WHEN THE PARTY ACCUSED OF A CRIME IS THE PRESIDENT

The Federal Public Prosecutor's Office and the US "ad hoc" Prosecutor

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ABSTRACT

This essay analyzes the prosecution models espoused in Brazil and in the US when the accused party is the president. Both the head of the Brazil's Federal Public Prosecutor's Office and the American prosecutor, *ad hoc*, were given a high degree of autonomy, which was reduced after scandals. Between the "autonomy to fight corruption" or "stability in the political system", the latter prevailed after experiments with autonomous prosecutors.

KEYWORDS: *Public Prosecutor's Office; Democracy; Autonomy; Accountability*

Quando o acusado de um crime é o presidente: o procurador-geral da República e o promotor "ad hoc" norte-americano

RESUMO

O ensaio analisa os modelos de promotoria adotados no Brasil e nos Estados Unidos quando o acusado é o presidente. Tanto o procurador-geral da República quanto o promotor *ad hoc* norte-americano experimentaram alto grau de autonomia que foi reduzida após escândalos políticos. Entre autonomia para combater a corrupção ou estabilidade para o sistema político, prevaleceu a segunda opção após experimentos com promotores autônomos.

PALAVRAS-CHAVE: *Ministério Público; democracia; autonomia;* accountability

INTRODUCTION[1]

It seems reasonable to suppose that, ideally, institutions should promote the idea of providing good services to citizens while they are simultaneously accountable and swift, with the ability to adapt, innovate etc. All these goals, however, are not easily identifiable outside the norms. Institutional frameworks tend to bring about trade-offs*:* they create incentives for certain behavior in detriment of others which, in some situations, may also be desirable.

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Electoral systems illustrate this well. A majority election for representatives tends to result in a lower number of parties with representation in the Legislative branch (Duverger, 1970; Guarnieri, 2015). This, according to supporters of this model, would facilitate governability because it would reduce, or even eliminate, the transaction costs of forming coalitions. On the other hand, the "loss" of votes in this model would make it difficult for minorities to elect members to the parliament who are more aligned with their demands and values, which would be a disadvantage in terms of representation (Limongi, 2003). The opposite is also true: a proportional system tends to boost more diversity in parliamentary representation, but could increase the cost of governability.

The institutional structures of State bureaucratic agencies, in different democracies, are also examples of trade-offs. Instead of governability/representation in the electoral system, in studies on bureaucracy, we have autonomy and accountability, along with discretionary power issues. The more autonomy, the more difficulties with accountability of politicians and the higher the chance that non-elected civil servants could "set their own agendas beyond any type of political control" (Fukuyama, 2014, p. 61). The more significant the discretionary power of non-elected civil servants, which always involves a level of "arbitrariness" (Lotta; Santiago, 2017), the harder it is to predict how bureaucracy will behave and the greater the space for bureaucratic lawmaking (Schoenbrod, 1993). On the other hand, if there is "excessive" control over bureaucracy, the lower the chance of innovating and adapting to a range of realities, which can stymie the development of institutions (Fukuyama, 2014).

The institutional framework of agencies tasked with criminal prosecution, the Public Prosecutor's Offices,[2] also makes trade-offs. The three models identified in democracies bolster some aspects in detriment of others: both the "bureaucratic" and the "independent" models, including the "electoral" model, encourage certain behavior by using incentives via institutional rules, but discourage other conducts on the continuum between independence and accountability (Kerche, 2018a; 2018b).

This essay will present the way in which the US and Brazil have worked around the trade-off over the course of history with regards to the prosecutor who has the power to prosecute the president of the Republic and his cabinet. This history is scored by highs and lows in respect of the independence of the US' *ad hoc* prosecutor and Brazil's head of the Federal Public Prosecutor's Office (*procurador-geral da República*). It will be shown that, in both countries, politicians understand that a prosecutor with expressive independence and high-level discretionary power to accuse the president generates a significant

for the comments of Fernando Filgueiras, Thiago Fonseca and Marjorie Marona.

[2] There is a variety of denominations for agencies responsible for criminal prosecution in democracies, as well as a lack of standardization of the title of their members. In this article, I have used the Public Prosecutor's Office and prosecutors for all models, except when more specification was required.

political burden. Between the trade-off of autonomy to fight corruption or stability for the political system and for the chief of the Executive branch, both in the US and Brazil, it was the latter option that prevailed after experimenting with high level of discretion and incentives to accuse politicians. In both these countries, politicians, regardless of whether they are part of the government or in opposition, have accepted a prosecutor with the power to accuse the head of the Executive branch with less autonomy. In the US, this was more open, while in Brazil it was based on tacit consent.

Besides this introduction, this essay will also include a section that discusses different institutional designs for the Public Prosecutor's Offices in democracies and highlights the incentives for each of these institutional models. The second section will discuss changes in Brazil regarding the way appointments are made for the head of the Federal Public Prosecutor's Office, who is the sole player with the power to make judicial accusations against the president, the ministers and congressmen/women, and how the different governments after the 1988 Constitution have handled the trade-off between autonomy and protection for the president. The third section will present the *ad hoc* prosecutor model used in the federal sphere in the US when a problem arises from a "conflict of interest" between the Department of Justice and the president (Nolan, 1990-91; Harriger, 1992; Fleissner, 1997-98), and the institutional transformation of this prosecutor throughout history. To close, in the final considerations, I will align the debate between the different institutional frameworks that allow prosecutors not within the ranks of the US Department of Justice and the two models for appointing the head of the Federal Public Prosecutor's Office that were used in the democratic period in Brazil.

MODELS OF PUBLIC PROSECUTOR'S OFFICES AND THEIR TRADE-OFFS

In general, democratic countries rely on a responsible agency for criminal prosecution. If it is the State that holds a monopoly on violence (Weber, 1972), it is then up to its numerous players, including the public prosecutors, to curb the illegitimate use of violence by its citizens.

If the common denominator among these agencies is the monopoly or quasi-monopoly of criminal prosecution, there are few similarities in terms of institutional frameworks when comparing with different countries. Organizational variances are significative. How prosecutors are recruited, how they are placed into careers, attributions that go beyond criminal prosecution, the position the agency holds within the State structure, among other aspects, make each of these agencies unique unto themselves (Tonry, 2012).

Two political variables, nevertheless, make it possible to classify all state players and agencies, including the different Public Prosecutor's Offices. I refer to accountability and discretion (Przeworski, 1998; Bovens *et al*., 2014; Lotta; Santiago, 2017; Kerche, 2018a; 2018b). Identifying who can punish or acquit a prosecutor (accountability) by the choices he/she makes (discretion) is key in understanding democracy.

Based on these variables, it is possible to place the Public Prosecutor's Office into three categories: the bureaucratic, the electoral or the independent models (Kerche, 2018a; 2018b). In each of these, it is possible to identify a balance, at least at first glance, between accountability and discretion (Kerche, 2009; Olsen, 2015), as is required by a normative approach to democracy. The more prosecutor's discretion, the greater the need for this player to be accountable for their acts. The model with the most discretionary power is the local prosecutor in the US, but this is also the only model that is directly accountable to the electorate. On the other end of the spectrum, Brazil's and Italy's independent prosecutors are less accountable, but the framers preferred to keep discretionary powers lower, which changed over time, as will be discussed later. Each institutional model of the Public Prosecutor's Office gives rise to incentives for certain behavior, while discouraging other conduct. These trade-offs will be presented in this essay.

The bureaucratic model

The agencies responsible for criminal prosecution are normally those that have ties to the government, even though there are differences in the level of discretion and accountability between countries that have adopted the bureaucratic Public Prosecutor's Office model. It is the government itself, therefore, that is charged with the responsibility of prosecuting someone for committing a crime and for challenging the monopoly on State violence. The justice minister, responsible for enforcing public security policy, oversees the prosecutors' efforts, identifies priorities, monitors use of the budget etc. The Public Prosecutor's Office, in this model, is understood and analyzed as an "instrument" of elected leaders (Olsen, 2005).

The government, thus, controls the flow of criminal prosecution that is put to the judges, "allowing the political environment to regulate to some extent the demands for action placed upon the judicial system" (Guarnieri, 1995, p. 244). It is the prosecutors, guided by the priorities set by the justice minister, that filter out the criminal cases to be forwarded to the Judiciary branch, prioritizing and selecting what judges will rule upon, working as the gatekeepers of the judicial system (Aaken *et al.*, 2010). And it is the government, in the end, that is politically accountable for the behavior of the Public Prosecutor's

Office. This relationship between the elected and non-elected players places this prosecution model closer to the dilemmas and difficulties that exist in democracies concerning bureaucracy. Considering the characteristics that involve priorities and allocate resources, since it is not possible to prosecute all crimes, prosecution "is an executive, rather than judicial, function" (Shapiro, 2013, p. 262). This model has been adopted in countries with consolidated democracies, such as Germany, Spain, the US (at a federal level), France, the Netherlands, England, and Japan, among others (Fionda, 1995; Kerche, 2009; Johnson, 2012).

The right to select what will be discussed at a criminal level is strategic. "Often the most important discretionary decisions are the negative ones, such as not to initiate, not to investigate, not to prosecute, not to deal, and the negative decisions usually mean a final disposition" (Davis cited by West, 1995, p. 25). In the bureaucratic model, however, the government can be held accountable by voters, even for the negative discretionary decisions taken by the prosecutors. When politicians delegate the right to make certain choices to prosecutors, the trade-off is that the prosecutors should be responsive to the government. When citizens delegate politicians to make certain choices, including in the criminal sphere, the trade-off is that these citizens can punish the politicians, or reward them, especially in elections. "It is precisely this political responsibility of the justice minister that helps maintain the civil quasi-irresponsibility of the magistrates for the relevant facts in their work" (Terquem, 1998, p. 131).

If, in this model, the incentive is for prosecutors to stay true to the priorities of the government by means of political and democratic accountability, there is a loss when the accused party is someone close to the head of the government. The Public Prosecutor's Office has less autonomy to take the case further against a high-level politician who is a member of the government. If the bureaucratic model understands a level of hierarchy between the Ministry of Justice and the Public Prosecutor's Office, it is evident that the agency will have less freedom to act when it comes to an accusation of corruption that involves a president, a prime minister, or any member of the cabinet.

The electoral model

This model is only found in the US at a local level, and some examples at a state level. Of the 50 US states, some 45 select their county prosecutors, known as the district attorneys (the DA), via direct and cyclical elections. That is, the electoral process to choose a prosecutor is similar to the dispute for any public post, meaning that elected district attorneys have incentives and restrictions that are similar to those for other politicians. It is important to point out that, in the US'

system for criminal justice, these prosecutors are quite discretionary and, in 97% of the cases, pleas are negotiated and merely confirmed by a judge (Tonry, 2012). Nevertheless, the high level of discretionary power is offset by vertical and democratic accountability, which is exerted directly by voters.

The consequence is that "American prosecutors, sometimes openly and unashamedly, take media reactions and political considerations into account when deciding what cases to prosecute and how to handle them" (idem, p. 2). In election years, according to research conducted in several states, local prosecutors are more punitive, present more cases to the jury, and have a preference for cases with higher repercussion than in non-election years (idem). If, on the one hand, this model generates incentives to meet preferences of citizens by means of the accountability enforced by constituents voting, on the other hand, using non-judicial criteria is boosted by the underlying logic of the electoral dispute.

The independent model

Brazil and Italy are the main examples of the independent Public Prosecutor's Office model. In both these countries, prosecutors are almost free of accountability, since the institutional framework ensures high levels of autonomy in relation to politicians and, ultimately, citizens themselves. Although there are important institutional differences between the Public Prosecutor's Offices in the two countries, prosecutors in both nations are extremely autonomous with respect to the government, parliament and other state agencies, despite presenting legal cases to the Judiciary branch, which is also not politically accountable. In Italy's case, not even the participation of judges in the trial is a limiting factor on the autonomy exercised by the Public Prosecutor's Office because the judges and prosecutors are in the same institution — the Judiciary branch — and they have identical career paths. In both countries, only the prosecutors themselves "could recruit, organize, govern, or sanction" prosecutors (Maravall, 2003, p. 283).[3]

Citizens, even by means of their representatives, have very few instruments to encourage certain behavior of prosecutors. Therefore, when "by some happy coincidence, bureaucrats [as prosecutors] act the way citizens want them to, bureaucracy may seem to be less of a problem, but it is not under democratic control" (Gruber, 1987, p. 12). This is because

> [C]*ontrol may occur through anticipated reactions. If bureaucrats accurately anticipate what the hand of the citizen would do, and then feel constrained to act on the basis of this anticipation, a form of democratic control has occurred. If the bureaucrats are wrong in their anticipation and act in*

[3] Although Maravall (2003) is referring to judges, the idea of independence is also applicable to prosecutors.

ways that the citizenry or legislature does not approve of, it cannot be said that their actions have been controlled by the citizenry. (Gruber, 1987, pp. 12-3)

In these examples of independent models, there is also no rigid hierarchical organization inside the agency that facilitates the control of the higher levels in relation to the base structure, since the prosecutor's career in Brazil and Italy is organized under "functional autonomy". The very few incentive resources available, such as promotions, for example, are rarely used in practice. In Brazil, these occur mainly in an automatic fashion based on time in service, not on merit, and, in some states, solely on seniority (Coslovsky, 2015). In Italy, "promotions are in fact exclusively regulated by seniority" (Pederzoli; Guarnieri, 1997, p. 330).

While prosecutors' discretion for civil issues is expressive in Brazil — since the framers attributed the Public Prosecutor's Office with the onus of defending social and collective rights of "disadvantaged" Brazilians (Arantes, 1999) —, when it came to criminal law, the decision was quite the opposite, similar to what the Italian framers did. In both countries, initially, in criminal matters, prosecutors retained low levels of discretionary power. It is as if the framers compensated the lack of accountability with less freedom of choice. Prosecutors should simply apply the law (as defined by parliament) in relation to what is presented by the police, who are in charge of criminal investigation. Both in Brazil and Italy, the "principle of legality" was then adopted, in which a prosecutor is obliged to take a case to a judge for a ruling every time the police, once inquiries are complete, present enough evidence to prove a crime has been committed. Such "corralling" with the police on one side, and the Judiciary branch on the other, virtually minimizes the lack of democratic accountability in the Public Prosecutor's Office, insomuch as it generates a type of separation of tasks in the legal system, reducing the prosecutors' discretion. Nevertheless, both in Brazil and Italy, the principle was relativized over time and allowed prosecutors, among other legal innovations, to conduct criminal inquiries (Kerche, 2018a).

In Italy, in 1989, a new criminal code allowed prosecutors to instruct Police in the investigative phase (Pederzoli; Guarnieri, 2008),[4] which eased the principle of legality: the prosecutor no longer waits to be called upon to start the criminal prosecution, and this can give rise to "unequal treatment because of the different orientations of the various public prosecutors" (Di Federico, 1995, p. 239). Besides this, given the sheer magnitude of matters that can be included as criminal cases, "together with creative interpretations of many of them on the part of the judiciary — allows them [prosecutors] enough grounds for

[4] Two important changes in the reform: the end of the judge of inquiry, in which a judge plays a more active role in criminal issues, and the consequential replacement of the "inquisitional" model with an "adversarial" model, in which the judge is neutral in relation to accusation and defense (Sberna; Vannucci, 2013; Guarnieri, 2015). However, the fact that judges belong to the same branch limits the independence of the judge in relation to making accusations. According to Nelken, prosecutors have never acted "simply as the official counterparts of the defense lawyer" (Nelken, 1996, p. 100).

starting investigations into large areas of administrative, political or even economic activity" (Pederzoli; Guarnieri, 1997, p. 334).

In a similar process, in Brazil, the Supreme Court (*Supremo Tribunal Federal*) decided, in 2015, that investigations conducted by prosecutors were constitutional, placing the role of the Public Prosecutor's Office higher than that of the police (Kerche, 2014). Furthermore, the Organized Crime Law (*Lei de Organização Criminosa*) in 2015 began to allow prosecutors to negotiate plea bargains with whistle-blowers charged with crimes, which also reinforced the discretionary power, with no accountability as a counterpart (Kerche; Marona, 2018).

As is the case with all institutional choices, this also generated a trade-off. If, on the one hand, prosecutors are freer to prosecute politicians in corruption cases, on the other hand, the possibility of holding the prosecutors themselves accountable is made quite challenging, if not impossible. The model, uncommon in democracies, generates highly contingent results, insomuch that it mitigates institutional rules and incentives. For citizens, very few alternatives remain besides hoping that the objectives of the prosecutors coincide with theirs.

THE HEAD OF THE FEDERAL PUBLIC PROSECUTOR'S OFFICE IN BRAZIL

The 1988 Constitution was a milestone for Brazil's Public Prosecutor's Office. The independence of the agency was assured by means of several institutional instruments at that time, protecting the organ from regular interference from politicians, in general, and from the government, more specifically. In addition, the framers guaranteed discretion for prosecutors in civil matters, but not in criminal ones, in the spirit that disadvantaged society would need a guardian for the social rights established in the new Constitution.

Despite the Public Prosecutor's Office's lobby having managed to approve most of its demands, some of them were not accepted by the framers (Kerche, 2009). For the purpose of this article, it is important to recall that the prosecutors' lobby contended that the heads of Public Prosecutor's Offices, from both states and federal spheres, be chosen, respectively, by state governors and the president from a list of three names voted on by the very members of the respective Public Prosecutor's Offices. The importance of the heads of the state and the Federal Public Prosecutor's Office is, among others, that they are the sole parties that can judicially accuse the heads of the state and the Federal Executive branch, the members of cabinets, as well as members of parliament. The framers preferred this means of appointment for the states, but not for the Federal Public Prosecutor's Office. Under the Constitution, it is up to the president to select the head of the Federal Public Prosecutor's Office from the

pool of prosecutors at a federal level, pending an appointment from the Senate's approval. Moreover, even though the mandate is for two years, there are no limits for new appointments. This appointment model has important consequences.

Taking it for granted that the head of the Public Prosecutor's Office, after his 2-year mandate has expired, will be interested in being re-appointed for the job, it is to be expected that the *agent* (the head of Prosecutor's Office) has incentives to respect the interests and the preferences of the *principal* (the president), as the "accountability conception of representation" stimulates (Przeworski; Stokes; Manin, 1999). Thus, it is more rational for the head of the Federal Public Prosecutor's Office to become aligned with the president rather than combative. The possibility of appointing the head of the Prosecutor's Office and re-appointing him/her is an important institutional instrument for the president to protect himself/herself from the head of the Public Prosecutor's Office, aligning, at least in this aspect, with the bureaucratic model. A good example of this dynamic recalls the Fernando Henrique Cardoso government (1995-2003): the same Federal prosecutor, Geraldo Brindeiro, was re-appointed four times for the position of head of Prosecutor's Office, even after having been accused of being excessively light-handed with the government, shelving accusations, which won him the nickname of "the general-shelver of the Republic".

The Luiz Inácio Lula da Silva government (2003-10) adopted a very different procedure, without altering the legislation. The former president started by respecting the three-name list forwarded on by the National Association of Federal Prosecutors, automatically appointing the name that gained the most votes from the federal prosecutors themselves. The question is why would a president relinquish the right to, at least, influence an actor that is so important they can criminally accuse the head of the Executive, his ministers and members of parliament? The answer probably lies somewhere between calculating a sign to his electorate that he will not follow the same pattern as Fernando Henrique Cardoso and his negligent head of the Public Prosecutor's Office, moving towards a view of the world that is more of a "unionist", in which the vote from the group itself is understood as being more democratic than selection made by elected politicians.

Requiring approval from the Senate, however, could be seen as a situation of "multiple principals problem" (and the resulting difficulties that come from this), but, in practice, senators have never refused a presidential appointment for the head of the Federal Public Prosecutor's Office. While the literature on appointing justices to the Brazilian Supreme Court reveals that names that would be rejected would probably never even be presented

to the higher house of the Legislative branch, assuring the false impression that the Senate is not a filter for appointments (Llanos; Lemos, 2013), the transposition of this observation to the appointment process to the head of the Prosecutor's Office is not automatic. Among many reasons, probably the most important issue during the Lula government, at least, is that the recommendation to the Senate, in some way, is not from the president, but made by members of the Public Prosecutor's Office (*procuradores da República*). This "depoliticization" of the appointment increases the cost of "politicizing" a refusal. This allows the model to be considered in terms of a simple agent-principal relationship.

The practice of the list voted by members of the Federal Public Prosecutor's Office inaugurated by Lula was maintained by Dilma Rousseff (2011-16) and, up to a certain point, respected by Michel Temer (2016-19), who chose not the first name, but the second on the three-name list, Raquel Dodge. With this, the logic of the model was inverted when compared with Cardoso's free appointment procedure: the principal began to identify with colleagues in the very agency and no longer with the president. Another consequence was the change in the electoral agenda, which began to cover corporate matters focusing on "electors", the members of Prosecutor's Office, in detriment of a more political agenda focusing on the government. The head of the Federal Public Prosecutor's Office was awarded with real autonomy to question the government. Although the lack of legal foreseeability in this means of appointment could weaken the independence of the head of the Prosecutor's Office in relation to the Executive Branch, because the president could discard the list voted on by the prosecutors, the commitment of the Workers' Party governments was so clear and public that the cost of presenting the Senate with a name that was not on the list would be expressive. Dilma Rousseff recommended Rodrigo Janot a second time as the head of the Public Prosecutor's Office at the peak of the "Operation Car Wash" (*Operação Lava Jato*), even after his efforts against the government and her political party. It does not seem to be a coincidence that the large-scale corruption scandals, with the "Big Monthly Payment" (*Mensalão*) and the Car Wash, came to the fore during the Workers' Party administrations (Kerche; Marona, 2018).

The Jair Bolsonaro government (2019-), in its turn, ignored the three-name list and went back to the model outlined in the Constitution, which generates incentives for the head of the Prosecutor's Office to be light-handed in his accusations against politicians, as previously discussed. Chosen to head the Federal Public Prosecutor's Office, Augusto Aras did not take part in the election to put together the three-name list, and his public manifestations were more than aligned with

the opinions of the president. Under this logic of the model, the trend is to re-establish a pattern of being less aggressive with the government, which may or may not fall into absolute submission. It is already possible to identify the light-handed approach in Augusto Aras' treatment of the (common) criminal accusations against Jair Bolsonaro in his first years in government (Kerche; Marona, 2020).

The fact is that institutions matter, even those of an informal nature, as in the case of using the three-name list: in the Cardoso and Bolsonaro administrations, at least in the first two years, there were heads of the Public Prosecutor's Office that were less aggressive towards the president. Meanwhile, in the Lula and Rousseff governments, respecting the name with the most votes from the members of the Federal Public Prosecutor's Office, there were its heads that were more "combative" in relation to the members of the government. During Temer's time at the helm, the head of the Public Prosecutor's Office that he appointed was second on the three-name list, only took a public stance against Bolsonaro when the new president discarded the possibility of re-appointing her for the job.

While an independent head of the Prosecutor's Office was appealing to the opposition during the Workers' Party administrations, incriminating Lula's e Dilma Rousseff's party, in Bolsonaro's government it has been understood that the best model is the one that continues dependent on the head of the Public Prosecutor's Office in relation to the president. Even parties that do not support the government backed Bolsonaro's initiative to appoint a name that did not appear on the three-name list. In the Senate, Augusto Aras had 68 votes in his favor and 10 against. Senator Renan Calheiros (MDB-AL), who had not formally supported the government, said in an interview that Bolsonaro was "courageous in challenging the 'corporativism' of the Federal Public Prosecutor's Office and imposing limits on the institution".[5] The press reported that the head of the Federal Public Prosecutor's Office receives support from both the leftwing and the rightwing for his critical position in relation to the way the Operation Car Wash has been conducted.[6]

In short: in the model taken on by the framers in 1987-88, the head of the Public Prosecutor's Office would have incentives to be less combative towards the government, approximating the Public Prosecutor's Office, in this aspect, to the dilemmas of the bureaucratic model. A means to changing this was the "informal" initiative of the Workers' Party governments to relinquish the right to choose the federal prosecutor in charge of prosecuting the president, his cabinet and representatives. Probably having learned from the consequences of the model used by Lula, Bolsonaro, with the support of politicians from different political parties, returned to the system in which it is more

[5] Available at: <https://noticias.uol.com.br/politica/ultimas-noticias/2019/10/11/renan-bolsonaro-erra-na-economia-choca-com-falas-mas-acerta-contra-o-mp.htm>. Accessed on: Nov. 17, 2020.

[6] Available at: <https://www.bbc.com/portuguese/brasil-53676271>. Accessed on: Nov. 17, 2020.

rational for the head of the Public Prosecutor's Office to be aligned with the government, instead of confronting the president.

THE US "AD HOC" PROSECUTOR

As we have seen, the trade-off involved in the bureaucratic model is established between being accountable to politicians — and, indirectly, to citizens — and the lack of autonomy to be able to prosecute high-level members of the Executive branch. The stronger the tie to the government, the less freedom there is to accuse the president and his ministers in corruption cases, for example.

The solution found in the United States at a federal level — but also in some states[7] and counties[8] —, although with some variations in the model throughout history, was to appoint an attorney from outside the staff in the Department of Justice when it is necessary to investigate the president and members of his cabinet. The milestone in this model is a law from 1978 (Ethics in Government Act), which regulated the *ad hoc* prosecutor at a federal level, despite the principle having been previously adopted with no legal prevision, "varying in jurisdiction, appointment method, and degree of independence from the executive" (Harriger, 1992, p. 1).

United States presidents Ulysses S. Grant (1868-77), Calvin Coolidge (1923-29) and Harry S. Truman (1945-53) appointed attorneys with the powers of a prosecutor. Franklin D. Roosevelt (1933-45) appointed a prosecutor from outside the Department of Justice, but only with the power to investigate, with no authorization to prosecute. Most of these prosecutors were dismissed and the investigations finalized by members of the Department of Justice itself. President Woodrow Wilson (1913-21), a member of the Democratic Party, invited a representative from the Republican Party and an independent investigator to work together with the Department of Justice to scrutinize supposed irregularities (Johnson; Brickman, 2001).

The benchmark for this essay, however, was the Watergate scandal in the Richard Nixon administration (1969-74), when a special prosecutor was appointed: the law professor and former representative in the John F. Kennedy government (1961-63) at the Supreme Court (solicitor general), Archibald Cox. This prosecutor, who was not part of the Department of Justice, had ample freedom to investigate any topic related to the 1972 elections.[9]

The special prosecutor was able to negotiate immunity with witnesses, decide whether individuals or organization were to be prosecuted, and even when investigations were to stop. It was also his decision as to when the attorney general, the head of the Department of Justice, was to be consulted and when it would be appropriate to

[7] There are examples of *ad hoc* prosecutors in some US states "when the regular government attorney [prosecutor] was disqualified from a case, whether for incapacitation or interest" (Harriger, 1992, p. 3).

[8] The Netflix documentary series *Making a Murderer* shows one case in which the local prosecutor, suspected of being partial, asks a prosecutor from a different county to take on a murder case.

[9] In 1972, five people were arrested while trespassing in an office of the Democratic Party in Washington, DC. President Nixon was accused of having knowledge of this illegal operation.

make public the reports on his activities concerning progress in the investigations. Furthermore, the removal of the special prosecutor could only be enforced in the event of "extraordinary improprieties", which did not, however, prevent the president under investigation from dismissing and appointing another law professor in his place — Leon Jaworski — in a complicated political process known as the Saturday Night Massacre (Johnson; Brickman, 2001).

After the Watergate scandal, which ended in the renunciation of the then US president, Richard Nixon, the

> *members of Congress agreed on the fundamental principle that there ought to be a mechanism to investigate executive misconduct that was independent of the president and the attorney general. They also agreed that this person could not be subject to dismissal during an investigation except in extraordinary circumstances* [...]" (Johnson; Brickman, 2001, p. 79).

Five years of "exhaustive legislative deliberations" (Gormley, 2001, p. 98), in 1978,[10] resulted in the approval of *The Ethics in Government Act*, which included the independent counsel,[11] more insulated than the special prosecutor. In addition, for the first time in the history of the US, the attorney general or any US attorney saw their role in prosecuting someone restricted, and they were replaced with an *ad hoc* prosecutor (Johnson; Brickman, 2001).

Unlike the special prosecutor who was able to be dismissed by the attorney general, the independent prosecutor, "upon the application of the Attorney General", is appointed by a "special three-judge Division in the United States Court of Appeals for the District of Columbia" (Nolan, 1990-91, p. 11).[12] After this recommendation, "there are very few formal constraints" (Fleissner, 1997-98, p. 434), either from the president of from Congress.[13] The independent prosecutor has ample freedom to investigate and prosecute those under investigation, with "minimal" accountability (Johnson; Brickman, 2001). The discretionary power, in its turn, is high, including the right to close a case without the need to investigate (Nolan, 1990-91). All this autonomy and discretion is assured by the "remote" possibility of removing an independent prosecutor by impeachment or by some form of legal penalty (idem).

Approval of The Ethics in Government Act, however, was controversial. Some questioned whether Congress could remove the Executive's power of law enforcement, understood as a violation of the separation of powers.

> *Critics have also expressed concern about the damaging effect upon the accused's reputation of the publicity surrounding the triggering of the*

[10] The law was emended in 1982 and 1987 (Nolan, 1990-91) and was renewed in 1994 (Johnson; Brickman, 2001). Even though the impact on the Executive Branch was significant, no president vetoed the re-authorization of the law (Fisher, 2000).

[11] Only with the amendment in 1983 did the name of the prosecutor change from *special* to *independent counsel* (Johnson; Brickman, 2001). To differentiate from the model adopted prior to 1978, in this essay, the *ad hoc* prosecutor, after the *Ethics in Government Act*, will be referred to as the independent prosecutor.

[12] There are three senior or retired judges appointed by the head of the Supreme Court (Harriger, 1992).

[13] Only two mechanisms, which are informal, based on the idea of self-limitation, could restrict prosecutors from outside the staff of the Attorney General: "First, the prosecutors are drawn from the private legal community, where they will return at the conclusion of their investigation. Therefore, they are concerned that they do not damage their reputations by abusing the immense power granted to them in the statute. Second [...], it is the perception by prosecutors that their work will be closely scrutinized by the press and that they will be judged accordingly by the public" (Harriger, 1992, p. 180). However, not always do the limitations from public opinion have an effect. Close to 60% of voters disagreed with the methods used by Kenneth Starr as independent counsel in the Clinton scandal, and only ⅓ showed support for the impeachment of the president (Maravall, 2003). After the law was renewed in 1994, an annual report was required for Congress, not as a way to inspect the activity, but to accompany expenditure of the independent counsel (Johnson; Brickman, 2001).

mechanism and the issuing of a public report; the dual standard of justice for public officials created by the charging of crimes not prosecuted for ordinary citizens [...]*; the waste of public funds resulting from special investigations of charges that the Justice Department could do routinely; the lack of checks on the independent counsel's power* [...]. *Supporters of the mechanism argue that it is the only practical response to the conflict of interest problem; it is necessary for the appearance of impartial justice and for the maintenance of public confidence in the justice system; its use has demonstrated that there are adequate checks on the independent counsel; and it serves the interests of the accused because, if cleared, their exoneration it is not "tainted" by questions of conflict of interest*. (Harriger, 1992, p. 7)

The US Supreme Court, in 1988, leaned heavily on the constitutionality of the independent prosecutor in the case *Morrison v. Olson*. The argument of those supporting the unconstitutionality of the law was that this would be re-inventing the separation of powers.

Under this view, the prosecutorial conflicts of interest, which are "remedied" by the appointment of independent counsels, are inherent in our constitutional scheme and should be addressed through impeachment — the only remedy provided by the Constitution for situations in which the executive branch fails properly to execute its duties. (Nolan, 1990-91, pp. 7-8)

Justice Scalia cast his dissenting vote arguing that giving unlimited time and money to the independent counsel was dangerous (Fisher, 2000). The decision, nevertheless, was for the constitutionality of the *ad hoc* prosecutor.

Between 1978 and 1987, seven independent prosecutors were appointed: two in the Jimmy Carter government (1977-81), and another five in the Ronald Reagan government (1981-89), for a variety of cases that range from the supposed use of cocaine by White House advisors up to the Iran-Contras Affair.[14] But if the milestone for approval for more autonomy for the *ad hoc* prosecutor was Watergate, the limitations on this independence more than 20 years later was the Monica Lewinsky scandal during the Bill Clinton administration (1993-2001),[15] which resulted in the impeachment of the president in the House of Representatives. On that occasion, the efforts of the independent prosecutor Kenneth Starr were contested, and the US legislative did not renew the law that established the independent counsel.

As the newspaper *The Post* affirmed at the end of the 1990s, "Congress's failure to reauthorize the independent counsel law stemmed from 'frustration with the conduct of many investigations,' including their cost, the lack of accountability of special prosecutors and the 'unchecked prosecutorial power' some attempted to exercise".[16]

[14] In 1986, it was revealed that, during the second mandate of President Ronald Reagan, the US sold arms to Iran in exchange for freeing hostages in the latter country, and it financed anti-communist groups that fought against the Nicaraguan government.

[15] In 1998, a scandal arose involving President Bill Clinton and a White House intern, Monica Lewinski. The accusation was that the president had had sexual intercourse with her, which he denied. The head of the Executive was accused of perjury, and his impeachment was approved by the House of Representatives.

[16] Available at: <https://www.washingtonpost.com/politics/2019/04/19/how-mueller-report-reminds-us-watergate/?fbclid=IwAR10Wwwg1JhSfUmdru54ljnKq2YiraHWzXg7Cq__nnMlwbrtfKivG0TsTtlY&utm__term=.3d8b875b5565>. Accessed on: Nov. 17, 2020.

In another statement, an observer said that the norms that regulate the independent prosecutor "are the worst engine for the deprivation of constitutional rights" (Harriger, 1992, p. 147). A former *ad hoc* prosecutor, James C. Mckay, said that the position became highly politicized and that "the 'ins' hate it and the 'outs' love it just for the purpose of bringing the 'ins' down".[17]

In lieu of independent counsel, US Congress, in 1999, created the special counsels. "The 'special counsels' under these regulations have, therefore, by express design, less 'independence' from the attorney general and the Department of Justice than did the 'independent counsels' under the *Ethics in Government Act* of 1978, or the 'special prosecutors' appointed by the attorney general for the Watergate matter".[18] Before, the prosecutor was appointed by the Judiciary branch at the request of the attorney general; today, the special prosecutor is appointed by the head of the Department of Justice himself or a deputy and is required to follow the policy of the Department (Bookbinder; Eisen; Fredrickson, 2017). The attorney general can annul legal action brought by the special prosecutor, decide on the scope of an investigation, supervise their work, and even dismiss them (Cole; Brown, 2019).

Summing up: the US model of appointing a prosecutor from outside the staff of the Department of Justice to avoid the limitations of the bureaucratic model went from low regulation prior to 1978, which weakened the prosecutor's independence, to regulation via the Ethics in Government Act, which guaranteed the independent counsel higher levels of independence and discretion, and then ended up in a model that is highly dependent on the attorney general and that continues until today. It is under this model that Donald Trump (2017-21) was investigated by special counsel, Robert Mueller, in a case of supposed interference by Russia in the presidential elections. Under suspect of the prosecutor's partiality, the 448-page report was sent to the attorney general and archived because it was not "established that the Trump campaign criminally conspired with Russia to influence the election".[19]

It is interesting to note that the new model, which is much more restrictive, was created during the administration of the democrat Bill Clinton, who suffered the consequences of an independent prosecutor, but in a period in which the majority in Congress was made up of republican representatives and senators. That is, the perception that excessive independence and discretionary power can be harmful to the political system has also been understood by the opposition, which benefitted in the Clinton impeachment.[20] The assumption of democracy that the opposition today can be the government tomorrow generates incentives to restrict the autonomy of those that could destabilize the government, in a type

[17] Available at: <https://www.washingtonpost.com/news/morning-mix/wp/2017/03/03/the-flawed-record-of-special-prosecutors-who-create-as-much-controversy-as-they-resolve/?noredirect=on&utm__term=.bf2af0e2d17a>. Accessed on: Nov. 17, 2020.

[18] Available at: <https://www.nbcnews.com/news/us-news/special-counsel-less-independent-under-expired-watergate-era-law-n761311>. Accessed on: Nov. 17, 2020.

[19] Available at: <https://www.bbc.com/news/world-us-canada-39961732>. Accessed on: Nov. 17, 2020.

[20] President Clinton was defeated twice in the House of Representatives in relation to the impeachment process in 1999, but the Senate did not achieve the ⅔ required to remove him from the post. He held the presidency until January 2001, being replaced by republican George W. Bush (2001-2009).

of "reverse political insurance": facing the "risk that they [politicians in power] will lose their position and influence in future democratic elections" (Dixon; Ginsburg, 2017, p. 989), the political elite is searching for ways to protect themselves in the subsequent period in relation to the risks highlighted in the model, such as "the risk of individual persecution or adverse treatment" (idem). However, here it is opposite to what the model has highlighted. In the place of limiting "their power by empowering an independent court to invalidate certain kinds of legislative action" (idem), we see a movement in the sense of reducing independence of a quasi-judicial actor. In other words: the model justifies politicians relinquishing influence, not only in relation to the Judiciary branch, but also the prosecutors,[21] because they fear that, once they have been replaced by adversaries in the government, these substitutes can use the agency to persecute them. With this, it would be better to limit all political interference, both by leaders and the opposition. Yet, as we have seen in the US, with regards to the *ad hoc* prosecutor, the movement was the opposite, allowing the government to have a certain level of influence over the actor that has the ability to accuse the president and his cabinet.

[21] The authors exemplify that the theory can be used beyond the constitutional courts affirming that in Taiwan "with some modifications, an insurance theory can explain the changes created by the Court Organization Law, which led to a significant increase in independence for prosecutors" (Dixon; Ginsburg, 2017, p. 993).

FINAL OBSERVATIONS

Although the differences in the justice systems in the US and Brazil are significant, it is possible to compare the prosecution in both countries using the dual-name references to political accountability/autonomy. In light of these variables, and respecting a structure of the agencies as a whole, Brazil's Public Prosecutor's Office, both at a federal and state level, has adopted a model that is different to the US Attorneys and District Attorneys. While the Brazilian agency is classified as independent, US federal attorneys are examples of the bureaucratic model, and those in the counties fit the electoral model. The model established in Brazil's 1988 Constitution leans towards independence in relation to political interference, making accountability difficult. Meanwhile, the bureaucratic model used in the US federal government is more inclined to accountability in detriment to autonomy when it comes to politicians. By reinforcing one aspect, you relinquish control of the other.

With regards to the power to judicially accuse the president, which is not attributed to just any prosecutor, both countries have taken political decisions that, in specific moments, regardless of the respective models for the Public Prosecutor's Office, have strengthened autonomy. The independent prosecutor, a role created after the Watergate scandal, and the head of the Federal Public Prosecutor's Office — *procurador-geral da República* — used during the Workers' Party administrations, are similar in that they were both tasked with prosecuting the president, they were both protected institutionally from interference from the

executive, and they could only be dismissed in extraordinary circumstances. The consequences of the institutional experience are also similar: in both countries, politicians seem to have understood that the political cost of maintaining an uncheckable checker outweigh the benefits. This understanding is not restricted only to the parties that support the government. Both in the US and Brazil — more explicitly in the former, less so in the latter —, politicians were led to forsake an autonomous prosecutor with the power to accuse the president, ministers and members of parliament. In the short term, it is true that this model can be beneficial to the opposition. In the end, "[I]ndependent counsel, cheered on by the administration's political opponents, are perceived as hunters by the public and may perceive themselves as hunters. And, of course, hunters like trophies" (Fleissner, 1997-98, p. 448). The issue is that, in the long term, and under the perspective of alternating the party in office, independent counsel may also be a risk to future administrations. That is, if today the hunter is in favor of the opposition, the fear is that they, in the future, become the hunted.

The independent counsel model, nevertheless, is appealing in the short term for those that do not support the government, but may be less attractive in the future when the opposition takes over the administration. This type of calculation is one of the explanations to help understand why politicians accept to reduce their "political influence" (Dixon; Ginsburg, 2017), but it also helps clarify the decision of the political elite to try, again, to take control of institutions. Both in the US and Brazil, respecting the structural differences for debate in the two countries, reducing the degree of independence of the prosecutor with the power to accuse the president has been a rational political calculation that has brought politicians from different parties together.

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