The prosecutor in the Brazilian legal system

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Abstract: This article will address the profile of the Brazilian Public Prosecution Service, focusing on two axes: the legal framework for its members and its role in criminal prosecution. The objective is to demonstrate the unique profile of the Brazilian Public Prosecution Service, especially after the 1988 Constitution, making it one of the most important and reliable institutions in Brazilian society, despite facing various challenges.

Keywords. Public Prosecution Service; Brazil; Legal framework; Criminal prosecution.

1. Introduction

The purpose of this article is to analyze the profile of the member of the Public Prosecution Service in the Brazilian legal system. The analysis will be divided into two main parts. The first one will focus on the legal regime of its members. After providing an overview of the Public Prosecution Service in Brazil, an examination will be conducted on the constitutional and legal guarantees afforded to its members, including the prohibitions and restrictions, as well as the process of admission and promotion in the career. The disciplinary legal regime applicable to the members will also be analyzed. Additionally, the organizational structure of the offices will be explored, with a focus on the presence or absence of hierarchy and the power of intervention. Furthermore, the National Council of the Public Prosecution will be addressed. In the second part, the focus will shift to the role of the members of the Public Prosecution Service and their position in criminal prosecution, analyzing general aspects of investigations, the role of the Public Prosecution Service in investigations, the principles of mandatory prosecution and non-discretionary action, and the relationship with the Press.

2. Legal Regime of Members of the Public Prosecution Service

The legal regime of members of the Public Prosecution Service is mainly governed by the Federal Constitution of 1988[1], as well as by Complementary Law 75/1993 and Law 8.625 of 1993. This legal regime ensures significant

I would like to thank Paulo Roberto Galvão de Carvalho and Tania Geralda Moura Borges de Mendonça for reviewing the text.

[1] Available at https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm.

independence for members of the Brazilian Public Prosecution Service in the performance of their duties, protecting them against undue pressures, while also seeking to establish controls on their actions.

2.1 Overview of the Public Prosecution Service in Brazil and institutional principles

According to the legal doctrine, the Public Prosecution Service "is undoubtedly one of the most powerful state institutions in Brazil."[2] To some extent, this is due to the profile outlined by the 1988 Federal Constitution, which characterized it as a "permanent institution, essential to the State's jurisdictional function", with the institutional and primary mission of defending the legal order, the democratic regime, and the non-disposable social and individual rights (Article 127)[3].

Established as an institution in Brazil since 1890[4], the 1988 Constitution guaranteed a substantial importance to the Public Prosecution Service achieved its most substantial growth, not comparable to that of other countries.[5] This Constitution significantly expanded the functions of the Public Prosecution Service and reinforced its guarantees of independence. Moreover, it granted extensive powers and bestowed unique treatment upon the institution in the history of Brazilian constitutionalism, endowing it with "an unprecedented significance in our history and even in comparative law."[6]

It can be asserted that the Public Prosecution Service in Brazil acquired its distinctive character with the enactment of the Federal Constitution of 1988 as a result of the transition from a dictatorial regime (1964-1985) to democracy. Prior to that, apart from having fewer guarantees, members of the Public Prosecution Service served as attorneys for the Union (federal government).

However, since 1988, the Public Prosecution Service no longer represents the Union and, instead, acts exclusively in the interest of society, undergoing a profound institutional change. It is addressed in the Constitution outside the chapters on the Executive, Legislative, and Judiciary branches, among the so-called "Essential Functions to Justice". In

[2] V.A. da Silva, *Direito Constitucional Brasileiro*, São Paulo, 2021, p. 514, free translation.
[3] "CHAPTER IV Essential Functions to Justice; Section I. The Public Prosecution. Article 127. The Public Prosecution is a permanent institution, essential to the jurisdictional function of the State, and it is its duty to defend the juridical order, the democratic regime and the inalienable social and individual interests".
[4] J.A. da Silva, *Comentário Contextual à Constituição*, 2ª ed., São Paulo, 2006, p. 593; P.G.G. Branco, *Curso de Direito Constitucional*, 14ª ed., São Paulo, 2019, p. 1155; H.N. Mazzilli, *Regime Jurídico do Ministério Público*, 3ª ed., São Paulo, 1996, p. 12. For an in-depth study of the institution's history, please refer to R.P. Macedo Jr., *Evolução Institucional do Ministério Público Brasileiro*, in A.A.M.d.C. Ferraz (coord.), *Ministério Público: Instituição e Processo*, 2ª ed., São Paulo, 1999, 36-65 and C.A. de Salles, *Entre a Razão e a Utopia: a Formação Histórica do Ministério Público*, in J.M.M. Vigilar and R.P.M. Macedo Jr. (coord.), *Ministério Público II: Democracia*, São Paulo, 1999, 13-43.
[5] H.N. Mazzilli, *Regime Jurídico do Ministério Público*, 3ª ed., São Paulo, 1996, 12.
[6] P.G.G. Branco, *Curso de Direito Constitucional*, cit., 1154.

DPCE online
ISSN: 2037-6677

the Federal Constitution, the Public Prosecution Service is covered in five articles (Articles 127 to 130-A).

The Public Prosecution Service is independent from the other Branches of Power and is granted institutional guarantees, particularly functional, administrative, and budgetary autonomy. Functional autonomy means that no external power or body can interfere, directly or indirectly, in the exercise of the institutional and specific duties of the Public Prosecution Service. Administrative autonomy refers to its capacity to self-organise administratively, while budgetary autonomy means it has the competence to develop its own budget proposal and manage its financial resources.

Reflecting our federal structure, in Brazil, there is the Union's Public Prosecution Service (within which the Federal Public Prosecution Service is included)[7], headed by the Attorney General of the Republic (or Prosecutor General of the Republic), and in each federative unit (26 in total) there are State Public Prosecution Services, each headed by a State Prosecutor General. The Attorney General of the Republic and the State Prosecutor Generals are always members of the Public Prosecution Service but are chosen by the Chief of the Executive Branch. At the federal level, this appointment is freely made by the President of the Republic, who appoints them from among the career members over the age of thirty-five, after their name is approved by an absolute majority of the members of the Federal Senate, for a term of two years, with the possibility of reappointment (Article 128, Paragraph 1, of the Constitution). It is important to highlight that the Attorney General of the Republic is the one who can file charges against the highest authorities in the country, including members of Congress and the President of the Republic. In recent times, there have been questions about the effective independence of the Attorney General of the Republic[8], considering that his or her unrestricted appointment by the President of the Republic may compromise his or her independence, particularly regarding investigations sensitive to the Head of the Executive.[9] However, doctrine

[7] According to Article 128, section I, of the Constitution, the Union's Public Prosecution Service includes: a) the Federal Public Prosecution; b) the Labour Public Prosecution; c) the Military Public Prosecution; d) the Public Prosecution of the Federal District and the Territories.

[8] Transparency International asserted in 2021: "The unjustified alignment between the Public Prosecution Service with Mr. Bolsonaro's government, and the resulting neutralization of a legal axis for the accountability of the president adds to a mounting pressure into the Brazilian system of checks and balances. (…) As previously denounced by Transparency International Brazil, these elements combined have the potential to reduce the institutional capacity of the Public Prosecution Service and its autonomy to investigate grand corruption schemes involving prominent politicians and businessmen, and to reverse the engagement of Brazilian authorities and institutions in fighting corruption" (Transparency International Brazil. *BRAZIL - Setbacks in the Legal and Institutional Anti-Corruption Framework*, 2021, p. 17).

[9] Many years ago, Hugo Nigro Mazzilli, one of the foremost authorities on the subject in Brazil, criticized the current system of appointing the Attorney General: "Although there has been much progress, we are still a long way from a meaningful and real guarantee. The very selection by the head of the Executive often carries within it the seed of political-party involvements and commitments" (H.N. Mazzilli, *Regime Jurídico do Ministério Público*, cit., 183).

rightly points out that the 1988 Constitution strengthened the independence of the institution by no longer allowing the unilateral dismissal of the Attorney General of the Republic by the President of the Republic[10] (it can only occur with the approval of an absolute majority in the Federal Senate, Article 128, §2, of the Constitution). That shows significant improvement in the system of selection and removal of the Attorney General.[11] At the state level, the appointment of the State Prosecutor General is made by the head of the Executive Branch from a list of three candidates provided by the career itself. He/she can only be removed by an absolute majority in the state Legislature.

The career of the Public Prosecution Service is structured into levels. Thus, there are members who handle cases at the level of first-instance judges, others who work before Appellate Courts, and finally, members who work at the level of the Superior Courts. Therefore, a member of the Public Prosecution Service does not follow a case from beginning to end, as there is a member assigned to each level of jurisdiction.

In general, there is a perception of strong public trust in members of the Public Prosecution Service, with the institution being among the most trusted according to society, despite the controversies arising from the Car Wash Operation.[12]

2.2 Principles and Guarantees

It is important to highlight that the Constitution expressly establishes the symmetry of legal regimes between members of the Public Prosecution Service and the Judiciary, even though they are distinct careers.

The Constitution ensures three institutional principles of the Public Prosecution Service: unity, indivisibility, and functional independence (Art. 127, §1). Unity means that the Public Prosecution Service is a single

[10] V.A. da Silva, *Direito Constitucional Brasileiro*, cit., 2021, 515; H.N. Mazzilli, *Introdução ao Ministério Público*, 2ª ed., São Paulo, 1998, 35.

[11] H.N. Mazzilli, *Regime Jurídico do Ministério Público*, cit., 113.

[12] In 2021, 45% of the Brazilian population trusted the Public Prosecution Service, ranking behind only the Armed Forces (63%), the Catholic Church (53%), major corporations (49%), and print media (47%). However, it was observed that "trust in the Public Prosecution Service has fluctuated significantly in recent years, starting at 50% in 2011, dropping to 45% in 2013, reaching 39% in 2015, and plummeting to 28% in 2017. In 2021, confidence in this institution reached 45%, the same level as in 2013" (L.d.O. Ramos, L.G. Cunha, F.L. de Oliveira, J.d.O. Sampaio, *ICJBrasil Report, 2021*, São Paulo, 11/12, free translation, available at https://repositorio.fgv.br/server/api/core/bitstreams/82935cd1-3393-4262-80a6-e8e39570caf7/content, accessed on February 5, 2024). The Car Wash Operation (between 2014 and 2021) investigated administrative members of the state-owned oil company Petrobras, politicians from Brazil's largest parties, including presidents of the Republic, presidents of the Chamber of Deputies and the Federal Senate, state governors, and businessmen from large Brazilian companies. It is considered the largest corruption investigation in the country's history, although the Brazilian Federal Supreme Court later declared that the judge of the case was not impartial, especially because of his close relationship with the prosecution authorities. Because of that, several nullities were declared.

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ISSN: 2037-6677

institution under a single leadership.[13] However, the Brazilian Federal Supreme Court (STF, in Portuguese abbreviation) has already ruled that "there is only unity within each Public Prosecution Service, with no unity between the Public Prosecution Service of one state and another, nor between them and the various branches of the Union's Public Prosecution Service."[14] Therefore, one can only speak of unity among all Public Prosecution Service in a conceptual manner, meaning that they all perform the same function of a *public prosecutor*, as taught by Hugo Nigro Mazzilli.[15] In turn, indivisibility means that members of the Public Prosecution Service can act as a substitute for each other in the exercise of their functions, not arbitrarily, but in accordance with legal provisions.[16] However, indivisibility also only exists within each of the branches.[17]

In the constitutional framework, the most important principle that governs members of the Public Prosecution Service is the principle of functional independence, which means that its members have broad freedom in the exercise of their functions, without functional or hierarchical subordination in the performance of their duties.

Therefore, the Prosecutor is only accountable to the Constitution, to the law, and to his/her own conscience, as commonly stated. No internal body (not even the Attorney General of the Republic) or external entity can interfere in the exercise of another member's core activities or in the formation of their functional conviction.[18] As taught by José Afonso da Silva, "No one has the legitimate authority to say to him/her 'do this', or 'do that', 'do it this way' or 'do it differently'. And if he/she does, the Prosecutor is not obligated to comply."[19] No one can tell a member of the Public Prosecution to do, to refrain from doing something, or even to do it differently. Thus, a member of the Public Prosecution Service cannot be compelled to file charges, to appeal in a particular case, or to refrain from doing so in another. Hierarchy and the duty of obedience exist solely in the administrative sphere, but never in the functional domain. Due to this principle, it is

[13] H.N. Mazzilli, *Regime Jurídico do Ministério Público*, cit., 81.
[14] STF, ADPF 482, Rapporteur: ALEXANDRE DE MORAES, Full Court, judged on 03-03-2020. All decisions of the Brazilian Federal Supreme Court can be consulted at https://portal.stf.jus.br/
[15] H.N. Mazzilli, *Introdução ao Ministério Público*, cit., 26.
[16] H.N. Mazzilli, *Regime Jurídico do Ministério Público*, cit., 81.
[17] J.A. da Silva, *Comentário Contextual à Constituição*, cit., 595.
[18] As stated by Justice Celso de Mello of the Brazilian Federal Supreme Court (STF), "the Constitution of the Republic has assigned to the Public Prosecution Service a position of unquestionable political-juridical eminence and has granted it the necessary means for the full realization of its lofty institutional purposes. Notably, because the Public Prosecution Service, as the independent guardian of the integrity of the Constitution and laws, does not serve governments, individuals, or ideological groups, does not subordinate itself to political parties, does not bow to the omnipotence of power, or to the desires of those who exercise it, regardless of the highly elevated position that such authorities may hold in the hierarchy of the Republic. It should not be the servile representative of the unipersonal will of anyone, under the penalty of the Public Prosecution Service proving unfaithful to one of its most significant functions, which is to defend the completeness of the democratic regime" (STF, PET 9068 MC/DF, judged on August 17, 2020, free translation).
[19] J.A. da Silva, *Comentário Contextual à Constituição*, cit., 596, free translation.

possible to observe divergent positions among members of the Public Prosecution Service acting at the same level of jurisdiction. The Brazilian Federal Supreme Court (STF) has already acknowledged the possibility that one prosecutor may request the defendant's acquittal while another may appeal against the acquittal verdict.[20]

On the other hand, the Constitution guarantees the principle of unity of the Public Prosecution (Article 129, paragraph 1), but it does not go as far as imposing specific forms of action, only the possibility of internal guidelines and other acts of the governing bodies aimed at guiding the members in their performance. However, they are not binding.

Doctrine points out that there are often situations of conflict between the principle of functional independence and unity[21], as isolated actions by certain members may bring harm to a unified institutional vision, as well as promote unjustified differentiation among citizens. This is one of the most complex challenges of the Brazilian Public Prosecution Service, seeking to reconcile the principle of institutional unity with that of functional independence.

The principle of functional independence gives rise to the so-called guarantee of the "Natural Prosecutor", by analogy to the guarantee of the Natural Judge.[22] The aim is to prevent the appointment of a "commissioned or exceptional" prosecutor, that is, a member of the Public Prosecution Service designated specifically for a case. It is a means of defense for the member of the Public Prosecution Service, even against the head of the institution[23], ensuring independent action while simultaneously safeguarding the collective interest, guaranteeing that only the Public Prosecutor designated according to abstract and predetermined criteria intervenes. This principle has been recognised by the Brazilian Federal Supreme Court, understanding that it seeks to prohibit *ad hoc* appointments made by the institution's leadership.[24] Moreover, the Supreme Court holds that the Attorney General cannot assume cases assigned to members based on abstract rules. As previously ruled, the "assumption of responsibilities of a Public Prosecutor by the Attorney General implies a break in the natural identity of the responsible prosecutor", and this principle excludes "the possibility of performing prosecutorial activities by an exceptional prosecutor, to the detriment of the functional independence of all members."[25] It would be futile to solemnly acknowledge functional independence if a prosecutor could be arbitrarily removed from a case and replaced by another. While not explicitly provided for, it is now understood that the principle of the Natural Prosecutor is an inherent guarantee of due

[20] STF, Writ of Habeas Corpus (HC) 69957, Rapporteur: NÉRI DA SILVEIRA, Second Chamber, judged on March 9, 1993.
[21] P.G.G. Branco, *Curso de Direito Constitucional*, cit., 1157.
[22] Such principle was pioneeringly advocated by H.N. Mazzilli, *O Ministério Público no processo penal*, in *Revista dos Tribunais*, year 65, v. 494, Dec. 1976, 270-272.
[23] P.G.G. Branco, *Curso de Direito Constitucional*, cit., 1157.
[24] STF, Writ of Habeas Corpus (HC) 67759, Rapporteur: CELSO DE MELLO, Full Court, judged on August 6, 1992.
[25] ADI 2854, Rapporteur for the Judgment: ALEXANDRE DE MORAES, Full Court, judged on October 13, 2020.

DPCE online
ISSN: 2037-6677

process. On the other hand, the Brazilian Federal Supreme Court understands that the Federal Constitution does not forbid the existence of "teams" or "specialized groups by subject", as long as they are constituted in the manner provided by law.[26]

However, the exaggeration of the principle of the Natural Prosecutor can bring risks and difficulties, especially in becoming an inert, bureaucratized body without the strength to carry out an efficient criminal prosecution, as taught by Scarance Fernandes. "On one hand, the principle has the advantage of avoiding the possibility of the Attorney General, driven by external influences, to remove from the natural prosecutor the assignment to act in a specific investigation or legal process. On the other hand, it carries the risk of making the Public Prosecution Service an institution that, by its nature, should have agility and dynamism as fundamental characteristics, especially in the face of contemporary demands for increased involvement in the investigative phase and greater efficiency in combating serious crimes and organised crime, to become an inert, bureaucratic organ."[27] In the same vein, Antonio do Passo Cabral proposes a reinterpretation of the mentioned principle, aiming to preserve the impersonal and objective designation of members of the Public Prosecution Service, "without neglecting a more efficient and coordinated performance of prosecutors".[28] However, it is certain that the overwhelmingly majority doctrine and jurisprudence consider the principle of the Natural Prosecutor applicable in Brazil.

To maintain independence, a legal statute allows resistance to internal or external pressures and mandates conduct compatible with such demands. In Brazil, public prosecutors have an equivalent status to judges in terms of qualifications, salary, and guarantees of independence, despite pursuing independent careers. In this context, specific guarantees and prohibitions are outlined for Brazilian public prosecutors. Alongside functional independence, members of the Public Prosecution Service enjoy additional safeguards, including life tenure, irremovability, and non-reduction of remuneration. This equivalence aligns them with the guarantee regime of the Judiciary. These safeguards act as a shield for members of the Public Prosecution Service, enabling them to exercise their functions autonomously[29] without fear of retaliation for their professional activities.

The first guarantee is that of life tenure, stipulating that after two years in the position, it cannot be lost except through a final and unappealable judicial decision, as outlined in Article 128 of the Federal Constitution. This safeguard is more robust than the stability granted to public servants in general. Following the two-year probationary period, which is shorter than that of public servants in general (three years), a

[26] STF, Writ of Habeas Corpus (HC) 69599, Rapporteur: SEPÚLVEDA PERTENCE, Full Court, judged on June 30, 1993.

[27] A.S. Fernandes, *Processo Penal Constitucional*, 7ª ed., São Paulo, 235-236, free translation.

[28] A.d.P. Cabral, *O princípio do promotor natural ontem e hoje: reconfigurando as atribuições do Ministério Público no processo civil e administrativo*, in *Revista de Processo*, vol. 345, year 48, 19-43.

[29] P.G.G. Branco, *Curso de Direito Constitucional*, cit., 1158.

Prosecutor cannot lose his/her position through an administrative process. The potential loss of the position can only occur during the initial two-year probationary period through an administrative process. Nonetheless, life tenure does not preclude members of the Public Prosecution Service from mandatory retirement at the age of 75.

Another guarantee for members of the Public Prosecution Service is their irremovability. In other words, they cannot have their place of work changed against their will, except for reasons of public interest, subject to various safeguards (through a decision of the competent collegial body of the Public Prosecution Service, with the vote of an absolute majority of its members, ensuring a full defense).

In addition to the aforementioned guarantees, there is the irreducibility of salary, applicable to all public officeholders in Brazil. The aim is to prevent retaliations against the exercise of prosecutorial functions.

Finally, the Constitution guarantees members of the Public Prosecutor's Office the right to be tried by a higher court if they are being investigated or prosecuted for the commission of a crime. This means that they will not be processed before a first-instance judge, as is the rule in Brazil, but rather before a collegiate court (Appellate Court, Superior Court of Justice - STJ, or Brazilian Federal Supreme Court - STF, depending on the position). It is understood that the goal is to ensure greater protection for members of the Public Prosecution Service in the exercise of their functions.

2.3 Prohibitions

In order to ensure the independence of members of the Public Prosecution Service, the Constitution (Article 128) imposes certain prohibitions to maintain their autonomy in the exercise of their activities. They are prohibited from receiving fees, percentages, or court costs under any circumstances or for any reason. It is implicit that members of the Public Prosecution Service, while receiving their salary, cannot accept any amount as fees or honorariums. Additionally, they are barred from practicing the legal profession outside of their duties to ensure the full focus on prosecutorial activities. Participation in a commercial company is also prohibited, except as a shareholder with no managerial functions, as provided by law. Another prohibition concerns the exercise, even during paid leave, of any other public function, except for a teaching position. The goal here is to prevent members of the Public Prosecution Service from dedicating more time to activities other than the prosecutorial duties. An explicit prohibition for members of the Public Prosecution Service is engaging in "political party activities" (Article 128, §5, II, d, of the Constitution), aiming to ensure impartiality in political party cases. They cannot join a political party or run for any elective office unless they are retired or resign. Moreover, they are prohibited from publicly and directly endorsing a particular candidate or political party.

Another prohibition established by the Federal Constitution refers to the judicial representation and judicial consultation for public entities, as stated in the final part of Article 129, item IX. This means a prosecutor

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ISSN: 2037-6677

cannot provide guidance or consultation to other governmental bodies or agencies, nor act as their legal representatives.

2.4 Admission and Promotion Process

According to the Constitution, "admission into the career of Public Prosecution shall take place by means of a civil service entrance examination of tests and presentation of academic and professional credentials, ensuring participation of the Brazilian Bar Association in such examination". Appointments are made in accordance with the order of classification (Article 129, Paragraph 3). It is not possible to appoint external individuals to the Public Prosecution Service to perform its functions, as was the case in the past, since the 1988 Constitution ensures that "the functions of public prosecution may only be exercised by career members" (Article 129, Paragraph 2). A law degree is required, as well as a minimum of three years of legal practice (Article 129, §3, CF).

Promotions in the career follow, as applicable, the criteria applied to the Judiciary (Article 129, §4 and Article 93 of the Constitution), alternating between seniority and merit.

It is worth noting that entrance exams for the Public Prosecution Service are generally highly competitive and have a high level of demand, resulting in the selection of high-quality members.

2.5 Disciplinary Regime and Procedures

Prosecutors can be subject to disciplinary proceedings if they violate their functional duties. There are two forms of investigation for such violations. The first is internal, conducted by the Public Prosecution Service itself through its disciplinary department. The second form of investigation is external, carried out by the National Council of the Public Prosecution– the body responsible for overseeing the Public Prosecution Service – primarily in cases where the inspectorate fails to fulfill its role properly.

In any case, the administrative disciplinary process must observe the principles of due process and the right to a fair defense, in accordance with procedures established by law (Complementary Law 75/1993 for the Federal Public Prosecution Service and Law 8.625/1993 for State Public Prosecution Services). Various sanctions are provided for, including warning, reprimand, suspension, and dismissal. However, if there is an administrative decision for dismissal, it is not sufficient for the removal of the member from the Public Prosecution Service; there must still be a subsequent action before the Judiciary and the loss of the position depends on a final and unappealable judicial decision.

The National Council of the Public Prosecution – the external oversight body of the Public Prosecution Service – can review, either *ex officio* or upon request, disciplinary proceedings against members that have been concluded within the past year. Furthermore, all decisions regarding the imposition of sanctions can be reviewed by the Judiciary to assess the legality of the proceedings and compliance with the basic guarantees provided by law.

2.6 Organisation of Offices. Specialised Offices

As previously mentioned, due to functional independence, each member of the Public Prosecution Service carries out his or her duties with complete autonomy, without any supervision or hierarchical control over their activities. There are superiors responsible only for administrative matters, but they do not interfere in the decisions made by the prosecutor. The offices are headed by a member of the Public Prosecution Service, but generally they have assistants and interns from within the institution. Typically, there are no representatives from other institutions working in the same office unless a Task Force is established.

Within the Public Prosecution Service, there are specialised offices dedicated to specific thematic areas, particularly those involving greater complexity, such as money laundering, homicide, crimes against the financial system, corruption, environmental crimes, and organised crime. Specially within the State Public Prosecution Services, more structured groups called Special Action Groups to Combat Organised Crime (GAECO in its Portuguese acronym) have been established for investigating organised crime, often with the assistance of members from other institutions, yielding positive results. In general, such groups act only in support of the natural Prosecutor. However, these groups are created through internal acts of the institution itself, which leads to significant variation in terms of organisation, structure, and responsibilities among the different units.

2.7 National Council of the Public Prosecution

The National Council of the Public Prosecution (CNMP, in its Portuguese acronym) is an independent body not linked to any of the branches of government, responsible for the external oversight of the Brazilian Public Prosecution Service concerning administrative and financial matters, as well as the proper discharge of official duties by its members (without prejudice to the role of their respective oversight bodies). The CNMP is regulated by Article 130-A, added by Constitutional Amendment No. 45 of 2004. For the external oversight of the Judiciary, there is another body called the National Council of Justice (CNJ, in its Portuguese acronym).

The CNMP consists of 14 members, including 8 from the Public Prosecution Service, 2 judges appointed by the Federal Supreme Court and the Superior Court of Justice respectively, 2 lawyers appointed by the Federal Council of the Brazilian Bar Association (OAB), and 2 individuals with recognized legal expertise and impeccable reputation, one appointed by the Federal Senate and the other by the Chamber of Deputies (subsections of Article 130-A). The members are appointed by the President of the Republic, after their nominations have been approved by the absolute majority of the Federal Senate, for a two-year term of office, one reappointment being permitted. This hybrid composition, the reasons justifying its creation, and its competencies, allows it to be characterised as an autonomous constitutional body (not linked to any of the branches of

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ISSN: 2037-6677

government) for the external oversight of the Brazilian Public Prosecution Service.[30]

In accordance with the constitutional provisions defining its competence, this external oversight is limited to the administrative and financial activities of the institution and the fulfillment of the functional duties of its members (caput of §2º), while preserving functional autonomy and independence. The CNMP cannot review acts related to the core functions of the members of the Public Prosecution Service, interfering with their functional independence.[31]

Within its competence, the CNMP can issue regulatory acts or make recommendations (Article 130-A, Paragraph 2º, of the Constitution) aimed at improving the institution, particularly from a standardising perspective.

The CNMP cannot dismiss a member of the Public Prosecution Service since he/she is guaranteed the right to only lose his/her position through a final court decision.[32] However, the CNMP can determine the member's availability or retirement with proportional benefits. The CNMP can also impose the sanction of compulsory transfer, with exceptions to the constitutional principle of irremovability.

Without prejudice to the disciplinary and oversight competence of each institution, the CNMP can initiate investigations and review, either on its own initiative or upon request, disciplinary proceedings involving members who have been judged less than one year ago.

3. The Member of the Public Prosecution Service and criminal prosecution

In order to understand the role of a member of the Public Prosecution Service in relation to the Judiciary, it is necessary to provide a general overview of our criminal justice system.

3.1 The Functioning of the Brazilian Criminal System of Justice

Although the Brazilian Public Prosecution Service has various institutional functions, the exclusive competence to propose public criminal actions is its most important function and has been associated with the institution for a long period[33], intertwining with the very history of the Public Prosecution Service.[34]

In Brazil, criminal prosecution is primarily governed by the Federal Constitution and the Code of Criminal Procedure[35], which dates to 1941

[30] E. Garcia, *Ministério Público: Organização, Atribuições e Regime Jurídico*, 3ª ed., Rio de Janeiro, 2008, 115.
[31] STF, MS 28028, Rapporteur CÁRMEN LÚCIA, Second Chamber, judged on October 30, 2012.
[32] STF, MS 31,523 AgR, Rapporteur CELSO DE MELLO, Second Chamber, judged on October 3, 2020.
[33] V.A. da Silva, *Direito Constitucional Brasileiro*, cit., 514.
[34] H.N. Mazzilli, *Regime Jurídico do Ministério Público*, cit., 217.
[35] Available at https://www.planalto.gov.br/ccivil_03/decreto-lei/del3689.htm.

(Decree-law nº 3,689, dated October 3, 1941) and was inspired by the fascist Italian Code of Criminal Procedure from 1930. Although it has undergone dozens of amendments, the Code still primarily regulates criminal prosecution in Brazil, along with other laws.

Our system is predominantly accusatorial, considering that the Federal Constitution grants to the Public Prosecution Service the power "to initiate, exclusively, public criminal prosecution, under the terms of the law" (Article 129, subsection I).

This accusatorial system was reinforced by the recent Law 13,964/2019, which not only restricts any precautionary initiatives of the judge in the field of personal precautionary measures but also includes Article 3-A in the Code of Criminal Procedure, stipulating that "criminal proceedings shall have an accusatorial structure, being prohibited any judge's initiatives during the investigation phase and the replacement of the evidentiary role of the prosecuting authority."

However, traditionally in Brazil, the same judge at the trial court level is responsible for both the investigation and the judicial phase. To overcome this situation, the same Law 13,964 created the figure of the "Judge of Guarantees" in Article 3-B of the Code of Criminal Procedure, aiming to separate the judge responsible for the investigation from the one who adjudicates the case. According to the aforementioned provision, the "Judge of Guarantees is responsible for overseeing the legality of the criminal investigation and safeguarding individual rights that require prior authorisation from the Judiciary". In the judicial phase, according to this new legislation, there must be a different judge, who has not had contact with the investigation.

In Brazil, besides the Specialised Justices (Military and Electoral Courts), there are Federal and State Justices. In general, the Federal Justice has jurisdiction over crimes involving the interests of the Federal Government and other crimes indicated by Article 109 of the Constitution.[36] The competence of the State Justice is residual. The Federal Public Prosecutors act before the Federal Justice, investigating and prosecuting federal crimes, like currency counterfeiting; smuggling; federal tax dodging;

[36] According to the Federal Constitution, Article 109: "The federal judges have the competence to institute legal proceeding and trial of: (…) IV – political crimes and criminal offences committed against the assets, services or an interest of the Union or of its autonomous agencies or public companies, excluding misdemeanours and excepting the competence of the Military and Electoral Courts; V – crimes covered by an international treaty or convention, when, the prosecution having started in the country, the result has taken place or should have taken place abroad, or conversely; V-A – cases regarding human rights referred to in paragraph 5 of this article; VI – crimes against the organisation of labour and, in the cases determined by law, those against the financial system and the economic and financial order; (…) IX – crimes committed aboard ships or aircrafts, excepting the competence of the Military Courts; X – crimes or irregular entry or stay of a foreigner (…); XI – disputes over the rights of Indians. (…) Paragraph 5. In cases of serious human rights violations, and with a view to ensuring compliance with obligations deriving from international human rights treaties to which Brazil is a party, the Attorney-General of the Republic may request, before the Superior Court of Justice, and in the course of any of the stages of the inquiry or judicial action, that jurisdiction on the matter be taken to Federal Justice".

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evasion of social security contributions; slave labour; money laundering; illegal transfer of money overseas; banking frauds; international drug trafficking; internet paedophilia; crimes committed by Internal Revenue employees, Federal Police officers or by personnel of any federal agency or department; environmental crimes, etc. The State Public Prosecutors act before the State Justice and investigate and prosecute crimes like murder, robbery, fraud, and all the offences not framed in the jurisdiction of other Justices.

In essence, there are four different stages in the functioning of the Brazilian criminal justice system: first, the investigative police, the Public Prosecution, or another legally authorized body collects evidence of a fact that might constitute a crime and identifies the perpetrator of the conduct (investigation); second, the Public Prosecution or, exceptionally, the victim accuses the possible agent (prosecution); third, the Judiciary convicts or acquits the defendant (adjudication); fourth, the criminal condemnation is implemented (execution).

During the first phase, there is an inquisitorial and not an adversarial system; the suspects may choose whether to be assisted or not by a lawyer, and, on their own initiative, may access non-sealed evidence regarding themselves. Judicial intervention occurs exceptionally, for instance, when a temporary arrest is required, or a judicial warrant is necessary.

In the second phase, the Prosecutor decides whether to sue or not. This decision is not discretionary, and whenever there is some evidence of a crime, there shall be an accusation. However, there are a few attenuations to this rule, as we will see.

In the third and fourth phases, there is a judicial process in an adversarial system.

During the judicial phase, the case is generally tried by a single judge, and since 2019 this judge must be different than the one responsible for the investigation. The sentence can be appealed, both by the prosecution and the defence, regarding both factual and legal matters. Such appeal will be judged by an Appellate Court. Against the decision of an Appellate Court, it is possible to file a new petition for the case to be reviewed by the Superior Court of Justice, especially when it involves a violation of federal law, or by the Federal Supreme Court, when it involves an alleged violation of the Federal Constitution. Only after the final judgment of all appeals and petitions to review the case is it possible to begin the execution of any sentence[37], which encourages the use of defensive appeals to postpone the final judgment and leads to significant delays in the execution of the sentence.

3.2 Investigation. General Aspects

The agencies and organisations responsible for criminal investigations in Brazil are, mainly, the Federal Police (as the name explains, act in the whole

[37] This understanding mainly arises from Article 5, Section LVII, of the Federal Constitution, which states that "no one shall be considered guilty before the issuing of a final and unappealable penal sentence".

country) and the Civil Police (that act in each State). There are other government agencies that investigate crimes in their respective areas of competence, although this is not their primary attribution.

The investigation conducted by the Police is held in a police enquiry ruled by a chief police officer or police commissioner. These agents must have a law degree and conduct the police enquiry under the supervision of the prosecutor. The judge acts in the investigation exceptionally, just when it is necessary to restrict the suspect's rights or guarantees.

At this step, it is important to outline the investigative procedure. In fact, there is no procedure to be strictly observed. The president of the investigation (the Police Officer, in the police inquiry) has a relative discretional power to determine the collection of evidence through the investigation. In other words, the strategy of the investigation is under the Police Officer's discretion. Despite that, the prosecutor, throughout the whole investigation, can interfere in this strategy, ordering the police to take specific measures or to obtain further proof. This is explained because the investigation is aimed to give the prosecutor the elements to file a charge.

As a general rule, the Brazilian Police do not have a good structure, especially the State Police. There are a lot of crimes to investigate and little structure. In addition, especially in the State Police, unfortunately it is very common for police agents to be corrupted. However, the Federal Police have been developing, since 1988, a better structure to investigate and sometimes to use new techniques of investigations.

In general, the investigation is primarily based on acquiring statements from suspects, victims, and key witnesses as the main method of gathering evidence, without the use of advanced techniques. Occasionally, simple examinations are conducted, such as to verify the authenticity of a document.

In more complex investigations involving organised crime, in addition to search and seizure, the law provides for special investigative measures, as stated in Article 3 of Law 12,850 of 2013, which defines criminal organizations and establishes provisions regarding their investigation.[38] These measures include cooperation agreements, the environmental interception of electromagnetic, optical, or acoustic signals; controlled actions[39]; access to records of telephone and communications, as well as registration data from public or private databases, electoral or commercial information; lifting of financial, banking, and tax secrecy, and also the infiltration of police officers in investigative activities. All these measures must be in accordance with specific legislation. The search for data in emails and cloud devices has become increasingly common, although the regulatory framework for these forms of investigation is not detailed.

[38] Available at https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2013/lei/l12850.htm

[39] According to Article 8 of Law 12,850, "controlled action" refers to "the practice of delaying police or administrative intervention related to actions carried out by a criminal organisation or its affiliates, while keeping it under surveillance and monitoring to ensure that the legal measure is implemented at the most effective moment for the collection of evidence and gathering of information".

In Brazil, the prevailed interpretation nowadays is that any interference with the suspect's privacy requires a warrant. Due to that, Judicial warrants are required to conduct searches in residences, in enterprises or to obtain data protected by constitutional secrecy (such as bank records, call logs and telephone communications, the secrecy of correspondence and other fiscal data). Judicial warrants are also necessary to authorise wiretapping, electronic surveillance, controlled delivery and the use of "undercover agents". Warrants are not required for personal searches, if the suspect carries weapons or evidence. Finally, the Police and Prosecutors have access to the data containing personal information, like address, filiation and personal qualification, kept by the Electoral Justice, Banks, Internet Providers, Telephone Companies and others, without the necessity of a judicial order.

The investigation can last months or even years, until the expiration of the legal term. In certain periods of time (generally each 30 or 90 days), the Police must ask for the extension of the investigation to the prosecutor. The prosecutor should, in this case, consent with the prolongation and determine the diligences the police must undertake during the period.

At the end of the police enquiry, the Police Officer makes a brief and objective report, describing the diligences performed and the evidence obtained, and sends the police enquiry to the Prosecutor. The prosecutor has four alternatives: (i) dismiss the case if prosecution is not possible (for instance, when there is no probable cause related to the author of the crime or the materiality, or if the offense is insignificant); (ii) request further investigation by the police; (iii) file a lawsuit if there is probable cause that an offense was committed. In this case, the police inquiry (or the preliminary investigation) and all the evidence collected accompany the indictment throughout the entire trial; and also (iv) negotiate an agreement with the defendant and his lawyer to avoid prosecution. We will delve into the details of these agreements later on.

It is important to mention that the reported crime clearance rate in Brazil is very low, below 10%, and although it is difficult to measure, especially because the data are not reliable, it shows how inefficient the Brazilian criminal system is. According to a recent survey, on average, only 1 in every 3 homicides that occurred in Brazil between 2015 and 2021 was solved.[40] Besides that, the system allows the defendant to indefinitely postpone the beginning of serving the conviction sentence. This and others features bring about a sensation of impunity throughout Brazilian society, especially in offences like corruption, widely spread in the society.

In fact, in the 2023 Corruption Perceptions Index, Transparency International ranked Brazil as 104th out of the 180 jurisdictions covered by the index.[41] Furthermore, according to the same index, Brazil lost a decade in the fight against corruption, as between 2012 and 2023, the country has lost 7 points in the Corruption Perceptions Index and dropped 35 positions, going from 69th to 104th place. However, Brazil has one of the largest incarcerated populations in the world, currently numbering 832,295 in 2022,

[40] Instituto Sou da Paz, *Onde mora a impunidade?*, 6ª ed., 2023, 15.
[41] Available at https://transparenciainternacional.org.br/ipc/.

the vast majority of whom are black people (68.2%) and aged between 18 and 29 years (43.1%).[42]

3.3 The Public Prosecutor and the Criminal Investigation. Relationship with the Police and Investigative Powers

In Brazil, in general, public prosecutors do not command the above-mentioned investigative organisations directly in a criminal investigation but can request investigatory procedures and the institution of a police investigation.

The relationship with the police, in general, is marked by tensions and corporate disputes that often compromise the effectiveness of prosecution. Nonetheless, there are a few examples of Joint Venture investigations, known as "Task Forces."[43] In these cases, prosecutors work together with agents from other agencies, even though there is no regulation of Task Forces in Brazil.

According to Brazilian Constitution, among other institutional functions of the Public Prosecution is its task to initiate, *exclusively*, public criminal prosecution, under the terms of the law (article 129, I) and to exercise external control over police activities (article 129, VII).

Based on these provisions, the Brazilian Federal Supreme Court recognized that prosecutors can conduct their own investigations, which are done especially when the police have no interest in investigating or lack independence to do so. Although there is no legal regulation regarding such investigations, the Supreme Court has established, in a binding manner, that "the Public Prosecution Service has the authority to initiate, for a reasonable period, criminal investigations, respecting the rights and guarantees afforded to any suspect or person under investigation by the State, always observing the constitutional instances of jurisdictional reserve and also the professional prerogatives invested in Lawyers in our Country (Law n. 8,906/94, article 7, notably sections I, II, III, XI, XIII, XIV, and XIX), without prejudice to the possibility - always present in the Democratic Rule of Law - of the permanent judicial control of the acts, necessarily documented (Binding Precedent n. 14), practiced by members of this Institution"[44].

Furthermore, in 2017, the Inter-American Court of Human Rights condemned Brazil in the case Favela Nova Brasília vs. Brazil.[45] This case

[42] Fórum Brasileiro de Segurança Pública. *Anuário Brasileiro de Segurança Pública 2023*, São Paulo, ano 17, 2023, 282, available at https://publicacoes.forumseguranca.org.br/items/6b3e3a1b-3bd2-40f7-b280-7419c8eb3b39, accessed on February 5, 2023.

[43] Like the Banestado case, that investigated the financial crimes related to the Bank of Banestado, in the Brazilian State of Paraná or the recent Car Wash Task Force (between 2014 and 2021), mentioned above.

[44] STF, RE 593727, Rapporteur for the Judgment: GILMAR MENDES, Full Court, judged on May 14, 2015.

[45] Inter-American Court of Human Rights. Favela Nova Brasília Case Vs. Brazil. Judgment of February 16, 2017 (Preliminary Objections, Merits, Reparations, and

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ISSN: 2037-6677

addressed the issue of police violence in Brazil and its investigation. The case involved acts perpetrated by public agents during police raids in Favela Nova Brasília, in Rio de Janeiro, on October 18, 1994, and May 8, 1995, which resulted in the murder of 26 people and sexual violence against 3 others. The Court understood that police violence is a human rights problem in Brazil and asserted that it is essential that, in cases of serious crimes committed by police agents, the investigating body must have real and concrete independence from the officials involved in the incident. This independence means "the absence of institutional or hierarchical relationship, as well as its independence in practice". Therefore, in cases of alleged serious crimes where police officers are prima facie possible accused parties, the investigation should be assigned, from the *notitia criminis*, "to an independent body different from the police force involved in the incident, such as a judicial authority or the Public Prosecution Service, assisted by police personnel, forensic experts, and administrative staff who are not affiliated with the security agency to which the potential accused or accused parties belong" (§187). The investigating body is thus required to demonstrate real and concrete independence from the individuals under investigation, as well as provide sufficient objective guarantees that inspire the necessary confidence in the parties and citizens (§216). Additionally, the Court imposed that Brazil, within one year from the notification of the judgment, establishes the necessary normative mechanisms to comply with these provisions (operative paragraph n. 16). However, even several years after the decision of the Inter-American Court of Human Rights, the Public Prosecution Service still does not have, as a rule, its own structure, especially in terms of personnel and experts, as indicated by the Court (with police personnel, forensic experts, and administrative staff who are not affiliated with the security agency to which the potential accused or accused parties belong) to conduct its owns investigations, which continue to be predominantly carried out by the Police and only supervised by the Public Prosecution Service.

Similarly, in 2020, in a case addressing the structural omission of the Brazilian Public Authorities in reducing police lethality, the Federal Supreme Court established that the Public Prosecution Service has a duty to investigate cases of suspected offences committed by public security agents.[46]

When conducting investigations, the Public Prosecution Service initiates the so-called Criminal Investigative Procedure (PIC, in Portuguese abbreviation), which is regulated by Resolution 181/2017 of the National Council of the Public Prosecution.

According to data from the National Council of the Public Prosecution Service, in 2021, the 26 States Public Prosecution Services opened a total of 13,552 Criminal Investigative Procedures in Brazil. Regarding the crimes investigated in these procedures, the majority involved crimes against tax

Costs), available at https://www.corteidh.or.cr/docs/casos/articulos/seriec_333_eng.pdf, accessed on February 5, 2024.

[46] STF, ADPF 635 MC, Rapporteur: EDSON FACHIN, Full Court, judged on 08/18/2020.

order (1,321), followed by organised crime (314), crimes under the bidding law (271), embezzlement (161), abuse of authority (143), passive corruption (134), money laundering (105), drug trafficking (99), active corruption (76), and torture (59). Out of the total procedures initiated, there were indictments filed in 3,423 cases and 5,851 cases were archived. In the scope of the Federal Public Prosecution Service, 4,601 Criminal Investigative Procedures were initiated in 2021, with the majority related to crimes against tax order (319), money laundering (90), drug trafficking (49), embezzlement (38), active corruption (27), abuse of authority (24), and passive corruption (22). Out of this total, 650 resulted in indictments and 877 were archived.[47]

When the Prosecutor directly conducts the investigation, it is possible to interview the suspects and key witnesses directly. Furthermore, the Prosecutor is authorised to access public data bases, to require information, exams, expert examination and documents to public and private authorities and request police force to help the investigation. Thus, he or she can carry out all the diligences that the Police can perform in their own investigations. The prosecutor can also request from the judge measures that require judicial authorisation, such as search and seizure, lifting of banking, fiscal, and electronic secrecy, wiretapping, environmental interception, as well as all the measures that the Police can request. They can also enter into a cooperative agreement with the defendant. However, in general, the Public Prosecution does not have agents to enforce court orders or carry out measures that require the use of force. In such cases, the assistance of the police or other institutions is necessary.

In cases where the prosecutors investigate, the judge oversees the investigation, especially authorising restrict measures. Besides that, when a suspect's guarantee is disrespected, it is possible to require the judge to correct the alleged abuse.

3.4 Principle of Officiality and Mandatory Nature of the Criminal Prosecution. Exceptions

In Brazil, the principle of officiality is generally in force. Investigation and prosecution are usually conducted by public authorities and initiated *ex officio*, without requiring authorisation from the victim or the Minister of Justice. This is the general rule in the Brazilian system.

However, there are situations in which the law itself requires authorisation for the police and prosecutor to act. This authorisation often needs to be given by the victim or their legal representative, and in some exceptional cases, by the Minister of Justice. In both cases, once the victim or the Minister of Justice authorises the prosecution, the investigation begins, and the prosecution is carried out by the prosecutor. This is known as "conditioned public criminal prosecution" and applies only if there is an express legal provision for it. For example, offences such as fraud, defamation against public officials, minor and negligent bodily injuries, as

[47] Available at https://www.cnmp.mp.br/portal/relatoriosbi/mp-um-retrato-2021, accessed on June 6, 2023.

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well as threats, generally require the victim's authorisation. On the other hand, the investigation and prosecution of crimes against the honor of a foreign head of state require authorisation from the Minister of Justice.

Furthermore, there are situations in which the victim or their legal representatives are granted the power to initiate the prosecution. Private prosecution is possible in two cases. First, when the Penal Code specifies that a particular offence can only be prosecuted by the injured party. For example, crimes against honor and property damage. Second, according to Article 5, LIX, of the Constitution: "private prosecution in the cases of crimes subject to public prosecution shall be admitted, whenever the latter is not filed within the period established by law". This allows the victim to act in case of omission by the Public Prosecution Service.

As previously mentioned, the distinction is determined by the law, and if the law does not provide any specific requirement, the investigation and prosecution can proceed independently of any authorisation. This is the general rule, called "unconditional public prosecution". The other situations ("conditioned public criminal prosecution" or "private prosecution") must be expressly provided for in the law. The reason behind this distinction is that in most situations there is a public interest in the investigation and prosecution of crimes. In other circumstances, it is understood that authorisation should be awaited from the victim or that the victim themselves should initiate the action to prevent further harm to the victim through the criminal process (*strepitus iudicis*), thus avoiding revictimisation. When there is a political interest of the State involved, the law requires authorisation from the Minister of Justice.

Moreover, prosecution is mandatory in Brazil, according to the so-called mandatory principle. When there is information about the commission of a crime, an investigation must be opened, and if there is probable cause, the Public Prosecution Service does not have discretion and must file criminal charges. The obligation to prosecute is not explicitly provided for in the Constitution but is implicitly derived from Article 24 of the Code of Criminal Procedure.[48] The decision regarding the presence of probable cause for filing criminal charges lies solely with the prosecutor responsible for the case. Due to the principle of functional independence, there can be no internal or external interference in this decision. The prosecutor must form his or her own conviction freely, based on the legal framework and without undue influences, whether internal or external. All manifestations of the Public Prosecution Service must be reasoned, as mandated by the Constitution, and based on the evidentiary elements available in the case.

The mandatory principle, according to the legislation currently in force, is controlled by the judge, who can disagree with the decision not to prosecute. In such cases, the higher authorities of the Public Prosecution Service will decide whether or not to proceed with the prosecution. Thus, the judge has control over the mandatory principle, as stated in Article 28

[48] "Article 24. Public prosecution crimes *shall be promoted* by the indictment of the Public Prosecution Service, but it shall depend, when required by law, on a requisition from the Minister of Justice, or on a complaint from the offended party or someone who is qualified to represent them".

of the Code of Criminal Procedure. However, the judge cannot, under any circumstances, impose on the Public Prosecution Service the obligation to file charges. They can only submit the matter to the higher authorities of the Public Prosecution Service to make a definitive decision. In 2019, Article 28 was amended to exclude the judge's control over the mandatory principle, requiring any decision not to file charges to be submitted to the higher authorities of the Public Prosecution Service. That means, according to the new legislation, that it will be the responsibility of the higher bodies of the Public Prosecution to oversee the principle of mandatory prosecution, without interference from the judge. The victim will also be able to appeal against the decision of the Public Prosecution not to prosecute a certain crime. However, the Federal Supreme Court interpreted this amendment to ensure judicial control over the dismissal, foreseeing that it must remain alongside the control exercised by the victim.[49]

Once charges are filed, the member of the Public Prosecution Service in general cannot withdraw the accusation. It is the so-called "principle of non-disposability of criminal action", established in Article 42 of the Code of Criminal Procedure, which states: "The Public Prosecution Service shall not withdraw from the criminal action". The referred principle is derived from the principle of mandatory prosecution. Only in the case of conditional suspension of the criminal process is there a provision for suspending the process while the accused fulfills certain agreed-upon conditions, as we will see. However, it is understood that the Public Prosecution must also safeguard the rights of the defendant throughout the entire prosecution. For this reason, it may be requested acquittal if it is believed that there is insufficient evidence for conviction. Nevertheless, Article 385 of the Code of Criminal Procedure establishes that "in public prosecution crimes, the judge may issue a conviction even if the Public Prosecution has recommended acquittal." Although this provision is subject to questioning by legal scholars, the Brazilian Federal Supreme Court (STF) has held it as constitutional.[50]

Furthermore, the Public Prosecution Service is not obliged to appeal a potential acquittal. However, once an appeal has been filed against the judgment, Article 576 of the Code of Criminal Procedure establishes that the "Public Prosecution shall not withdraw the appeal that has been filed."

Despite the principle of mandatory prosecution, there are situations in which the member of the Public Prosecution does not bring charges, even when there is probable cause. On one hand, there are hypotheses established by jurisprudence or general guidelines from higher authorities of the Public Prosecution Service that guide the decision not to file charges in certain situations. For example, the possibility of archiving cases involving insignificant offences (importation of a small quantity of marijuana seeds, smuggling of a small quantity of cigarettes, tax evasion of a small amount). However, it is important to highlight that there is a significant selectivity within the Brazilian criminal and procedural system, as only a small fraction of reported crimes is effectively investigated and brought to the attention of

[49] STF, ADI 6298, Rapporteur: LUIZ FUX, Full Court, judged on August 24, 2023.
[50] AP 976, Rapporteur: ROBERTO BARROSO, First Panel, judged on February 18, 2020.

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the Public Prosecution Service. On the other hand, there are situations in which, even with probable cause, it is possible to reach an agreement with the accused and his/her defence counsel to prevent or suspend the proceedings. Since 1995, there have been legal changes allowing exceptions to the filing of charges based on consensus, further mitigating the mandatory principle. These cases are characterized by the "regulated discretion" of the member of the Public Prosecution Service. Three major waves of consensus can be identified in our system.[51]

The first wave was the Law 9,099 of 1995, which regulated the so-called "criminal offences of lower offensive potential" (considered offences with a maximum penalty not exceeding two years). For such offences, there is a possibility of a plea agreement, reached between the Public Prosecution Service and the defence before filing charges, in which the suspect agrees to fulfill certain conditions - the immediate application of a penalty involving the deprivation of rights or fines -, and the Public Prosecution Service refrains from filing charges.[52] In this case, there is no conviction or admission of guilt. If the specified conditions are fulfilled, the punishment is extinguished. If the conditions are not met, the Public Prosecution Service must file charges. Law 9,099 also provided for the conditional suspension of the criminal process in Article 89. This is a benefit based on consensus for crimes with a minimum penalty of one year or less, in addition to other requirements[53], in which the Public Prosecution Service files charges, and if an agreement is reached with the defence, the process is suspended while the accused fulfills certain conditions. Once the conditions are met, the process is terminated. If the accused fails to comply with the conditions, the proceedings will resume.

In the second wave, Law 12,850 of 2013, which governs the investigation of criminal organisations, introduced the plea agreement known as "cooperation agreement", which refers to an instrument used in the Brazilian legal system where a defendant or suspect can provide information and cooperate with authorities in exchange for benefits such as a reduction in sentence or other advantages. Among the benefits provided

[51] M. Zilli, *Tudo o que é sólido desmancha no ar. Do processo penal disputado à revolução consensual. Presente, passado e futuro do processo penal brasileiro*, in G. Madeira, G. Badarò, R.S. Cruz (coord.), *Código de Processo Penal: estudos comemorativos aos 80 anos de vigência*, V. 1, São Paulo, 2021, 71-99.

[52] According to Article 76 of Law 9,099, the proposal will not be admissible if it is proven: (i) that the perpetrator has been previously convicted of a crime punishable by deprivation of liberty by final judgment; (ii) that the offender has benefited previously, within a period of five years, from the application of a penalty involving the deprivation of rights or fines, under the terms of this article; (iii) that the offender's background, social conduct, personality, as well as the motives and circumstances do not indicate that the measure is necessary and sufficient.

[53] According to Article 89 of Law 9,099: "In crimes in which the minimum penalty imposed is equal to or less than one year, whether or not covered by this Law, the Public Prosecution, when filing the indictment, may propose the suspension of the proceedings for a period of two to four years, provided that the accused is not currently being prosecuted or has not been convicted of another crime, and the other requirements justifying the conditional suspension of the sentence (Article 77 of the Penal Code) are present".

for in the law, this agreement allows the Public Prosecution Service not to file charges against a collaborator who assists in the investigation of criminal organisations. The law stipulates certain requirements for the agreement, such as the collaborator providing assistance in investigating an offense of which they had no prior knowledge, not being the leader of the criminal organization, and being the first to provide effective collaboration. When it is established, as a benefit, that no charges will be brought against the collaborator, this is known as an "immunity agreement", an exception to the principle of mandatory prosecution.

Finally, in 2019, a third wave emerged, significantly expanding the space for consensus in Brazil and further mitigating the mandatory principle. Article 28-A of the Code of Criminal Procedure introduced the Non-Persecution Agreement (ANPP in Portuguese abbreviation), which is an agreement between the Public Prosecution Service and the defence. Under this agreement, the accused fulfills agreed-upon conditions, and no charges are filed. The law itself establishes the requirements for the Public Prosecution Service to offer this benefit, including, among others, crimes with a minimum penalty of less than four years, not committed with violence or serious threat, and the offender's confession.[54] Although some of the requirements prescribed by law are less objective, it is the responsibility of the Public Prosecution Service to assess their fulfillment. Once the agreement is reached, it is submitted for the judge's approval, who examines its factual basis, legality and voluntariness. Once the agreement is fulfilled, the punishment is extinguished.

[54] "Article 28-A. If the case is not subject to dismissal and the suspect has formally and circumstantially confessed to the commission of a criminal offence without violence or serious threat and with a minimum penalty of less than 4 (four) years, the Public Prosecution Service may propose an agreement on non-persecution, provided that it is necessary and sufficient for the reproach and prevention of the crime, subject to the following mutually and alternatively agreed conditions: I - repair the damage or return the object to the victim, except when it is impossible to do so; II - voluntarily relinquish assets and rights indicated by the Public Prosecution Service as instruments, product, or proceeds of the crime; III - perform community service or provide services to public entities for a period corresponding to the minimum penalty prescribed for the offence, reduced by one to two-thirds, at a location indicated by the execution judge, in accordance with Article 46 of Decree-Law No. 2,848, of December 7, 1940 (Penal Code); IV - pay a pecuniary penalty, to be determined in accordance with Article 45 of Decree-Law No. 2,848, of December 7, 1940 (Penal Code), to a public or socially beneficial entity, preferably one whose function is to protect legal interests similar to those apparently harmed by the offence; or V - fulfill another condition indicated by the Public Prosecution Service, for a specified period, provided that it is proportional and compatible with the alleged criminal offence. (…) § 2º The provisions of the caput of this article do not apply in the following cases: I - if a criminal transaction under the jurisdiction of the Special Criminal Courts is applicable, pursuant to the law; II - if the suspect is a repeat offender or if there is evidentiary material indicating habitual, repeated, or professional criminal conduct, except in cases where the past criminal offences are insignificant; III - if the offender has benefited from an agreement on non-persecution, a criminal transaction, or conditional suspension of the process within the 5 (five) years prior to the commission of the offence; and IV - in cases of crimes committed in the context of domestic or family violence or crimes committed against women based on their gender, in favor of the aggressor".

In all agreements that avoid prosecution, the member of the Public Prosecution Service must have sufficient evidence to file charges (probable cause). However, the Brazilian Federal Supreme Court has affirmed that the accused does not have a subjective right to the agreement, as it falls under the category of "regulated discretion", guided by the requirements set forth in the law. The higher authorities within the Public Prosecution Service control this regulated discretion. The Judiciary always reviews the agreements to assess their factual basis, legality, and voluntariness.

Despite the almost unanimous affirmation of the principles of mandatory prosecution and non-disposability, it can be observed that, due to changes in the last 20 years, the actual application of these principles can be questioned. Considering the discretion granted to members of the Public Prosecution Service to assess the appropriateness of such benefits and their ever-expanding scope, it can be argued that Brazil is currently approaching a system of regulated discretion.[55]

3.5 The Prosecutor and the Relationship with the Press

Until recently, there was no legal regulation regarding the relationship between prosecutors and the press. However, there has always been a concern to provide information to society about the work of the Public Prosecution Service, and press offices within the Public Prosecution Service have been established for this purpose.

However, considering allegations of abuse in the disclosure of information, especially during the so-called Operation Car Wash - where, given the significant interest from the media and the public, it was common to have extensive dissemination of procedural stages, including press conferences - there has been increased attention to the issue in recent years.

The Law on Abuse of Authority (Law No. 13,869, dated September 5, 2019) established as a crime the act of "prematurely attributing guilt to the person responsible for an investigation through communication, including social media, before the conclusion of the investigation and the formalization of the accusation". The penalty for this offence is imprisonment for a period of 6 (six) months to 2 (two) years, plus a fine.

Important to mention that the Superior Court of Justice (STJ, in Portuguese abbreviation) upheld the civil conviction of a Prosecutor for moral damages due to a press conference in which he disclosed an accusation filed by the now-defunct Operation Car Wash Task Force against Luiz Inácio Lula da Silva, the current President of Brazil (at the time, the former President). In this case, the justices considered that the prosecutor exceeded the limits of his functions by using disparaging qualifications regarding the honour and image of the former president, in addition to employing non-technical language in the interview.[56] In the conviction, the Court also took

[55] In this sense, A.d.P. Cabral, *Colaboração premiada no quadro da teoria geral dos negócios jurídicos*, in D.d.R. Salgado, L.F.S. Kircher, R.P. Queiroz (coord.), *Justiça Consensual. Acordos criminais, cíveis e administrativos*, São Paulo, 2022, 204.

[56] STJ, Special Appeal No. 1,842,613/SP, Justice Luis Felipe Salomão, Fourth Panel, decided on March 22, 2022.

into account that the Prosecutor attributed facts to the former president that were not mentioned in the accusation explained during the press conference. However, notwithstanding this decision, the Brazilian Federal Supreme Court understands that any civil actions for compensation arising from conduct committed by a public official during the regular exercise of their duties should be filed against the State.[57]

In 2023, Resolution No. 261 of the National Council of the Public Prosecution was enacted, which establishes the Code of Ethics for the Brazilian Public Prosecution Service. Article 12 of the mentioned Code of Ethics imposes on prosecutors, in their relationship with the press, the obligation to act prudently and respect fundamental rights of individuals. Furthermore, paragraph 1 establishes that prosecutors should avoid expressing or prematurely forming value judgments about ongoing investigations, as well as "issuing negative judgments about the final actions of other bodies within the Institution or of other bodies and individuals within the justice system". This final part can be seen as a form of censorship of criticism regarding the performance of members of the Judiciary and the Public Prosecution Service. According to the same Code of Ethics, prosecutors should refrain from adopting positions that imply unjustified pursuit of social recognition or self-promotion in any form of expression.

This is a current issue in Brazil. In a case involving the disclosure to the press of an accusation against two former senators for corruption, the National Council of Public Prosecutors (CNMP) relied on the argument of violating confidentiality to punish two members of the Public Prosecution Service. However, the members of the Public Prosecution Service argued that the case was not under confidentiality, and there was a public interest in the disclosure considering the individuals involved and the crimes charged. This case has heightened the perception of risk among public officials involved in corruption cases against high-ranking public figures (chilling effect).[58]

[57] "The court's jurisprudence has settled on not recognizing the public official as a defendant in civil liability actions, in light of Article 37, § 6, of the Federal Constitution. In an action for recourse, the public entity being sued should seek reimbursement from the official when they have acted with intent or negligence" (STF, ARE 753134 AgR-segundo, Rapporteur: DIAS TOFFOLI, Second Chamber, judged on December 5, 2022).

[58] The National Council of Public Prosecutors (CNMP) applied a "30-day suspension penalty to Federal Prosecutor Eduardo El Hage and a reprimand penalty to Federal Prosecutor Gabriela de Câmara (…) due to the disclosure, by the punished members, of confidential information they knew by virtue of their office or function" (Case: No. 1.01306/2021-60 - Administrative Disciplinary Proceeding), available at https://www.cnmp.mp.br/portal/todas-as-noticias/16010-cnmp-aplica-pena-de-suspensao-por-30-dias-e-censura-a-membros-do-mpf, accessed on February 5, 2023, free translation. International Transparency released a statement on the CNMP's decision of December 19, 2022, stating that "the decision of the National Council of Public Prosecutors in its session last Monday (19/12/2022) to penalize Prosecutor Eduardo El Hage and Prosecutor Gabriela de Góes (...) is serious and concerning. In addition to the grave injustice of the specific case, the decision of the Council (...) brings serious consequences for the actions of all members of the Brazilian Public Prosecution Service. The legal uncertainty it generates further increases the perception of risk for

DPCE online
ISSN: 2037-6677

4. Conclusion

It is worth noting that Brazilian prosecutors, after the Constitution of 1988, have been able to operate with guarantees that effectively ensure the independent exercise of their functions. These guarantees have allowed prosecutors to carry out several investigations and prosecutions, even when related to figures with great political and economic power in Brazil, which led them to earn the respect of civil society as a very well-acknowledged institution. Among the guaranteed rights provided, the principle of the natural prosecutor deserves special emphasis, ensuring independent exercise of functions for members of the Public Prosecution Service, avoiding arbitrary reassignments and interferences from the Attorney General of the Republic or State Prosecutors General, as well as protecting the community against specially designated prosecutors. On the other hand, there are various controls on their actions, which have even been subject to expansions in recent times, especially following allegations of abuse that occurred throughout the so-called "Operation Car Wash". However, it is possible to observe that, under this pretext, there have been some measures that can be seen as "retaliations" against the actions of members of the Public Prosecution Service, causing the so-called "chilling effect".

Among the current trends, there is a concern to better regulate the relationship between the member of the Public Prosecution Service and the media, to improve the regulations on the selection of the Attorney General of the Republic, precisely to ensure independence in carrying out his/her duties, to focus greater attention on investigating crimes committed by security agents, as well as to discuss and legally establish more rational criteria of opportunity and discretion for criminal prosecution that are democratic and transparent, with the aim of reducing the selectivity of the Brazilian prosecutorial system and better channeling the efforts of the prosecuting authorities.

Nevertheless, even though there is still much room for improvement, it can be said that the Brazilian Public Prosecution Service has contributed to its constitutional objective, to defend the juridical order, the democratic regime, and the inalienable social and individual interests.

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