Law Enforcer". Six years of research including surveys, qualitative interviews, and analysis of the work done by public prosecutors convinced me to describe their ideology as *political voluntarism*. Its main elements are: 1) a pessimistic assessment of the capacity of civil society to defend itself by itself ("under sufficient", in the legal jargon); 2) a pessimistic assessment of political representatives and institutions that are seen as corrupt and/or unable to fulfil their duties and; 3) an idealized conception of the MP as the preferred representative of an incapable society (albeit without an explicit grant of political power and lacking accountability mechanisms) and inept administrations that fail to enforce laws.

This ideology of *political voluntarism* is widespread within the MP and has inspired the action of public prosecutors. A survey applied among public prosecutors from 7 Brazilian states, representing the country's various regions, reveals how an increasing number of public prosecutors have been taking on the role of defenders of diffuse and collective rights. From Figure 2 it can be seen, for instance, how many of the respondents already prioritised these new areas and an even greater number intended to give them priority in the years to follow.

[8] This model has been the subject matter of analyses and criticism that point out the absence of mechanisms for accountability, whether in terms of imposing sanctions in the cases of abuse of power or whether in terms of forcing the MP to act where discretion allows public prosecutors to choose not to act. For a discussion of the elements that make up the MP's institutional independence, see Kerche, Fábio. "O Ministério Público no Brasil. Autonomia, organização e atribuições." PhD dissertation presented to the Department of Political Science of Universidade de São Paulo. 2002.

Figure 2. Areas considered priority by the respondents (in the past two years and for the next two years)
(%)

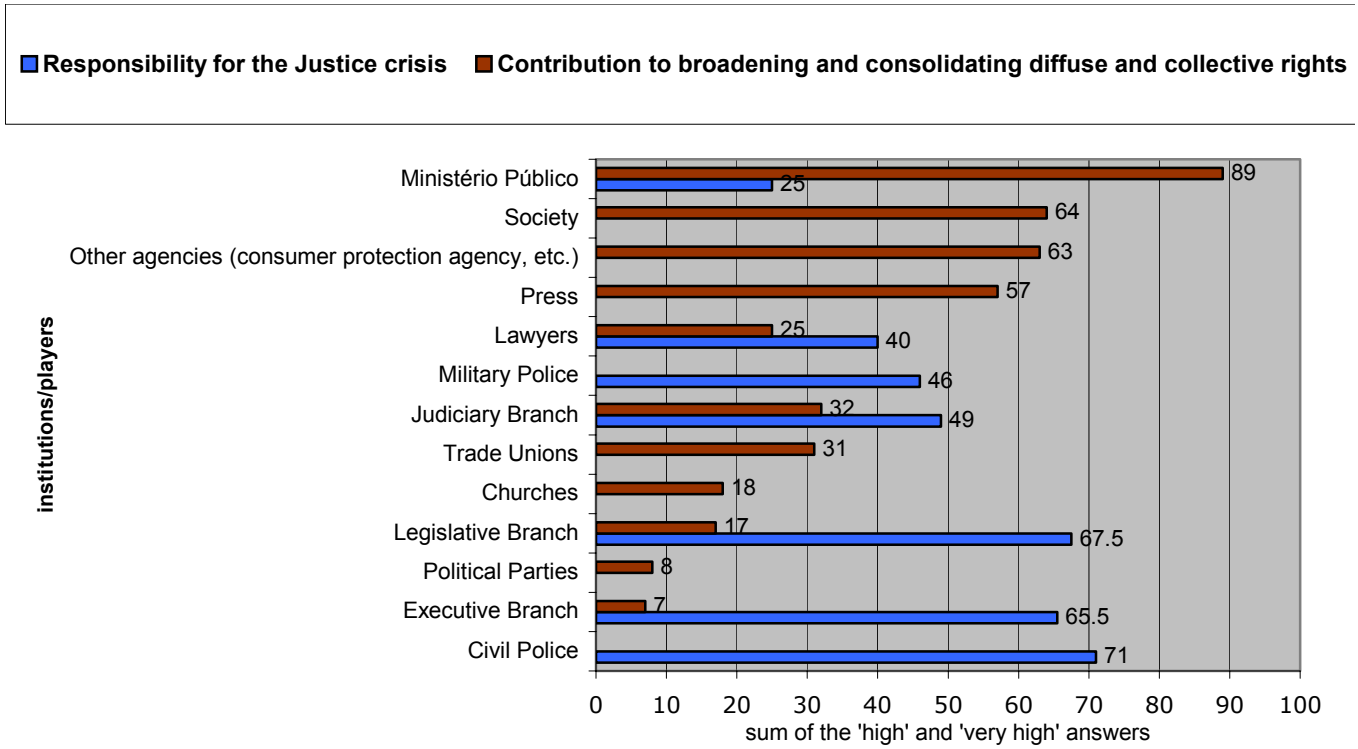


Source: Arantes, 2002. *op.cit.* (p.107)

From the survey it was also possible to note the level at which the elements of this ideology combine themselves to form the *political voluntarism* of public prosecutors. Figure 3 shows the prosecutors' pessimism about and criticism of the role performed by the branches of government, both in terms of not contributing to the broadening and consolidating of diffuse and collective rights in Brazil and in terms of the responsibility of the Legislative and Executive for the crisis of justice faced by Brazilians. On the other hand, respondents consider that the Ministério Público has contributed to broaden and consolidate society's new rights -- more than society itself and incomparably more than

other political institutions. The Ministério Público is also seen as not responsible for the crisis of justice. In short, in the view of the public prosecutors, the positive performance of the various agents is inversely proportional to their political nature: the further from the political-representative world, the greater the positive contribution to diffuse and collective rights (Ministério Público, society, technical bodies, press) and the closer to the political-representative world, the greater their share of responsibility for the justice crisis in Brazil

Figure 3. Comparing the opinions of members of the Ministério Público on institutions' level of responsibility for the Justice crisis and their contribution to broadening and consolidating diffuse and collective rights in Brazil



Source: Arantes, 2002. *op.cit.* (p.126)

The ideology of *political voluntarism* is not new in Brazil, but rather stems from an old pattern which has always criticized the artificial nature of our political institutions and harboured the dream of a neutral power, outside the world of politics and autonomous enough to protect and lead an incapable society. The distance between the world of political institutions and the real world constitutes one of the most persistent ideas in the Brazilian political imagination, a perception feeding criticism of the idealism of our political

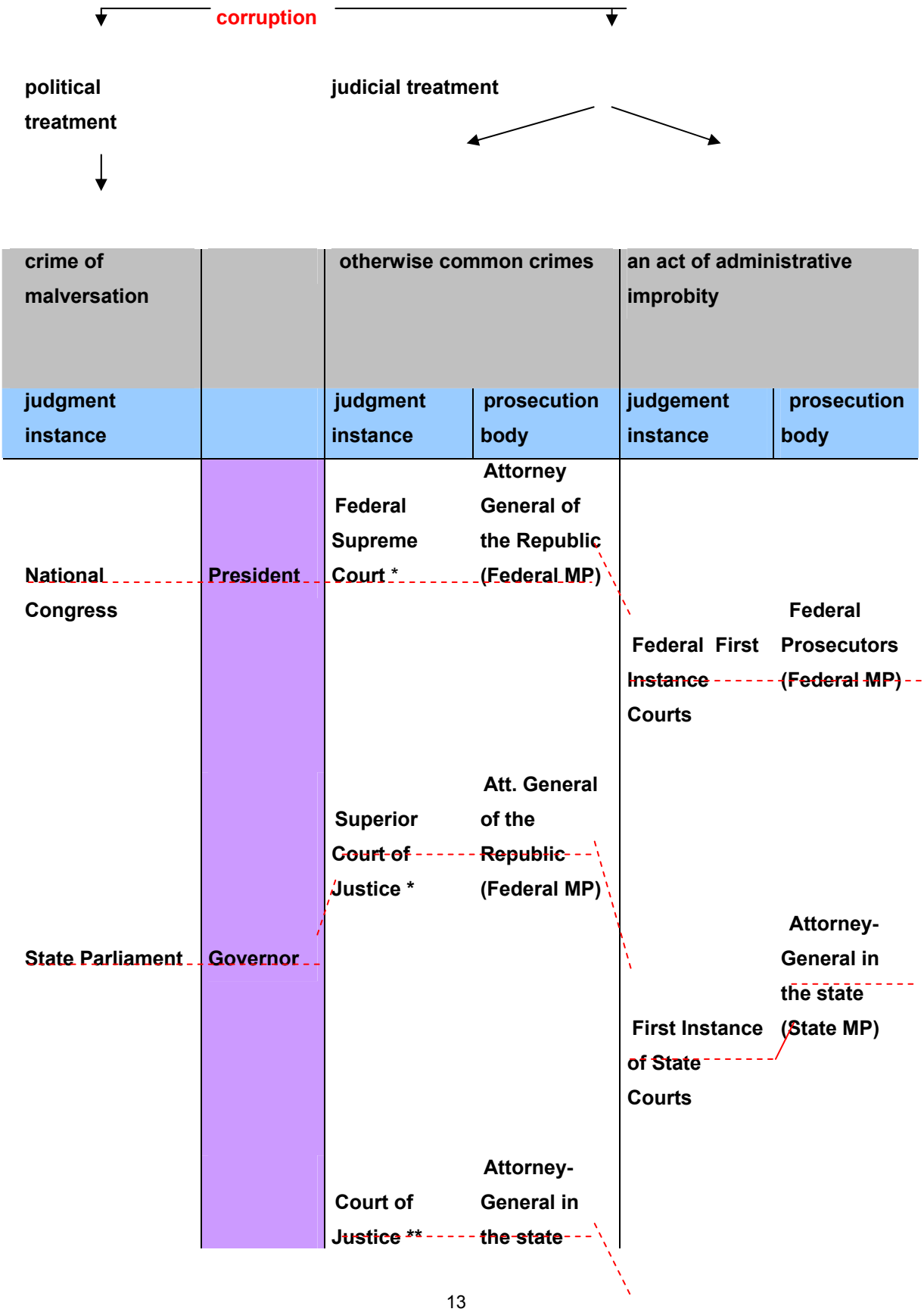
elites and the failure of thee representative system to provide effective answers to the demands of society. Disappointment at how the political system works, and assuredness that society is fragile, lead to attempts to circumvent the political sphere and search for alternative means to ensure legal rights. This is an old idea in Brazilian political thought that today makes up the ideological universe of the political voluntarism of public prosecutors, and which constitutes one of the chief ingredients in the phenomenon of *judicial activism* or the *judicialisation of politics* in Brazil.[9]

The Ministério Público and the fight against corruption in Brazil

As seen in figure 4, in Brazil, any corruption acts by political agents of the executive branch are liable to three different treatments, based upon three different legal definitions.

[9] The bibliography on *legal activism* is vast, ranging from sociological analyses, centred on the behavioural and ideological aspects of legal enforcers to political studies on the different institutional models of relationships between legal institutions and the political system. It can be said that the topic of *judicialisation of politics and politicisation of justice* is a development and an update of the classical issue of *legal activism*. This study is based on: Cappelletti, Mauro. *Juízes Irresponsáveis?* Porto Alegre: Fabris, 1998. Cappelletti, Mauro.*Juízes Legisladores?* Porto Alegre: Fabris, 1999. Cappelletti, Mauro & Garth, Bryant. *Access to Justice: the Worldwide Movement to Make Rights Effective. A General Report.* Milan, Dott.A.Giuffrè, 1978. Garapon, Antoine. *Le Gardien des Promesses.* Paris, Edtions Odile Jacob, 1996. Tate, C. Neal & Vallinder, Torbjorn (eds.) *The Global Expansion of Judicial Power.* New York: New York University Press. 1997. Volcansek, Mary L (ed.). *Judicial Politics and Policy-Making in Western Europe*. Frank Cass: London, 1992. Sadek, Maria Tereza (org.) *O Judiciário em Debate*. São Paulo: Sumaré, 1995. Sadek, Maria Tereza, "O Poder Judiciário na Reforma do Estado" in Pereira,Luiz Carlos Bresser, Wilheim, Jorge e Sola, Lourdes (orgs.). *Sociedade e Estado em Transformação.*São Paulo: Editora UESP; Brasília: ENAP, 1999 (cap. 12)Vianna, Luiz Werneck, Carvalho, Maria Alice R., Melo, Manoel P. C., Burgos, Marcelo B. *A judicialização da política e das relações sociais no Brasil*. Rio de Janeiro: Revan, 1999. Vianna, Luiz Werneck (org.). *A democracia e os Três Poderes no Brasil.* Belo Horizonte: Editora UFMG, Rio de Janeiro: IUPERJ/FAPERJ, 2002

Figure 4. The MP and the fight against political corruption



City Council	Mayor	(State MP)	First Instance of State Courts	State Prosecutors (State MP)
result: **Impeachment and suspension of political rights**		**result:** **1 to 8 years' imprisonment, and fine; loss of mandate**	**result:** **loss of stolen assets / goods;** **recovery of losses;** **loss of mandate;** **suspension of political rights for 8 to 10 years.** **prohibition from entering into public contracts for 10 years.**	

1. The “political” route considers the act of corruption a crime of malversation - setting grounds for *impeachment* proceedings, with the possibility of loss of mandate and suspension of political rights. Though *impeachment* proceedings against mayors, governors and the president are addressed within the respective legislative houses and, in this sense, are essentially dependent upon the correlation of the existing political forces, the proceedings are endowed with a judicial character (with rules and guaranties of ample defence), and the houses of representatives almost resemble courts of justice, in order to avoid any sect-based bias or the tyranny of the legislature over the executive.
2. The judicial route itself contemplates two other possibilities: either treating the act of corruption as an ordinary offence or as an act of administrative improbity. In the first case, the act of corruption is clearly defined in the Penal Code and the defendant, if condemned, may be imprisoned for 1 to 8 years, in addition to losing their mandate and incurring fines. In the same manner as in the cases of impeachment, judging corruption as a common crime – also due to the gravity of the penalty– is entitled to special guaranties: the defendant is judged at a "special" judicial instance, one level above the federative judicial structure, precisely to

prevent the trial courts, which are monocratic, from being used as instruments of political warfare between splinter groups within them.

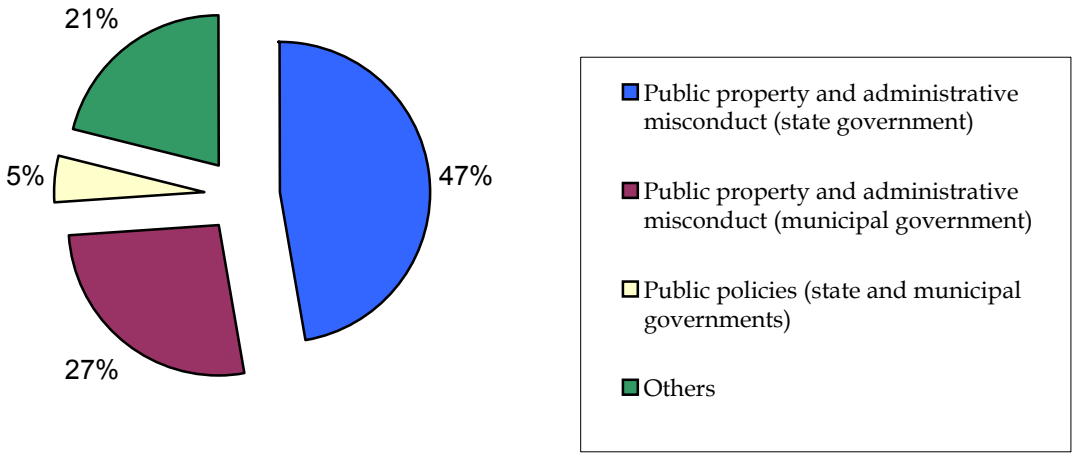
3 A significant Brazilian innovation in this area was the definition of a third form of treating corruption, qualified as acts of administrative misconduct or improbity. This new form was provided for in the 1988 Constitution and enacted by a Law in 1992, and seeks to exert the same impact as ordinary political and judicial proceedings but neither being dependent on the contingencies of the former (correlation of forces within the legislative) nor being limited by legal prerogatives that come with the position as the latter. If found guilty by a Public Civil Action [class action] for administrative misconduct the defendant loses his mandate and has his political rights suspended for a period of 8 to 10 years, as well as being mandated to reimburse the amount to the public coffers. Since corruption is not defined as a crime in this case, this third alternative enables those in executive posts - from mayor to the president of the Republic - to be judged at a first-instance [trial] court, without the privilege of the special venue at higher courts.

The differences between the legal instances of power, as shown by the dotted line in the organization chart, represent the potential for action by public prosecutors ready to prosecute authorities for administrative misconduct in courts throughout Brazil. In comparison, if prosecution proceeds in terms of common criminal law, this occurs at the top levels of state and federal MPs, i.e., with one of the 27 Attorney Generals in state government or with the Attorney General of the federal government. Another innovating trait of the law on administrative improbity is that it not only addresses administrative probity and morality but also includes the *purpose* of public acts as something liable to judicial control. To give you an idea of what that represents, consider the following. The Fiscal Responsibility Law (2000) obligates government administrators to a severe regime of financial management and created no less than 104 possible acts for which administrators may be liable for improbity or misconduct. Furthermore, the law defines twenty new common crimes which can cause the government to incur fiscal punishment and administrators criminal punishment.

Some empirical data regarding the performance of the MP in its fight against political corruption, via the civil route of administrative improbity

According to recent data collected by the MP in 14 of the 27 Brazilian states, there are over 4 thousand civil administrative improbity suits against holders of public office in course within the judicial system.

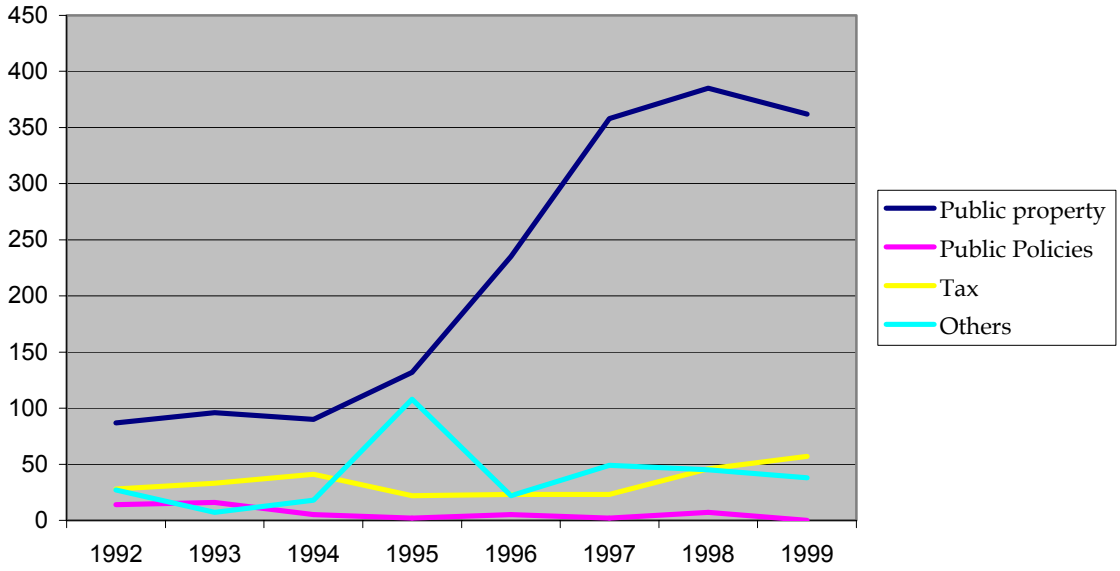
Figure 5. Public Civil Actions brought by the Prosecutors for the City of São Paulo (1992-1998)



Source: Arantes, *op.cit.* 2002 (p. 140)

In the city of São Paulo, between 1992 and 1998, the Prosecutors for the City of São Paulo alone initiated 157 class action suits. As shown in figure 5, 74% of the suits related to cases of public property and administrative improbity and misconduct (47% of which at state level and 27% at local level). Only 5% of the suits sought to solve problems relating to the rendering of public relevance services. This result shows that, out of politics' two prime areas open to participation by the Ministério Público, the city prosecutors favoured control of *rulers* rather than overseeing public services. By June 2003, that figure had more than trebled, reaching a total of 572 suits.

Figure 6. Public Civil Actions brought by the city prosecutors in the rest of the State of São Paulo (1992-1999)



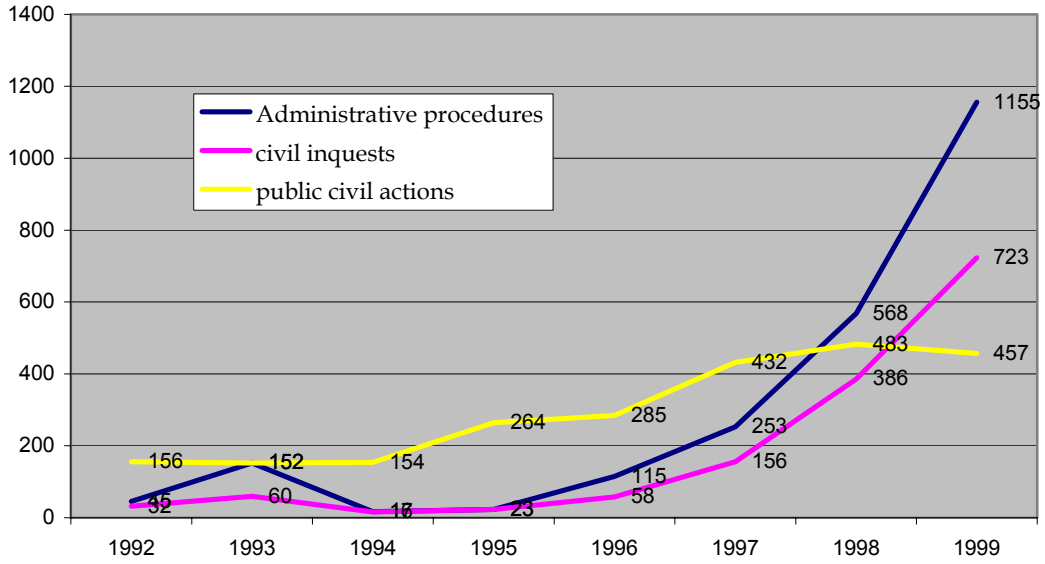
Source: Arantes, *op.cit.* 2002 (p. 144)

A closer look at the City Prosecutors in the rest of the São Paulo state (see figure 6) shows a significant number of public civil actions, particularly those relating to public property and administrative improbity, between 1992 and 1999.

However, actions by the MP have not succeeded in the Judiciary, be it for the slowness of proceedings, or the numerous dilatory appeals, or for the more restrictive attitude on the part of judges regarding the MP's authority to act in that area, often failing to recognise the legal legitimacy of suits or the legality of procedures adopted during the investigation. Of the 572 total number of actions brought by prosecutors in the Capital since 1992, less than 5 have come to an end (*transit in rem judicatam*) to-date.

Such low procedural effectiveness has led the MP to privilege pre-legal procedures, such as civil inquests, to solve cases without subjecting them to the judiciary's appraisal. As shown in figure 7, resorting to such strategy grew exponentially from 1996 onwards (civil and filed inquests) while the number of public civil actions stopped growing. If our hypothesis is correct these data indicate that the Ministério Público is trying to offset the slow procedural effectiveness of collective actions with direct, out-of-court settlements, which undoubtedly makes its intervention upon reality more aggressive, though it also highlights the limits of its performance as **political law enforcer.**

Figure 7. Administrative procedures, civil inquests and public civil actions by the City Prosecutors in towns and cities of the State of São Paulo other than the Capital

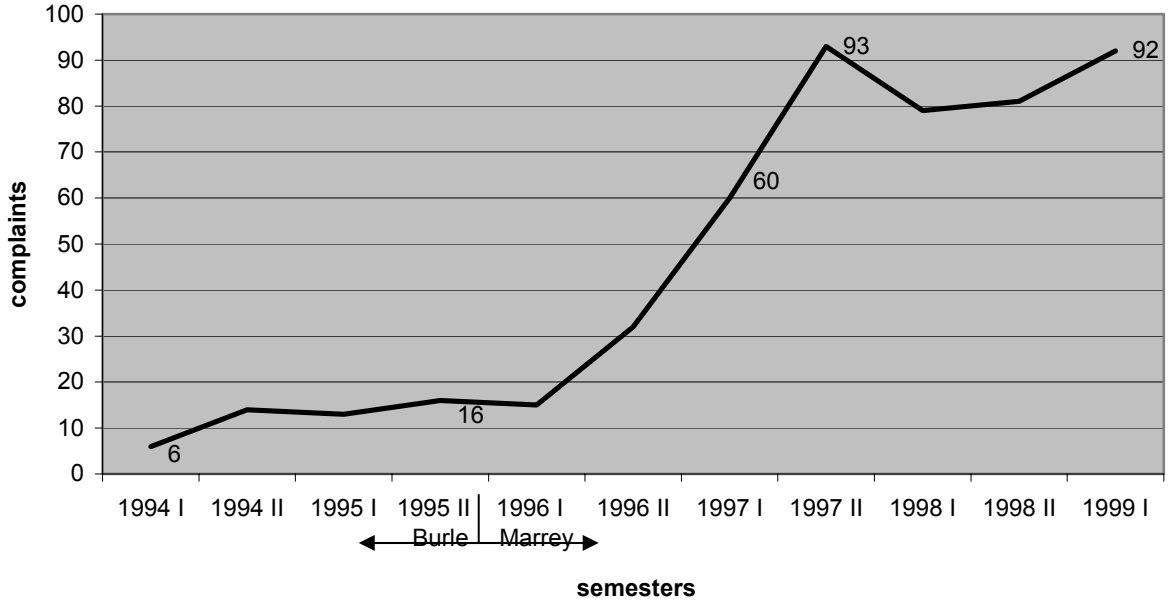


Source: Arantes, *op.cit.* 2002 (p. 147)

Some empirical data regarding the MP's action in fighting political corruption via the ordinary criminal route

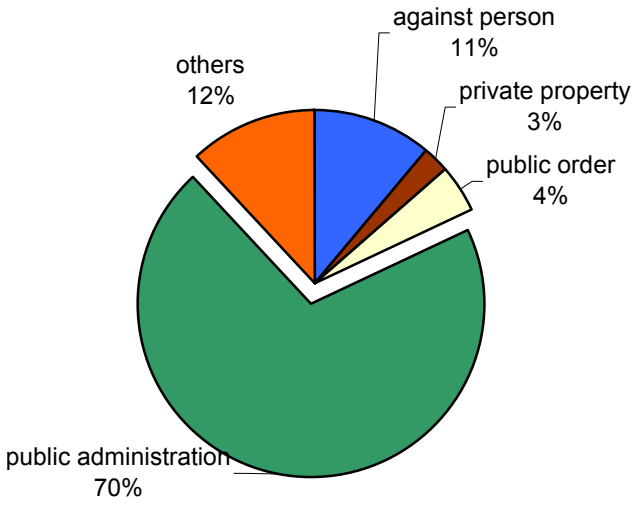
As criminal suits against mayors enjoy a 'special venue' privilege in state government courts of justice, it is the duty of the Attorney-General in the state to bring the suit. It can be seen from figure 8 that there has been a significant increase in the number of suits of this kind since Mr. Marrey took office as the Attorney-General in 1995/96. The discrepancy from the former attorney-general makes it clear that, given the concentration of jurisdiction within the MP's highest body, solving crimes perpetrated by mayors depends upon the political willingness of the person who is in office.

Figure 8. Complaints by the Attorney-General in the state of São Paulo against Mayors (1994-1999)



Source: Arantes, *op.cit.* 2002 (p. 227)

Figure 9. Crimes perpetrated by mayors, in 519 complaints by the Attorney-General in the State of São Paulo (1994-1999)



Source: Arantes, *op.cit.* 2002 (p. 232)

Of the 645 municipalities which comprise the state of São Paulo, no less than 38 percent (247) have had their mayors criminally charged at least once, considering those elected between 1982 and 1996. Of these, 71 have already had at least two mandates sued in that period and 6 municipalities have managed the feat of having their last three elected mayors sued in criminal courts: Bauru, Cachoeira Paulista, Jacupiranga, Nhandeara, Platina and Taiuva.[10]

While penal suits may refer to any type of crime committed by mayors, they are mostly, quite obviously, crimes against public administration itself (over 2/3 of cases, as shown in figure 9), such as appropriation of assets by virtue of office (embezzlement), illegally hiring civil servants, fraudulent practices in public service tenders etc. As other examples, there have also been cases of 5 mayors charged with murder and another 5 who were sued by crimes against the environment, as a direct consequence of the recent legislation that has determined certain injuries to the environment to be crimes.

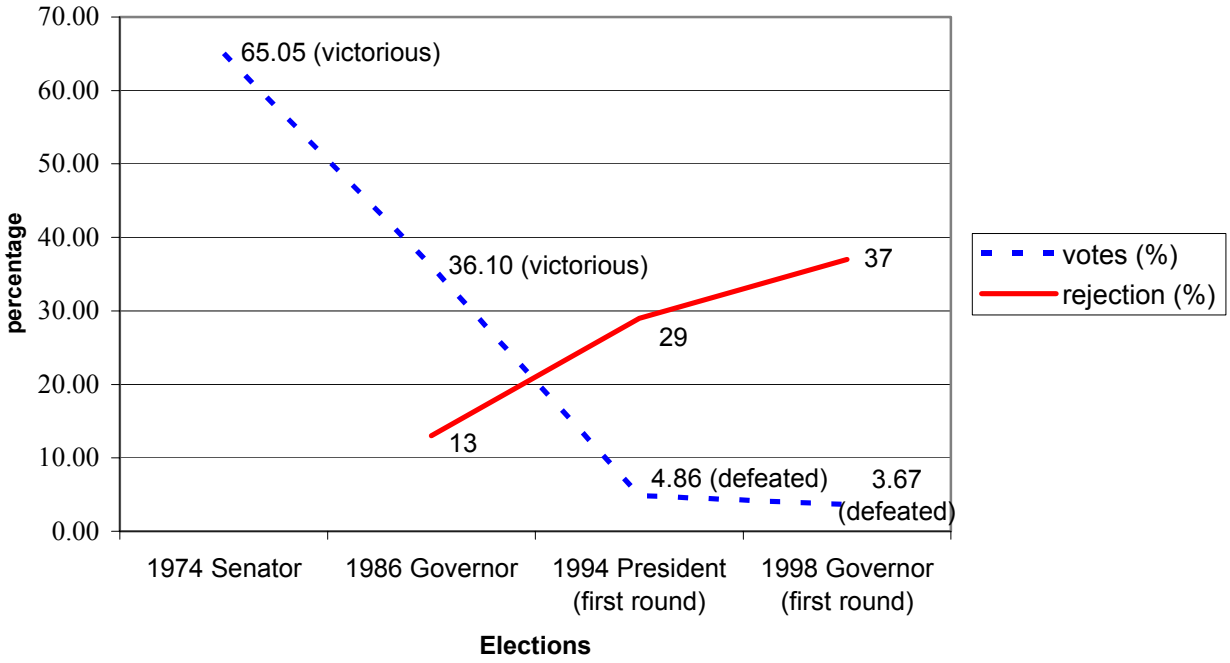
Some exemplary cases

Orestes Quércia, a former governor of the State of São Paulo (1987-1991) and an expressive political leader, with ambitions to become president of Republic, had his political career cut short practically due to allegations of corruption, quite a few of which were perpetrated and investigated by the MP. Today, 10 years since the first allegations, Quércia has yet to be condemned by justice, though he has already been found guilty at the ballots. As shown in figure 10, since Quércia became the subject of corruption allegations his voting percentage in São Paulo declined in reverse proportion to the increase in rejection levels by voters just before each election.[11]

[10] In the cases of Bauru and Taiuva, Antonio Izzo Filho was sued both times he held office (1988-92 and 1996) and so was Adauto Vidal (1988-92 and 1996), respectively.

[11] Several civil servants during the Quércia administration have been sued and the former governor himself was indicted by the Federal MP in three cases, turned into media scandals by political commentators. Quércia was held responsible, with other members of his administration, for fraudulent procedures and overpayment [superfaturamento] of imports from Israel (US$310 million worth) destined to universities and the police. He was also accused of several irregularities in the privatisation of the São Paulo state government airline, VASP and, lastly, with over 100 others for abuse of the Banco do Estado de São Paulo during his administration and his successor's, Mr Fleury (1991-95). Quércia was accused of causing a deficit of over R$ 2 billion at BANESPA. Of the three proceedings, which have been dragging through the courts for years, only the first one has been concluded – with Quércia's acquittal by the supreme court. The latter two remain ongoing.

Figure 10. Orestes Quércia: electoral performance and rejection numbers. (%)



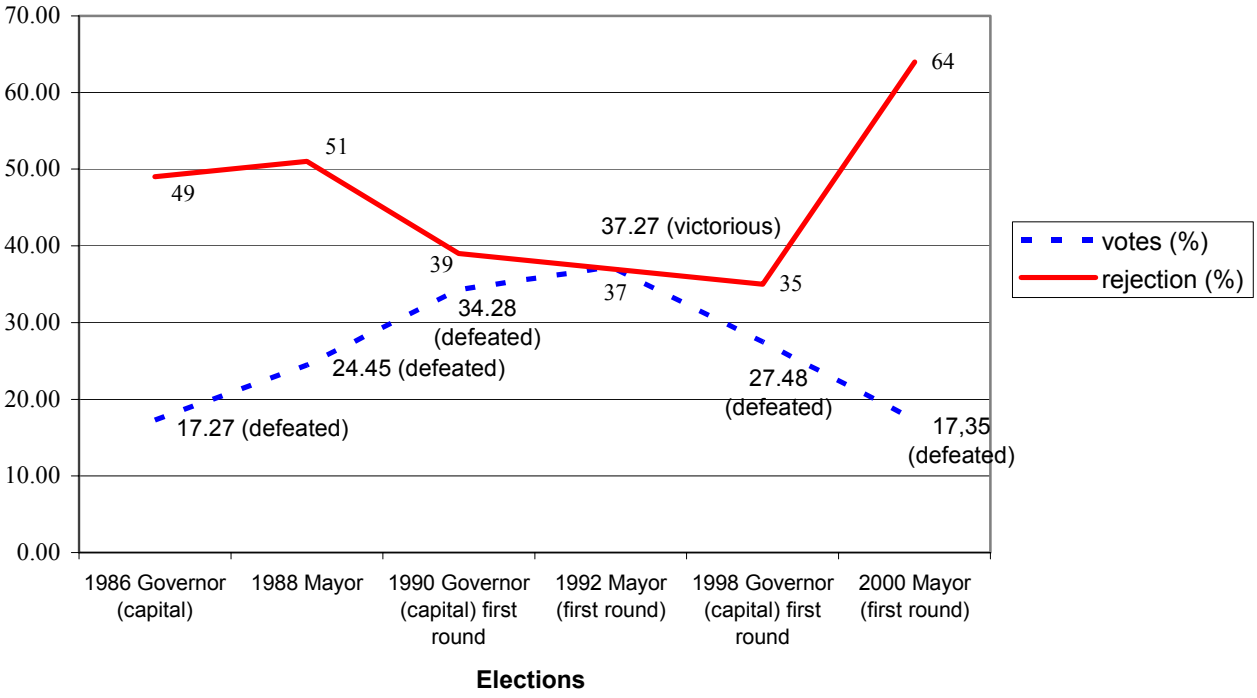
Source: Arantes, *op.cit.* 2002 (p. 155)

The case of former São Paulo mayor Paulo Maluf, is even more remarkable. Maluf's image has been associated with an administration style, dating from when he served the military government, described as "stealing but acting". Especially after he served a term as the mayor of São Paulo (1993-97), Maluf found himself involved in a series of corruption scandals: overbilling the city when purchasing chicken for school lunches (dubbed "frangogate"/ "chickengate"), fraud in the payment of judicial city debt bonds ("precatórios), overbilling in the construction of the Ayrton Senna expressway, making illegal remittances of foreign currency overseas, and money laundering through bank accounts in tax havens abroad. Out of all these Maluf has so far only been found guilty of using public funds for personal advertising and has been sentenced by the Court of Justice in another suit, to pay approximately US$500 million, a decision which at present awaits confirmation by the higher courts.

Despite his resisting on the judicial level, the ballots also seem to have already condemned him (cf. election performance and rejection levels in figure 11). This case is particularly significant, as it forced the MP to request the assistance of MPs in other

countries (especially in Switzerland) in order to uncover the route used to move the funds through foreign bank accounts.

Figure 11. Paulo Maluf: electoral performance and rejection numbers (%)



Source: Arantes, *op.cit.* 2002 (p. 157)

Amidst hundreds of examples that could be presented I would lastly like to mention the case of Londrina, a city in the State of Paraná, and whose name owes itself to the presence of the English in the region at the start of the 20th century. The city, which still prides itself of the English legacy of its urbanisation standards (Londrina means "Little London") was recently the setting of one of the biggest political corruption scandals. Antonio Belinatti, mayor for three terms, was accused of corruption in 1999. The scheme the mayor set up included several kinds of fraud and appropriation of public funds into bank accounts which, amongst other things, would supply the electoral campaigns of family members and political allies. Following a broad social and political movement (named "red feet, clean hands"), which mobilized various civilian associations, the press and the MP, the mayor was impeached by the City Council in June 2000.

Belinatti was arrested but is now free and facing approximately thirty five class-action suits and fourteen criminal-action suits for the embezzlement of millions of dollars from the city coffers (over one hundred people and companies are being charged jointly with the former mayor). The movement, to mark people's resistance against corruption, placed a one-ton stone in the middle of the city, to symbolize the fight for public morality. The prosecutors and the "red feet - clean hands" movement (which has since become a NGO) were awarded the 2001 Integrity Award from Transparency International. The NGO's website contains the case's history and a listing of the people involved in the accusations (www.pevermelho.org.br)

The MP's action in fighting organised crime

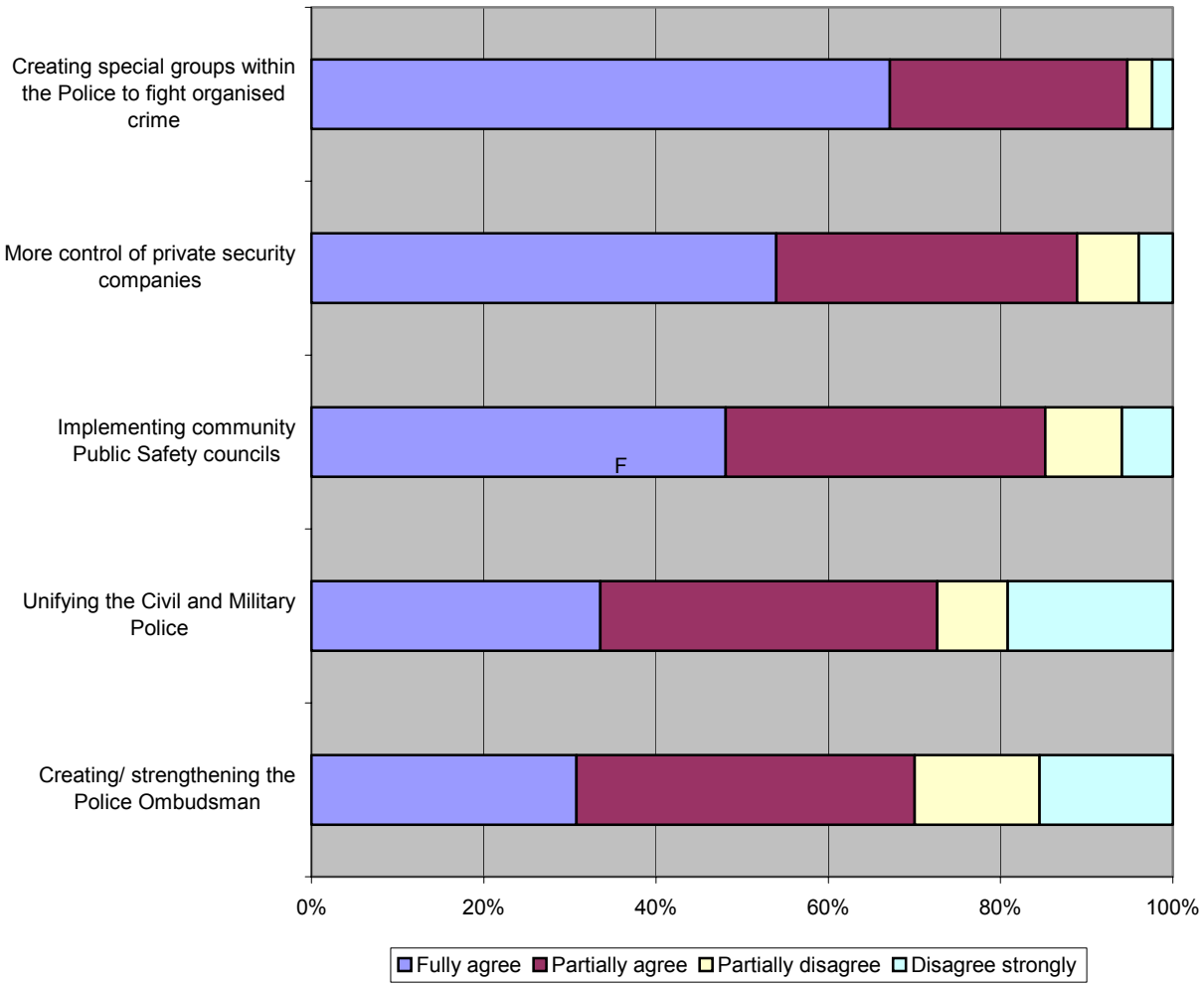
In the past few years the MP has acted in the fight against organised crime, though the results are still incipient in that area. The MP has played a more assertive role in the fight against organised crime since prosecutors were deployed to work specifically with that issue, forming the so-called GAECO, meaning the "Special Action Groups to Fight Organised Crime". By means of these groups the prosecutors are granted autonomy to devote their work to the issue, receiving material and human resource support and end up doing work the Police often fail to do: building an information centre on criminal organisations and the areas in which they operate. These special groups have also been working as *task-forces*, i.e., performed joint actions with operatives from other government agencies, such as chiefs of police, police officers and tax inspectors, to dismantle groups and specific criminal schemes. There are, today, in the São Paulo MP, 6 operating groups of prosecutors, one in the capital and 5 others elsewhere in the state. Amongst the problems the Groups consider priorities are the drug traffic, tax fraud, money-laundering, fuel tampering and vigilante groups.

Amongst some of GAECO's concrete actions in the capital we can mention the "City Inspectors' Mafia" (1999), a scheme whereby city inspectors promoted extortion and 'kickbacks'. GAECO was able to dismantle the group and convict some of the involved, including a city councilman.

In addition to bringing penal suits, GAECO has also been conducting criminal investigations, in place of the Police. Such action by the MP has been the object of controversy, given that Chiefs of Police and police-officer associations have been claiming that the MP is appropriating itself of Police work and that these actions could not be conducted by the body which will subsequently bring the penal suit, under risk of being

biased. The issue is that it is said, quite openly, in Brazil today, that "there is no organised crime without police officers involved", making it crucial that the criminal investigation be conducted by the MP in that area. Chiefs of Police have been reacting and trying to stop their monopoly over police inquiries from being taken away. In a survey carried out recently, the chiefs of police strongly disagree from the possibility that the MP lead the police investigation work or even with creating special groups within the institution itself for that purpose (see figure 12).

Figure 12. Proposals put forth to improve public safety



Source: Arantes & Cunha, 2003 (p.132)

Problems and Setbacks in the MP's action against political corruption and organised crime.

As an institution which has earned independence and a series of attributions in defending diffuse and collective rights, the MP has been facing two main issues:

1. The low procedural effectiveness of its actions, due to the slowness of justice and the police's ineffectiveness, has led the MP to favour pre-proceeding procedures and to conduct the investigations itself in the most relevant cases, thus challenging the Judiciary and the Police, institutions with which the MP makes up the judicial system.
2. The prominence acquired by the institution and even the excesses some of its members have made have given rise to a debate on reviewing its autonomy and its broad functions, which has placed the MP in a collision course with the legislative and executive branches too.

Amid such cross-fire, the MP has recently suffered two significant setbacks. The first relates to expanding the 'special venue' privilege previously reserved for common crimes to include acts of administrative improbity while in public office. This change, based on a law introduced in late 2002, threatens to have the following devastating effect: removing from almost 9,000 prosecutors the possibility of using administrative improbity suits against mayors, governors and other authorities. Instead, the Attorney-Generals in each 27 state government and the federal attorney general have gained the prerogative to prosecute in appellate- and higher-courts (see organization chart 1). Furthermor, over four thousand prosecutions currently underway may suffer a fatal setback. According to the new law, cases must be sent to higher courts for appraisal and await trial on a long waiting-list. A greater risk would be the mass dismissal of these suits, since they have been brought in an unsuitable venue, according to the new interpretation. As of the writing of this paper six months into the effective date of this new rule, the situation is rather chaotic, precisely because a fair share of state MPs simply refuse to accept the new law and continue to bring improbity suits in lower courts of the first instance. There is even a ruling by the Paraná state Court of Justice that considers the new law unconstitutional and therefore civil suits continue to be conducted at first instance in that state. On a nation-wide level the MP pledges to fight the change and is exerting pressure onto the Federal Supreme Court to declare unconstitutional this law which expanded the 'special venue'

privilege to improbity suits.[12] On a state level, most MPs have been advising their members not to change their procedures and await a decision by the Judiciary on the constitutionality of the new law.

The second setback the MP has suffered concerns criminal investigations. A recent decision by the federal supreme court ruled that criminal investigations are the exclusive prerogative of police forces and overturned the authority of the MP in this area. Be it in fighting political corruption, be it fighting organised crime, the MP had been 'dodging' police inquests and conducting its own criminal investigations, particularly by means of the Special Action Groups, as noted above. Should the supreme court decision prevail, most criminal prosecutions underway against corruption and organised crime may be dismissed, given that they are based on investigations conducted by the MP itself.[13]

Regardless of such setbacks – not yet definitive – the Brazilian Ministério Público continues to play an important role with regard to the protection of society's diffuse and collective rights and the fight against organised crime. The tension created by the model of an independent, highly discretionary institution, which has accumulated a series of eminently political functions in recent years without, however, being subject to accountability mechanisms, has led to a permanent debate on the possibilities and limits of legitimate action by the Ministério Público.

The basic dilemma that surrounds the Ministério Público – a classical problem of constitutional democracies – lies in the relationship between functional independence, institutional responsibility and forms of accountability. In Brazil, as we have seen in this paper, the new institutional setting – associated with the voluntarism of members of the Ministério Público – has created the possibility of both the judicialisation of political conflicts and the politicisation of judicial institutions. From the point of view of institutions, the Ministério Público has broken the isolation of the justice system and transformed this branch of government into a relevant player in the political process; but its politicisation has brought forth yet again the issue of controls over the institution.

The main reason for the Ministério Público's having assumed the role of a **political law enforcer,** is undoubtedly the functional independence of its members, one created

[12] On 27 December 2002, the National Association of MP Members [Associação Nacional dos Membros do Ministério Público] brought a Direct Inconstitutionality Action before the Supremo Tribunal Federal but did not obtain a preliminary injunction against introduction of the special 'instance'. The case still awaits judgement of its merit. To follow up on the development of the case visit the supreme court's website www.stf.gov.br under ADI/2797.

[13] See the STF decision on case RHC 81326, still not definitive. The criminal investigation work, together with other attributions of the MP are being questioned before the Supreme Federal Court by the Liberal Party [Partido Liberal], in Direct Inconstitutionality Action ADI/2943. (www.stf.gov.br)

through a succession of isolated, yet cumulative, changes to ordinary and constitutional laws. Were it not for the guarantees and prerogatives acquired in this process, public prosecutors would certainly not have accomplished a good share of what they have done so far. It was precisely because they are subject only to 'law and their consciences' that members of the Ministério Público were able to dedicate themselves with gusto to defending society, presenting themselves as the guardians of expectations unfulfilled by democracy.

But such an independent position finds itself threatened in the same measure as its attributions become more political. After all, the concept of legal independence was historically conceived to move justice institutions away from the political sphere, but in Brazil this relationship has inverted. Legal independence has become the means for prosecutors to act precisely as political law enforcers. As political neutrality is unlikely and the politicisation of justice is undesirable, we predict that the Ministério Público will find it very difficult to maintain its institutional independence, especially as their actions on behalf of law become more politicised.

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