

The “Prosecutor”: Differences and Similarities Between Brazilian and United States Constitutional Systems

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Abstract: This paper results from a bibliographic and field research that had as main objective to identify in the constitutional literature and in the personal experience of the authors, elements that could confirm the hypothesis that supposes that the differences between the Brazilian and the United States of America constitutional systems are relevant in light of the prosecutor's role as the holder of the criminal and civil issues. The authors' participation in the International Legal Scholars Academy Program, from Delaware Law School, guaranteed the field research, which was supported by the bibliographic review of Brazilian and North American authors, in addition to the two Constitutions and infraconstitutional laws. The conclusion, so, confirmed the hypothesis, that is, although substantial similarities have been identified between the two systems, the differences among them are huge, to the point that it can be said that they are indeed paradigmatic. Especially, because in U.S. prosecutors have the obligation to represent them government in all legal matter, while a public lawyer represents Brazilian government in legal matters. In short, Brazilian Prosecutors represent and defend the law enforcement, not the government. Also, because of the differences of the judicial traditions: Civil Law *versus* Common Law. To achieve the objective, the referent technique was used and inductive method was applied. The nature of the research is basic and the approach to the problem is qualitative.

Keywords: Liberal Democracy, Constitutional Right, Public Prosecutor

1. Introduction

Although written in English, this paper is based on the perspective of two Brazilians, who work professionally and academically in Brazil. In other words, it is a comparative view of Brazilians about them domestic and the United States systems. As a premise, is adopted the idea that the republic is the best way to constitute a state, and Liberal democracy the best way to govern it. Liberal democracies, by the way, in Yacha Mounk words, “are full of checks and balances that are meant to stop any one party from amassing too much power and to reconcile the interests of different groups [1]”. So that from this assertion emerges another fundamental premise of this work, that the institutional prosecutor's function is essential to the very functioning of the state as guarantor of individual freedoms in particular and human and social rights in general.

Said that, the research presented in this paper had as referent the study of Brazilian and U.S. constitutional systems

from the prosecutor's role in both countries. The problem that arose thus was: are there differences between these two systems? The hypothesis, as seen in the abstract supposed that yes, and are paradigmatic. The bibliographic research and the author's practical experiences as participants in the Widener University - Delaware Law School “International Legal Scholars Academy Program” confirmed that. The objectives, in turn, are to analyze and describe the normative functional frameworks in U.S. and Brazil.

The method used was the inductive; the nature of the research is basic; the approach to the problem is qualitative; the objectives are descriptive; and the procedure is bibliographic technician. The categories, whose operational concepts follow throughout the text, are Liberal democracy; Human rights; and Prosecutor. Therefore, this paper is divided, besides this introduction, of the conclusion and bibliography, in two topics, namely: Similarities and differences between the constitutional systems of Brazil and the United States of America; and, Differences between the role of the prosecutor

in Brazil and the United States.

2. Similarities and Differences Between the Constitutional Systems of Brazil and the United States of America

It is known from the specialized literature that the prime difference between the Law and Legal Systems of Brazil and U.S. is the influences they had. The first one took as reference the Civil law, as the second, the Common law. About the distinctive features of these two schools, in short, Frank August Shubert says, "Civil law systems are based upon detailed legislative codes rather than judicial precedents [2]". As an example of this assertion, verified by the authors, is the minister of the classes, or, the way you teach in both countries, since in Brazil law professors teach mainly based on codes and laws, while in the U.S. they teach mainly based on emblematic real cases.

This typical difference is actually paradigmatic and certainly affects the way the legislative system create and judiciary system interprets and enforce the law, but besides that, there are a lot of similarities that deserves to be mentioned for the purposes of this work. The greatest of all is Human rights, conceptualized by the United Nations as "rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status [3]". In the words of Renato Janine Ribeiro, in free translation, "the modern Democracy has a big asset in its favor: it is the advent of the human rights, that is, rights everyone has just because they were born, that are above the political power itself [4]".

Note that U.S. Constitution, that have just seven articles, prescribes right in the first ones the separation of power, distributing charges between Legislative (Article 1), Executive (Article 2), and Judicial (Article 3), creating so the bases to the check and balance system, which was and still is important to guarantee these rights in your own huge community [5]. About the check and balance, uses the lesson of James Madison, for whom:

It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. However, what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government, which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions [6].

In other words, the U.S. constitutional system was designed to protect the people against the tyranny, including and especially the government, which configures as a defense of human rights in itself, and that put U.S. at the forefront of the development of the modern State to its contemporary form.

The first amendment, by the way, is about the things the government cannot do to hang individual and public liberties referring to freedom of speech, of press, petition, and of reunion, presenting itself as a true first-generation human rights treaty.

Regarding specifically the object of this paper, it is important to mention also the fifth and the sixth amendments, in which is written respectively that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury [...]". In addition, that "in all criminal prosecution, the accused shall enjoy the right to a speed and public trial, by an impartial jury of the state and district wherein the crime shall have been committed [...]". Well, is not for nothing that the ten first amendments are known in the western world as the "bill of rights".

Up to this point, the similarities between the two constitutional systems are clear because the first Brazilian republican constitution, in 1891, already separated the power in the light of U.S. way, including a Congress with two Houses (Article 16), the figure of the president and the vice-president (Article 41), and a Judicial with a Supreme Court (Article 55). In those times, even the name was similar, since the current Federative Republic of Brazil was called Republic of United States of Brazil [7].

Although the fact that Brazilian independence happened in 1822, therefore not so long after U.S. independence, the adopted system was the Imperialism almost absolutist, exercised by the son and then by the grandson of the king of Portugal, from which independence was declared. Just in the year of 1889, the Republic was proclaimed.

That is, Brazil choose late to be a truly State, but already did, and after some interruptions the people proclaimed the current and called 1988 Constitution, in which the country definitely fits into the list of liberal democracies, prescribing in the Constitution itself virtually all first, second and third generation human rights. How the federalism in Brazil was built top down and not bot8] tom up as in the U.S., Brazilian federalism keep peculiar differences especially regarding the poor autonomy of the federal states to legislate, which includes the prosecutor's activity, determined primarily by the Federal Constitution.

For an operational concept of Liberal democracy, so, it is taken the Yacha Mounk's definition, for whom, in his Brazilian edition of the book mentioned above, in free translation "Liberal democracy is a both liberal and democratic political system - a system that both protects individual rights and translates popular opinion into public policy [8]".

At the same time could be what Francis Fukuyama defines as "what we in the West consider decent and humane political [09]". Even for some critical authors, moreover, like Yuval Noah Harari, for whom the "liberal democracy is uniquely problematic", it is also "the most successful and most versatile political model humans have so far developed for dealing with the challenges of the modern world [10]". That could mean that the Liberal democracy is the principle of the principles, as it has taken as a premise of the present paper.

As said by the Harvard professors Steven Levitsky e Daniel Ziblitz, the “Madisonian system of checks and balances has endured for more than two centuries”. Furthermore, according to them, “Democracies work best – and survive longer – where constitutions are reinforced by unwritten democratic norms [11]”. These authors defend that the liberal democracies are in crisis, but what matters for the objectives of the present paper is the differences about the way of these “unwritten democratic norms” are exerted by society and governments. Francis Fukuyama, cited above, now in another book, said that:

In contemporary developing countries, one of the greatest political deficits lies in the relative weakness of the rule of law. Of all the components of contemporary states, effective legal institutions are perhaps the most difficult to construct. Latin America today is overwhelmingly democratic, but rule of law is extremely weak, from the bribe-taking police officer to a tax-evading judge [12].

Indeed the majority sociological and political Brazilian currents, called “culturalista”, attribute the origins of the socioeconomic problems to the fragility of Brazilian’s respect of law and legal and moral principles written and not written. Consequently, *patrimonialism* and *clientelism* grows in public and private administrations, weakening the democracy and impairing the development in the general sense. Although in the United States it happens too, the review of the literature of both countries showed that in Brazil it is so much more intense.

Therefore, both countries have liberal constitutions that set the Human rights in the center off all and before the political power. Both are also federations, presidentialisms and well define the separation of power, but still the differences are enormous. The paradigmatic influences between the Common Law and the Civil Law is certainly the biggest as seen. The U.S. Constitution (1787) has seven Articles and twenty-seven Amendments, while Brazilian’s (1988) has two hundred and fifty Articles and one hundred and three Amendments, besides the hundred and fourteen Articles of the Act of Transitional Constitutional Prescriptions. The fifth Article, moreover, has LXXVIII sections.

In short, Brazilians’ constitutional system in particular, and the legal system in general, have influences of the U.S. Constitution and legal system, but also suffered influences, as U.S. too, of another Western systems and way to handle with the issues of community and society. However, if a look from afar suggests similarities, a closer look denotes differences. Ultimately, for the purpose of this paper, must be clear that the most apparent difference is in the way in which countries organize the administration functions of government and even the State (Union and federated states).

3. Differences Between the Role of the Prosecutor in Brazil and the United States

A definition for the category “Prosecutor” is fundamental since the beginning of this topic because the differences about

it between Brazil and U.S. are not just, as it will be observed, of jurisdiction and competence, but also in the definition or nomenclature. In literal translation, Brazilian people calls the Prosecutors “Promotores de Justiça”, which means “Justice Defender”, and they are members of “Ministério Público”, a sort of “Public Ministry” and it is really, saved the differences, the Public Prosecutor in the line of duty. Well said, for purposes of this paper, a Brazilian Prosecutor is the protector of the society, and its role is considered by the Brazilian 1988 Federal Constitution, fundamental for the compliance of the law in a broad spectrum, to protect citizenship, to defend the democracy, and its principles, always guided by the Constitution principles.

Notwithstanding both prosecutors perform a fundamental and crucial role in the administration of justice, the differences between Brazilian Prosecutors and US Prosecutors are huge from the start.

A US Prosecutor is always in first place a lawyer, approved on the bar exam.

But coming back through time, according to the US Judiciary Act of 1789, Section 35, “in each judicial district shall be appointed a meet person learned in the law to act as an attorney for the United States, to prosecute federal crimes and to represent the United States in all civil actions to which it was a party.”

The United States Attorneys (Prosecutors) are the chief federal law enforcement officers in their districts, and they are responsible for federal criminal prosecutions and civil cases involving United States Government. Nowadays there are 94 Attorney's Offices in the US. The chief is always appointed or elected, depending on the State's Law, but the Attorney General of the United States is always nominated by the President and confirmed by the Senate.

In addition, here it is important to tell that the United States are the only country in the world that allows citizens to elect prosecutors.

The United States is the only country in the world where citizens elect prosecutors.' Local public prosecutors-whether called district attorneys, state's attorneys, prosecuting attorneys, or county attorneys- originated in colonial America without counterpart in eighteenth-century England.' American prosecutors began as appointed government officers, and they have remained so in the federal government. Between 1832 and 1860, however, nearly three-quarters of the states in the Union decided to give voters the right to elect public prosecutors.' The change in the method of selecting prosecutors occurred during the same era-and in many instances, at the same state constitutional conventions - in which American government became more democratic. 4 Between 1820 and 1860, states across the country adopted new constitutions to enlarge voting franchises, reapportion legislatures, and make many more government offices, including governors and judges, elected.

The American Bar Association brings the definition of the prosecutor “as the legal party responsible for presenting the case against an individual or a corporation suspected of breaking the law, initiating and directing further criminal

investigation, guiding and recommending the sentencing of offenders, and are the only attorneys allowed to participate in grand jury proceedings [13]."

The influences about the U.S. Public Prosecutor framework is certainly from England. In free translation, for the French professor René Davi, "It should be noted that there is no institution in England comparable to our public prosecutor. [...] The authority that will take the initiative in criminal issues is today, in England, in general, the police [14]". However, it is also worth note that the French public prosecutor is also different from the Brazilian public prosecutor in that it is linked to the Ministry of Justice.

Turning back to the comparison with Brazilian Prosecutors, it is correct to say that there is no public prosecutor's structure in the world how it is seen in Brazilian Constitution of 1988, which dedicated a whole chapter to the Institution, considering the existence of the prosecutors essential to the justice framework.

Hugo Nigro Mazzilli explains that:

The 1988 Brazilian Constitution was a landmark in the history of the Public Ministry, by assuring it that no constitutional text or far had conferred on the institution, even in comparative law. For the first time, the Law Major disciplined in a harmonious and organic way the national prosecutors and their main attributions, giving it guarantees of State Power. Independence and autonomies of the institution are no longer sought as mere corporate advantages, The 1988 Brazilian Constitution was a landmark in the history of the Public Ministry, by assuring it that no constitutional text or far had conferred on the institution, even in comparative law. For the first time, the Law Major disciplined in a harmonious and organic way the national prosecutors and their main attributions, giving it guarantees of State Power Independence and autonomies of the institution are no longer sought as mere corporate advantages, to be raised, rather, to practical conditions for the free exercise of their functions in the Democratic state [15].

From the 127 article of the Brazilian Constitution it is possible to conclude that "Brazilian Public Ministry" (prosecutors public institution) is an independent institution, with its own budget, forecast by the constitution, with a wide range power to act in all social areas to protect the society:

Article 127. The Public Ministry is a permanent institution, essential to the judicial function of the State, and is responsible for defending the legal order, the democratic regime and the unavailable social and individual interest.

§1º The institutional principles of the Public Ministry are unity, indivisibility and functional independence

§2º To the Public Ministry is assured functional and administrative autonomy, and, subject to the provisions of art. 169, to propose to the Legislative Power the creation and extinction of their positions and auxiliary services, providing them by public examination of tests or evidence and titles, remuneration policy and career plans; the law will provide for its organization and operation.

§3º The Public Ministry Service shall prepare its budget proposal within the limits established by the budget guidelines

law.

The Professor Eduardo Ritt presenting his study about Public Ministry essence, comments that:

[...] Now, if it is up to the Brazilian Public Ministry to protect fundamental rights and democracy itself, as mentioned in the article 127, caput, of the 1988 Constitution, as well as to ensure the effective respect of the Public Authorities and services of public relevance to the rights enshrined in this Constitution, promoting the measures necessary for their guarantee, as determined by art. 129, item II, of the same Constitution, thus establishing a real control over the other State Powers, it is clear that the Public Ministry has a rare and special relevance in the Brazilian scenario. Thus, even thinking of the Public Ministry as a State Power, since the tripartition of powers is not scientific but, rather, ideological, especially since the Institution has a Constitutional Task of control over the powers. [16].

To become a Brazilian Prosecutor, beyond de bar exam, the professional has to participate in a very difficult contest, a specific exams, in which he or she will be tested about professional technics as law knowledge, capacity of legal argumentation and solve toughest simulated juridical cases.

Each member of the Brazilian Public Ministry, federal or state, based on the Brazilian Constitutional principles, has independence to work in the strict compliance with legal duty.

According to the Public Ministry National Council (CNMP) the independence of each member of the MP (Public Ministry), provided by the 1988 Brazilian Constitution, consists in a whole autonomy to work in accordance with the law and its compliance:

Each attorney, without performing his duties, has all autonomy. It is not subject to requests from anyone, nor hierarchical superior. If multiple members are acting in the same process, each may give his or her personal conviction about the case; they are not required to adopt the same understanding as their colleague. Because of this principle, a hierarchy in the Public Ministry is considered with respect to administrative and management acts. For example, only the Attorney General of the Republic can appoint prosecutors to act on a force task. After appointment, however, the attorney general has no power to say what action the prosecutor should take in his or her work.

The US Prosecutors, on the other hand, in the line of duty, are submitted to the District Attorney, that is the director of the prosecution office, and the chief prosecutor for a local government area [17].

Turning back to Brazilian Prosecutors fundamental constitutional principles, it is imperative to talk about the principles of unit and indivisibility, which gives strength to the Brazilian Public Ministry. The first one means that the institution is one and the members of a single body are under the administrative direction of the institution by the Attorney General of each State. On its turn, the indivisibility establishes that Public Ministry Members (prosecutors) may be substituted for each other when it is needed, but not arbitrarily, and always in the manner set forth in law.

The Us Legal System allows prosecutors in the line of duty

to choose between initiating or declining charges. Therefore, when analyzing the possibility of criminal pursuit, the prosecutor shall consider federal enforcement priorities, including federal law enforcement initiatives or operations aimed at accomplishing those priorities. Equally is important to evaluate the nature and seriousness of the offense, and the deterrent effect of the prosecution.

US Prosecutors also verified the culpability in connection with the offense, eventual victim's interest, the agent criminal activity registers, and the consequences in case of conviction.

According to the 1988 Constitution, the Penal Code and specific criminal laws, Brazilian Prosecutors have exclusive ownership to handle criminal public charges, and conditioned charges, that is, the ones which the continuation depends on the victim's will.

However, once initiated the criminal procedure, with the reception of the complaint by the judge (Brazilian Procedural Code), the prosecutor cannot decline or stop the continuation because of he is conviction or social issues. He will need to finish the criminal procedure, and then, only if there are no concluding evidences, or if any justification defense thesis are acceptable, he can plead or agree with acquittal.

On the other hand, if a Brazilian Prosecutor analyses a criminal procedure initiated by him or by the police, he can conclude, grounded in law, that the case can be closed, and submit the request to the judge. In that case, if the judge do not agree, he can only submit the case to the State Attorney General, which can agree with the prosecutor or not. If not, the Attorney General can only determine to another prosecutor to charge the defendant, in an order that is called complaint by delegation, but never determine the first prosecutor to act against his conviction.

The article 128 of the 1988 Brazilian Constitution establishes the structure of the Brazilian Public Ministry, the choice of the Attorney General, and delegates to the infra-constitutional law the task to define the structure and the assignments of the prosecutors. An important constitution provision determines that the *infraconstitutional* law project about Public Ministry issues will be always propose, exclusively by the federal or state Attorney General, with the purpose to increase the Public Ministry work in behalf of the society.

The mentioned constitutional article also establishes fundamental guarantees to the prosecutors function, aiming to protect his work and to allow the freedom of acting in the behalf of society, being possible to charge, even the State, when it's purpose are against the democracy and Brazilian citizen's fundamental and constitutional rights.

The U.S. Prosecutors have the obligation to represent U.S. government in all legal matter, while a public lawyer represents Brazilian government in legal matters. Brazilian Prosecutors represent and defend the law enforcement, not the government.

Brazilian Prosecutors also have the constitutional right to be immovable, after two years from the start of effective exercise of their functions. It is a fundamental protection to avoid political interference on their work, and allows the prosecutors

to give continuity to important investigations, and to act freely, in accordance with the law, in many political investigations.

Another guarantee given to Brazilian Prosecutors by the Constitution of 1988 is the right of irreducibility of salaries. These guarantees is also very important to preserve and stimulate the prosecutor profession, because Brazilian Prosecutors, by strict constitutional seal, provided for in the article 128 of the Brazilian Constitution, cannot advocated or exercise any function of his own, except magisterium.

The Brazilian Constitution goes beyond, when defines in the article 129 the Constitutional Functions of the Brazilian Prosecutors':

Article 129. Institutional Functions of the Public Ministry are:

I - privately promote public criminal action, as provided by law;

II - to ensure the effective respect of the Public Authorities and services of public relevance to the rights enshrined in this Constitution, promoting the measures necessary to guarantee them;

III- promote civil inquiry and public civil action, for the protection of public and social assets, the environment and other diffuse and collective interests;

IV- to promote the action of unconstitutionality or representation for the purposes of the intervention by the Union and the States, in the cases provided for in this Constitution;

V - defend the rights and interests of indigenous peoples in court;

VI- issue notifications in the administrative procedures within its competence, requesting information and documents to instruct them, in accordance with the respective complementary law;

VII- exercise external control over police activity, in the form of the complementary law mentioned in the previous article;

VIII- requesting investigative diligence and the initiation of a police inquiry, indicating the legal basis of its procedural manifestations;

IX - to exercise other functions that may be conferred upon it, provided that they are compatible with its purpose, with judicial representation and legal advice from public entities being forbidden.

§1º - The legitimacy of the Public Prosecutor's Office for civil actions provided for in this article does not prevent third parties, in the same cases, according to the provisions of this Constitution and the law.

§2º- The functions of the Public Prosecution Service can only be exercised by members of the career, who must reside in the district of the respective capacity, unless authorized by the head of the institution.

§3º- The entry into the career of the Public Prosecutor's Office will be made through a public competition of evidence and titles, ensuring the participation of the Brazilian Bar Association in its realization, requiring at least three years of activity from the law degree and observing the order of classification in nominations.

Finally, Brazilian Prosecutors are prohibited from engaging in political activities. In other words, the prosecutors, which entered the Public Ministry after 1988, are forbidden to run for any elective office.

However, many people consider this constitutional barrier prejudicial to the prosecutor function, because they cannot exercise a fundamental citizen right that is to be voted, unless they permanently disengage themselves from the Public Ministry.

Turning to U.S. Prosecutors, it is possible to see that many States in the U.S., as Delaware, Colorado, California, among many other, allow the election for prosecutors, which will act, according to the specific State Law, for example, as Attorney General, District Attorney, State's Attorney, U.S Attorney, with jurisdiction in the judicial circuit, or in the county, or in specific areas as misdemeanors cases and adult felonies, or with primary duties for the entire State.

Under this angle, it is possible to perceive a diametrically opposite difference to the present comparison, showing that Brazilian Prosecutors and U.S. Prosecutors, notwithstanding a few similarities, have a complete and different structure on the exercise of their functions.

4. Conclusion

As outlined in the introduction, the research mainly proposed to justify the hypothesis that there is a considerable difference between the structure of the Prosecutor's role in the United States and Brazil, considering the constitutional foundations in both countries.

In addition, it was possible to view, from the contours of the research that the Ministerial Function gained in Brazil, after the advent of the Federal Constitution of 1988, a wide power to act for the good of the Brazilian People.

From the 1988 Federal Constitution, it is clear that Brazilian Prosecutors have fundamental constitutional guarantees like parity and symmetry between the Judiciary Power and the Public Ministry, in relation to salary, in relation to the career form, as well as institutional fences.

The United States Constitution, in its third article, provides for the general structure of the Judiciary Power, but does not mention the role of the prosecutors.

Therefore, the Brazilian Federal Constitution specifically provides for the role of the prosecutor, while the U.S. Constitution, when mentioning in the third article only the structure of the Judiciary Power, relegates the establishment of the U.S. Prosecutors functions to the *infraconstitutional* law.

In addition, the research concludes that the role of the prosecutors in the United States it is more similar to the role of the State or Federal Brazilian Public Lawyers, which further distances the nature and concept of the Brazilian Prosecutors

in comparison sought in the present article.

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