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THE NEW INSTITUTIONAL DESIGN OF THE PROCURACY IN BRAZIL: MULTIPLICITY OF VETO PLAYERS AND INSTITUTIONAL VULNERABILITY

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ABSTRACT

This project aims to analyze the effect of the new institutional design of the public prosecutor's office on policy making. The key moment of institutional change was in 1988 when the new constitution vested the Procuracy with great powers. The Procuracy has undergone a radical redefinition in its institutional design, with a very significant extension in its powers, which is unparalleled in the world, as far as this researcher has been able to establish (Voigt 2003). It has become a very important veto player. A polity's ability to change or to commit to policy depends on the *effective* number of vetoes in political decision making (Cox and McCubbins 2000). This research aims to investigate the effects of the new incentive structure on policy-making. The institutional arrangement of Procuracy is a relevant independent variable to explain the quality of the political outcome, the governability, and considering its increasing role in combating crimes, the propensity of politicians to commit crimes. In Brazil, there are unique features in its design, the most important of which is its decentralized nature. Members of the Procuracy are granted unparalleled functional independence and they are not subordinated to the Attorney General. Each prosecutor has unrestricted freedom, only limited by the law. This design implies that each individual prosecutor is a veto player, with different purpose. It is hypothesized that the larger the number of veto players personalized in each prosecutor's figure, the weaker the Procuracy gets institutionally, the higher the transactions costs are, policy instability. The low level of institutionalization of the Procuracy opens up the possibility of manipulation of prosecutors as instruments for the achievement of interest groups. This vulnerability affects its *de facto* independence. The Procuracy's behavior will be investigated strategically in relation to other relevant political actors in the executive and legislative branches. It is hypothesized further that, paradoxically, the institutional change in 1988 produced unintended consequences and may have weakened rather than strengthened the Procuracy.

KEY WORDS: Procuracy, Institutional Design, Veto Players, Institutional Vulnerability

THE NEW INSTITUTIONAL DESIGN OF THE PROCURACY IN BRAZIL: MULTIPLICITY OF VETO PLAYERS AND INSTITUTIONAL VULNERABILITY

Flavianne Fernanda Bitencourt Nóbrega*

1. From Institutionalism to Constitucionalism

Institutions are created to distribute power and reduce transaction costs, guiding the actions as they shape incentives and expectations; incentives such as reward and punishment. Given that institutionalism is a standard that rejects both the behaviorist (subjective preferences, utilitarian aggregation of individual preferences, formal democracy), and Marx's social determinism approaches (collective interests, social structure, substantive democracy), to perform normative judgments over the quality of preferences and political outcomes.

Notice that the normative concern brought by the Neo Institutional debate, enables the link of the theme institutions with quality of democracy. However, Ellen Immergut presents this normative concern as an important challenge to institutionalists, extremely difficult to meet¹. The institutional tradition search a standard to judge how badly particular institutions distort political behaviors and political decision, and further, decide what steps are necessary to correct these distortions. Rousseau has already in his famous passage on the distinction between the “general will” and the “will of all” argued that the organization of political process influences the quality and justness of political decision².

Because Institutionalists eschew both behavioralist and social determinist approaches as a standard to make judgments about the quality of political preferences and outcomes, interests are no longer regarded as assessments of individual and collective

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¹ Immergut, Ellen M. The Theoretical Core of the New Institutionalism. *Politics and Society*, 26 (1), 1998, p. 7-14.

² Rousseau, Jean Jacques. *Do Contrato Social*. Livro II, Capítulo III, Editora Hemus, São Paulo, 1999, p.40-41.

decisions are not a sum of individual wishes. The behavioral approach adopts an *a posteriori* normative standard and the social determinist an *a priori* one, based on objective interests, such as those derived from class, gender, social position. As Ellen Immergut argues, the institutionalist approach attempts “to *square the circle* between *a priori* and *a posteriori* standard by recommending formal procedures that can be used to define substantive justice”³. (v.g. Rawl’s Veil of Ignorance, Habermas’ Ideal Speech Situation, Lowi’s Juridical Democracy).

As institutions are creations of man and do not embody man’s alleged righteous nature, one must recognize bias in institutions. This assumption implies that an institutional analysis should take in consideration the direction and implication of this bias and also suggests ways to improve the justness of institutional outcomes.

The analysis above does not intend to give a methodological response of how to measure democracy's quality, specially because it is a theoretical one. Ellen Immergut’s contribution lies not only in presenting answers, but mainly in the questionings it provokes by considering that institutional design has repercussions to the quality of democracy. And it is in that sense that this paper takes her into consideration.

In this paper, the institution taken as the investigation object is the Procuracy of Brazil. It is, specifically, analyzed the effect of some features of the new institutional design of the Public Prosecutor’s Office on the quality policy making. The consequences – positives or negatives – of the new constitutional arrangement, given by the 1988 Constitution of Brazil, are taken into consideration.

The concern with the Procuracy's institutional design was already mentioned in an earlier research of Stefan Voigt and Anne van Aaken, where they take the Procuracy's institutional arrangement as a relevant independent variable to explain a greater propensity of the politicians in committing crimes, which creates an environment with incentives to corruption and direct repercussion in the quality of democracy and stability of the Rule of Law⁴. Today, this theme is a current debate in countries like Mexico, Germany, Italy, and Switzerland.

³ Immergut, Ellen M. The Theoretical Core of the New Institutionalism. *Politics and Society*, 26 (1), 1998, p. 7-14.

⁴ Anne vonn Aaken, Setfan Voigt, Eli Salzberg. The prosecution of public figures and the separation of powers – confusion within the executive branche – a conceptual framework. *Constitutional Political Economy*, 15, 261-280, 2004.

In Brazil, this theme is not yet central to the debate, albeit, few such as Maria Tereza Sadek and Fabio Kerche, have brought this question of a new institutional arrangement of the Procuracy to be discussed in the Political Science. The new Brazilian scenario with the 1988 Constitution represented an expansion of possible arenas opened to Justice system's purview. The Brazilian Constitution of 1988 became one of the most long and detailed in the World and also one that regulates practically all aspects of collective life.

Sadek, for instance, affirms that it is difficult to find a single issue not open to the Brazilian constitutional purview⁵. The Constitution has reduced the power of the majority to determine public policy and given great power to institutions that comprise the justice system, as the Procuracy, for the protection of interests and liberties of the citizenry, including the minority and for the constitutional review of legislative and executive acts. Thus, the tension between the Rule of Majority and the Rule of Law takes place.

2. Rule of law and Rule of majority

The conceptions of democracy, yielded in the context of Rule of Majority and Rule of Law, reproduce in reality a concrete relation between two populated institutions: the legislatures and the courts⁶. With Constitutionalism and the Rule of Law, the situation, in which political decision taken by the legislative and the executive branches might be reviewed by Courts, was stressed. This was thus described by doctrine as judicialization of politics and the judiciary begins to appear in literature as a veto player.

However, Przeworski and Maravall point out the necessity to make clear two distinct situations:

1) the enhanced judicial authority over legislation would be the "judicialization" of politics, also named "constitutionalization" and 2) the judicial actions against politicians would be "criminalization".

⁵ Sadek, Maria Tereza et alli. The New Brazilian Public Prosecution. In: Democratic Accountability in Latin America. Oxford: Oxford, 2003. p. 203

⁶ Przeworski and Maravall. Introduction. In: Democracy and the rule of law. New York University., 2003. p. 13

The latter relates to the typical action of the judiciary which is to control the abuse of power and to punish the politician by his behavior against the Law. Andrew Arato defines that as “legal accountability”⁷. His proposal is not to expand the concept of accountability, because he considers it fundamentally as political accountability, of retrospective character, performed by the voters. The author uses the term “legal accountability” in the metaphorical sense to refer to legal control (legal sanction) of the government. In his work he points out legal accountability as one of the five normatives sets to reduce the hiatus between representatives (citizen) and representeds(govern).

This “legal accountability” would be related to the Rule of Law and Constitutionalism as a guarantee mechanism of the popular sovereignty, insofar as it limits the governors’ actions, legitimates the representative democracy and assures the rules of the game. It is condition “sine qua non” to enhance political accountability. The author, however, stresses that judicial review, although important, provokes questions of legitimation, when confronted with legislative purview. That because the legislator is elected and, therefore, has a legitimacy from citizens that the judiciary members lack.

This Paper takes the idea of Rule of Law in a large concept , as a State ruled by laws, so that it does not exclude considering the Brazilian reality inserted in the *Rule by law* context as treated by Holmes⁸ and applied by Zaverucha to the Brazilian case⁹. The Rule of Law is an ideal concept in which every individual would be treated equally.

Confronted by practical evidence of a government through laws, where laws are used as instruments to guarantee the interests of those who have the power and not of the citizens, who is at the edge. Thus, the new rules brought by 1988 Constitution are questioned whether they came do represent indeed the *status quo* maintenance.

Still in that context, the judicialization of politics situation, of the conflict between legislators and courts, can be used by certain political actors as a powerful instrument for the maintenance of their interests. The judicialization, in this hypothesis, is used as a convenient strategy and to dethrone a political adversary. This is one of the hypotheses

⁷ Arato, Andrew. Accountability y sociedad civil. In: controlando la politica – ciudadanos y medios em las nuevas democracias latinoamericanas. Ed. Temas.

⁸ Holmes, Stephen. Lineages of the Rule of Law. In: Democracy and the rule of law. New York University, 2003, p. 23.

⁹ Zaverucha, Jorge. FHC, forças armadas e política: entre o autoritarismo e a democracia. Record, 2005, p. 31

raised by José Maria Maravall¹⁰. Given that consideration, it is relevant the author's distinction between "judicial activism" and "judicialization of politics". The former relates to situations in which the judiciary expands its action to subjects that would correspond to political agents or when it acts as an arbitrator in typical political fields that should be settled in arenas other than the judicial. This type expands increasingly when the political system is fragmented, perplexed or blocked. This fragmentation argument is the main explanation given by Tocqueville to judicialization¹⁰.

The latter, or judicialization of politics in the strict sense given by Maravall, politics would be judicialized when the Courts became actors-puppets in political strategies that seek to alter the rules of democratic competition, while the democracy and the Rule of Law are kept. Such strategies include the usage of courts to criminalize political adversaries¹¹. Both the opposition and the government can use these strategies. When the initiative comes from the government it works as a manipulation of the judicial acting so that it establishes the power in the hand of those who already have the *status quo* and weakens the opposition.

Tate and Vallinder describe two types of judicialization of politics that emerge under some common conditions. The first type is related with "the process by which courts and judges come to make or increasingly to dominate the making of public policies that had previously been made by other governmental agencies, especially legislatures and executives". That means nonpolitical judges in the exercise of political discretion. The second type is related with the "process by which nonjudicial negotiating and decision making forum come to be dominated by quasi-judicial (legalistic) rules and procedures"¹².

Vallinder thesis about the expansion of judicial power in political systems is also significant for the debate because he suggests some political conditions that appear to promote the judicialization of politics. Those are: a) democracy; b) separation of powers; c) politics of Rights; d) interest group use of the courts; e) opposition use of the court; f) ineffective majoritarian institutions; g) perceptions of the policy making institutions - identified when the public and the leaders of interest groups of major economic and social institutions accord the policy-making of judiciaries, who have reputation for expertise and

¹⁰ Maravall, José Maria. Rule of law as a Political Weapon. In: Democracy and the rule of law. New York University, 2003. p. 277

¹¹ Maravall, José Maria. n(10). p. 262

¹² Tate, Neal & Vallinder, T. *The Global Expansion of Judicial Power*. New York: New York University Press, 1995. p. 28.

rectitude, because they view the majoritarian institutions as immobilizing, self-serving, or corrupt; h) Willful – Delegation by Majoritarian Institutions, identified when the political costs of taking any action on some issue, such as abort, are too great that politicians delegate that issue to the Courts.

It is important to highlight that in speaking of constitutionalization in Political Science we are referring to the State control; in general terms, denotes the coercive power through which the State is reprimanded. Thus, Constitutionalism refers to the existence of institutional mechanisms of control of power to protect the interests and freedoms of the citizens, including those that can be the minority. This concept is not necessarily connected to the idea of a written constitution. England, for instance, has a consuetudinary constitution, unwritten and it was there that the word ‘constitution’ was used for the first time with a political meaning, in the debates that led to the outbreak of the 1642 Civil War¹³.

The expansion of the judicial decision arena (courts, not accountable) over political deliberation arenas (elected by the people and accountable) was already analyzed by Tocqueville in the United States Democracy and it had its expression in the post authoritarian Europe, specially, with the adoption of the Kelsenian model of Constitutionality’s Abstract Control. That refers to the judicial review in light of the Constitution of acts performed by the Executive and the Legislative branches, that is, the authority to nullify and modify governmental acts.

The tension between *rule of majority* and *rule of law* articulates itself in disputes over democracy and legitimacy (Law), it is embodied in two distinct institutional systems: 1. electoral institutions, govern, legislators, 2. Courts, Police, Procuracy, lawyers, amongst others. There is not, however, an institutional ideal for this tension; the choice of institutions will always imply in trade-offs. Hence, it is important to evaluate the established institutional design performance to point out the reform or improvement possibilities of it. Amongst the attempts of a model to reduce the risks of majority’s tyranny is the mechanism of “checks and balances”, proposed by Madison in Federalist 51, where “each department should have a will of its own”. This means that to keep each branch

¹³ Gordon, Scott. Controlling the State: Constitutionalism from ancient Athens to Today. Harvard, 1999, p. 5

within its boundaries, it was necessary to make them mutually dependent, by giving to each some veto capacity in the decision-making process.

3. The Procuracy in Brazil

The new institutional design of Brazil's Procuracy brought by the 1988 Federal Constitution of Brazil has elicited the above debate between *rule of majority* and *rule of law*. There was a radical redefinition of its institutional design, with a vast enlargement of powers. It was placed as an instrument, a mechanism for the application of the Rule of Law. The constitutional norm gave the Procuracy enormous independence and responsibilities towards the constitutional defense of the citizens' and society's interests and the public administration control, in all its branches.

Indeed, the article 127 of 1988 Constitution in pronouncing the Procuracy as the instrument in defense of the 'juridical order' and 'democratic regime' authorized its intervention in the political arena. Expanded its action beyond criminal persecution, to which it was traditionally confined, stretching its jurisdiction to invalidate acts of government, for instance, interfering on the public service performance (e.g., health and education), enforcing collective and diffuse rights¹⁴ (e.g., environment, consumer and property of artistic, aesthetic, historical, touristic and scenic values), protecting the rights of the minority (e.g., those of children and adolescents, the disabled, the elderly), even the prerogative of pleading in order to nullify normative acts and laws promulgated at the federal, state and municipal level, through the constitutional review.

Hence, financial freedom was granted to the institution, with its own budget, administrative autonomy and law initiative, without bonds or subordination to any of the powers of the Executive, Legislative, and Judiciary¹⁵. Its members were given the same guarantees, granted to the ones from the Judiciary – lifelong tenure for its members, a guarantee prosecutors will not be transferred to other jurisdictions against their will, and a

14 This act manifests itself through the legal instrument of the Public Legal Action, Class Action, for the defense of diffuse and collective rights. Its origin is related to barriers originated from the collective action dilemma and with the Capetelli's termed "second wave" of the movements to the justice access, where reforms which made possible the judicial representation of diffuse interests took place. In: Cappelletti, Mauro e Bryant Garth. *Acesso à Justiça*, trad. Ellen Gracie, Sergio Fabris, 2002, p. 49.

15 In the 1967 Constitution the Procuracy integrated the Judiciary Power and with the Constitutional Amendment nº 01/69 it became an entity of the Executive.

constitutional guarantee of due benefits. The second one relates specially to the institutional design that came to grant the natural prosecutor tenet, preventing the prosecutor from being removed according to the administration's political interest which was a despicable practice, very common during the military dictatorship. It was also vetoed the prosecutor designation *ad hoc*, that is, the prohibition of strangers to the members' frame of the Procuracy of exerting typically ministerial functions.

The selection of the Attorney-General has also undergone several substantial changes. This is one of the fundamental indicators to investigate the Procuracy's independence. Stefan Voigt, Lars Feld and Anne van Aaken have already stressed the importance of this variable.

Before the 1988 Constitution, the Attorney-General occupied an office which was freely hired and fired *ad nutum*¹⁶ by governors, whose criteria was based in trust. That meant the politician could fire, whenever he desired, the only person that had the power and the duty to prosecute him. Currently, government is obliged to choose among the career's integrating members, with tenure of two years, with the possibility of unlimited re-conduction in the federal level and restricted to a re-conduction in the state's level. Focus to the repercussion of the distinct institutional designs in the state and federal jurisdiction. For the former, the General Attorney is chosen freely by the president among career members over 35 years of age, with his name being submitted to approval by absolute majority in the Senate. For the latter, the governor is limited to choose through a triple list elaborated by the Procuracy, without questioning from the Parliament¹⁷. The dismissal of the General Prosecutor from his office occurs in both cases with the participation of the legislative branch.

It's important to highlight the distinction between two fundamental concepts in order to understand the Brazilian Procuracy institutional design: 1) *functional autonomy* and 2) *functional independence*. The first – an external approach – is connected to the Procuracy's freedom to exert its duty before other entities and state institutions. This means that Procuracy is independent from other branches of government – it is not subordinated to Executive, Legislative or Judiciary branches. The second – an internal approach – refers to

16 *Ad nutum* means 'at free will', according to the decision and will of the superior. In: Almicare. Manual de Latim Forense, Leud: São Paulo, v. 1. p.107

17 1988 Brazilian Constitution, art. 128, § 1º § 3º.

the freedom of its members, each prosecutor, to exert their duty before other entities and/or member of the same institution. According to this latter characteristic, there is no functional hierarchy in the Brazilian Procuracy, it is decentralized and each prosecutor has unrestricted functional freedom, being limited only by the law; they cannot receive orders such as, plea or not, appeal or not, withhold this thesis or not¹⁸.

The sound case law¹⁹ at Supreme Court of Brazil states that according to the *functional independence* guarantee, the Procuracy members direct their own conduct in the processes in which they have to intervene, even creating a dissonance between them, yet in the same process. Each prosecutor have a great individual independence. It is important to notice that individual prosecutors vary considerably, from those who take a very conservative approach to those who espouse the most liberal interpretation of institution's responsibilities²⁰.

In practice *functional independence* seems to be in conflict within the *unity tenet*, stated in the 1988 Constitution, art. 127, § 1º, according to which the Procuracy is an unity institution, under the same direction, exerting one sole function. On the other hand, theoretically, the Supreme Court of Brazil, not facing straightly the problem, understands that there is not a conflict between the functional independence and the unit tenet, because the first one is justified, through a philosophical argument, by the second. The controversy was unraveled only by the analysis of abstract definitions and not considering the consequences of the two concepts in reality – the *unity tenet* and the *functional independence*.

4. The Procuracy as a *veto player*

The new institutional design of the Procuracy yields the theoretical problem of how to frame it into the traditional theory the separation of powers, which the 1988 Federal Constitution incorporated in its second article, as a sound clause. A few attempts were in

¹⁸ Mazzilli, Hugo Nigro. O acesso à justiça e o Ministério Público. Saraiva: São Paulo, 2001.p.170. Exception to the strictly foreseen cases by law, as in the rejection of police's inquiry or the civil inquiry (art. 28 of CPP or art. 9º form LACP)

¹⁹ Mirabete, Julio Fabbrini. Código de Processo Penal Interpretado. Atlas: São Paulo, 2003. p.646. RSTJ 99/374

²⁰ Sadek, Maria Tereza et alli. The New Brazilian Public Prosecution. In: Democratic Accountability in Latin America. Oxford: Oxford, 2003. p. 208

the sense of creating hypotheses *ad hoc*, keeping the hard core of Montesquieu's thesis and adding the Procuracy as some sort of fourth power. This paper does not rely on this stratagem, for it adopts the distinct theoretical referential – the one of separation of the powers, in the sense studied by Tsebelis and later worked by Haggard and MacCubbins.

That is, the separation of powers is investigated in the perspective of the existence of effective *veto players* that interfere in the political system, in an analysis that emphasizes the system's *checks and balances*. It takes, yet, Madison's influence to distinguish between Separation of Powers and Separation of Purposes. Beyond the Separation of Power, given by constitutional rule, there must also be a Separation of Purpose – so that different parts of government are motivated to seek different goals.

MacCubbins resumes the distinction, arranging them orthogonally. Thus, it would permit the existence of situations in which there is legally a separation of powers, but no separation of purposes, because these powers do not adopt, in practice, distinct purposes. Conversely, a situation in which formally not a separation of powers, but a separation of purposes prevails, as in Japan's case, which lacks a formal separation of power with a unitary parliamentary regime, but the separation of purpose can take place in the form of a coalition government in which the goals of the different coalition members differ or through dominant parties that are internally divided. A separation of purpose can occur with or without a separation of power. It suggests a two-by-two typology with combinations of Separation of Power (unified or separated) and Separation of Purpose (unified or separated)²¹.

Therefore, the interaction between the separation of powers and of purposes is fundamental in counting the number of *effective veto players*. Others analysis ignores the effect of a separation of purpose and captures only formal veto players. Here, separation of power and separation of purpose are both considered relevant variants. Thus, if power is separated, but purpose is unified, then the effective number of vetoes may be near one, as each separate institution is working toward a common goal, with jointly determined payoffs. By contrast, if each veto player's payoffs is independent from others, then the effective number of vetoes may be near the maximum number of vetoes²².

²¹ Haggard and MacCubbins. Political Institutions and the Determinants of Public Policy. In: Presidents, Parliaments and Policy. Cambridge: Cambridge, 2001, p. 4.

²² Haggard and MacCubbins. n(21) , 2001, p.6.

Whereas the separation of powers formally multiplies the number of vetoes, the separation of purposes increases the preference diversity of the agents who control the veto points. Ergo, depending on how they behave from purposes, distinct or not, the effective number of veto players is obtained, that can be either an individually considered agent or a collection of them²³. With New Zealand as an example, that has a unicameral parliamentary system and three parties that ensure the majority of the seats in the parliament and depending on the unity or difference of purposes of each one of the three parties, there might be one or three veto players.

The institutional separation of powers and of purposes implies two kinds of tradeoffs, regarding the democratic outcome. The first one is related to state governability, which depends foremost on the number of *effective* veto players in the political system. That is a trade-off between a political system's *decisiveness* – the ability to change policy – and its *resoluteness* – the ability to commit to policy. The second trade-off is between the *private-* and the *public- regardness* of policy produced. It has a concern with the risk of influence from certain groups of interest and the public policies account for private interests.

Therefore, as the *effective* number of vetoes increases, there is an increase in the transaction costs that must be overcome in order to change policy. Thus, the greater the transactions costs are, the greater the state *ungovernability* and *indecisiveness* will be. Conversely, when there are fewer *effective* vetoes, *irresoluteness* arises – in fact, it is too easy to make policy and there is an absence of *checks and balances*. The institution chosen by the author refers to political parties. He analyses that the greater the number of *veto players* embodied in the person of the parliamentarians, the weaker the parties will be, the greater will the negotiation costs be, as well as the governability difficulty, the number of public policies of private character, the fragmentation and state instability.

Analogically, let's bring the theoretical contribution of effective veto players to analyze the Procuracy in Brazil, this is possible because MacCubbins goes further considering the judiciaries and military as potential *veto players*. He points out as forms of

²³ Haggard and MacCubbins. n(21), 2001, p. 24.

separation of powers the presidentialism, by separating the Executive from the Legislative; the bicameralism; the federalism; the judicial review and the exception regimes²⁴.

By the institutional design previously studied, the Procuracy could be characterized as a veto player, because it works as a veto point in several public policies, controlling and complicating the governmental action, also with the prerogative of pleading in order to nullify legislature and executive acts, through the constitutional review. It is relevant, nevertheless, to highlight the quantitative aspect of this *veto player* that can jeopardize or not the state's stability.

The Procuracy's new institutional design and expansion of its powers has brought about a reconstruction of its identity, which has not yet been reached. Sadek, in this sense, observes that one of the main problems of the Procuracy in Brazil, today, is its low level of institutionalization²⁵. Particularly, the choice of an institutional design (*functional independence*) without hierarchy and an extreme autonomy of each prosecutor individually considered represented an institutional incentive to the construction of an identity shaped by the individual characteristics of each member and not of the institution as a whole. The Procuracy's performance is related to the individual performance of each one of its members considered isolated. Differently from the Brazilian model, the Procuracy in Portugal is hierarchical, its members must watch the determination of superior agents.

The unique features in Procuracy's design in Brazil granted to each prosecutor the ability to act with a high degree of autonomy, without strictly adhering to precedents or directives established by the Attorney General. And each individual prosecutor interpretation of law vary considerably, from those who are conservative to the more liberal ones.

The Brazilian *functional independence* model although embedded with an antipositivistic philosophic concern of guaranteeing the plurality of interpretations and the prosecutor's self determination, ends up leading to negative results of the practical point of view to democracy. The absence of an identity represents the existence of multiplicity of *effective* veto players as there are members that act with distinct purposes.

²⁴ Haggard and MacCubbins. n(21) , 2001, p. 32.

²⁵ Sadek, Maria Tereza et alli. The New Brazilian Public Prosecution. In: Democratic Accountability in Latin America. Oxford: Oxford, 2003. p. 208.

This veto players inflation brings resolution problems and state instability, because instead of having only one or a few veto players related to the institution's wholeness, which would be close to an ideal situation of checks and balances, there is a multiplicity of veto players because of the individuality of each prosecutor.

Thus, it is hypothesized that the new institutional design of *functional independence* brings incentives to the prosecutors actions with great individual independence, with diverse preferences and separation of purposes, even in the same process. Therefore, the larger the number of veto players personalized in each prosecutor's figure, the weaker the Procuracy gets institutionally, the higher the transaction costs, and the policy instability.

In that sense, MacCubbins' theoretical referential is useful because it allows the evaluation of the dynamics of an institution – not in a formal perspective – once it stresses the distinctions that occur from the practical perspective of the implications of the institutional design. The interaction between separation of powers and separation of purposes enables the explanation in this sense in order to perceive that there is a multiplicity of prosecutors, acting as *effective* veto players.

5. Institutional Vulnerability: a lack of *de facto* Independence.

Before analyzing some factual evidences, it is relevant to notice Stefan Voigt, Lars Feld and Anne van Aaken great contributions to the debate. They introduce an important separation between *de jure* Procuracy's Independence and *de facto* Procuracy's Independence. The variables that make up *de jure* Procuracy's Independence can all be found in legal documents whereas *de facto* Independence is concerned with their factual implementation²⁶.

Thus, *de jure* Independence can occur without *de facto* Independence. The authors above mentioned have reached, through a rigorous statistical analysis, a provocative result: “while *de jure* Procuracy's Independence appears to increase corruption, *de facto* Procuracy's Independence reduces it”²⁷. This conclusion can be understood in the sense

²⁶ Anne von Aaken, Stefan Voigt, Lars Feld. Power over prosecutors corrupts politicians: Cross Country evidence using a new indicator, July, 14, 2004.

²⁷ Voigt, Stefan. Lars Feld and Anne von Aaken. n(26), July, 14, 2004

that countries with high corruption levels may feel induced to increase the independence of their prosecutors formally without securing it factually.

Brazil is one of this case – a high corruption level and a large *de jure* Procuracy's Independence. *De facto* Procuracy's Independence can not be investigated without an analysis considering some factual intended or unintended consequences of its institutional design.

Therefore, it is hypothesized further that, paradoxically, the institutional change in 1988 produced unintended consequences and may have weakened rather than strengthened the Procuracy. In other words, it is questioned whether the new institutional design would have enhanced *de facto* Procuracy's Independence. The particular *functional independence* design brought a multiplicity of veto players. Each prosecutor addresses to himself and not the institution, as if the power were fragmented amongst each one of its members, and not in the institution. The purpose is not unified, and the institution of Procuracy is internally fragmented. The effect is a low level of institutionalization.

A low level of institutionalization of the Procuracy means institutional vulnerability. That opens up the possibility of manipulation of prosecutors as instruments for the achievement of interest groups. As the Procuracy in Brazil is an important and strategic gate-keeper to judiciary, a judicialization of politics in that terms is quite dreadful.

Besides, with individually defined purposes, the prosecutor is more easily coopted by the media or by political parties. Thus, based on a supposed *de jure* independence a free non institutionalized action of the individual prosecutor might be *de facto* an instrument for the accomplishment of certain groups' interests. It appears in the manner of nested games²⁸, in Tsebelis' expression, in which the prosecutor finds himself interacting with other political actors in multiple arena games or in institutional arrangement games.

Hence, supposedly in behalf of an ideal of accomplishment of democracy, subjective and particularly evaluated by the individuality of each prosecutor, there is the potential risk, consciously or unconsciously, for one to be acting in a game of multiple arenas in behalf of a certain group of specific interest, be that political or economical.

Some exhibitionism and excesses committed by some individual members through the aid of mass media and the opposition have revealed a Procuracy without identity. Some

²⁸ Tsebelis, George. *Jogos Ocultos*. São Paulo: Edusp. 1998, p. 20

political science as Fábio Kerche²⁹ have, also, criticized the Procuracy for paralyzing public decision-making and have questioned the very nature of such oversight capabilities, concerned with the ability of non elected officials to intervene in acts legitimated by the popular vote.

In fact, those critics would not take place if prosecutor had a cohesive action towards a unified purpose. A great evidence of those criticisms is a project of Constitutional Amendment that contains a series of proposals seeking to diminish the power of Prosecutor, particularly with regard to its capacity to accuse, to prosecute authorities and to affect public policy.

Above, a problem of principal-agent is pinpointed. How much the principals will tolerate the judicial rule-making activated by Procuracy is a crucial question. As Alec Sweet³⁰ states , rulers will permit delegated power to operate only as long as the benefits of such delegation outweigh the costs. When the costs of delegation come to prevail over the benefits (e.g. when agents begin to govern in the place of the rulers), the principals will rein their agents. (e.g. restricting or abolishing their power).

Recently, a proposal to reform the Law of Administrative Impropriety (Law 8.429), passed in 1992, with the agreement of legislature members and judges from Constitutional Supreme Court was put out in a Brazilian newspaper³¹. Because of misconduct of office, this law allows the president and governors to be accused before low level judges, and not before Supreme Courts. The justice Gilmar Mendes said that it leads to distortion, and to “ungovernability”. He refers to the misuse by prosecutors of this legal instrument, especially in Fernando Henrique Cardoso government, as a grand evidence of state instability. For Mendes, the prosecutors have used this action, many times to support the interests of political parties from opposition.

This jurisdictional reform intends to diminish the power of the individual and low level prosecutor and allows only the Attorney General to prosecute governors and the president before Supreme Courts.

²⁹ Kerche, Fabio. O Ministério Público Brasileiro e seus mecanismos de accountability. In: XXIII Encontro Anual da ANPOCS, Caxambu, Minas Gerasi, 1999.

³⁰ Sweet, Alec Stone. Governing with judges: constitutional politics in Europe. Oxford University Press, 2000. p. 24.

³¹ Folha de São Paulo. 1 de julho de 2006. “STF defende foro privilegiado para ações de improbidade”.

Another reform proposal known as “Muzzle Law” (Lei da Mordação) intends to impose a gag rule to make the prosecutor responsible for eventual abuses. The Judiciary branch and media does not support this project.

An evidence of prosecutor individual profile can be found at the IDESP’s (Instituto de Estudos Econômicos, Sociais e Políticos) research – São Paulo 1996 – with 763 members of the Procuracy in seven states in Brazil. This study pointed out that the prosecutors and attorneys believe that they individually are – not the political parties nor the Legislative and Executive power – responsible for the enlargement and consolidation of the diffuse, collective and homogeneous individual rights³².

Currently, the Procuracy of Pernambuco in Brazil³³ intent to implement a strategic plan to convince each prosecutor to work toward a common goal and unified purpose, even against its particular interpretation of law and state’s responsibilities. However, this would also entail a change of culture and behavior, because the law still guarantees to each member the *functional independence* and the liberty to interpret the law. Nevertheless, effective incentives must be created to enhance a unified action of the Procuracy’s members.

As Sadek has stated the Procuracy “may be the Brazilian institution that has changed from a constitutional perspective, and as result, it still attempting to define itself internally and externally”³⁴ The new institutional design that granted to prosecutor great *de jure* individual independence and new attributes was not enough to define an institutional identity. Its identity must be constructed historically.

In this paper, it is indicated that a particular feature of this new institutional arrangement – *functional independence* – originally stated to assure independence to Procuracy, could paradoxically lead to negative results, when individuals prosecutors work isolated, with separated purposes as multiple veto points. Because of the large degree of freedom and autonomy given to each prosecutor, who is not obliged to follow a unified purpose or common goal, the Procuracy became institutionally fragmented and vulnerable.

³² Cf. Maria Tereza Sadek (org.). “O Ministério Público e a Justiça no Brasil”. São Paulo: Editora Sumaré/IDESP, 1997.

³³ Cf. www.mp.pe.gov.br

³⁴ Sadek, Maria Tereza et alli. The New Brazilian Public Prosecution. In: Democratic Accountability in Latin America. Oxford: Oxford, 2003.p. 223.

The others Legislative and Executive branches, in consequence, do not have a reference of how they should act not to be prosecuted. Thus, the way found by the rulers is to diminish Procuracy's power.

It is important to notice that Procuracy must build an institutional identity, with prosecutors seeking the same goal and adopting a coherent strategy also to maintain its power and to assure the Rule of Law. The National Council of Procuracy, brought by the constitutional judicial reform in 2004, seems to be an institutional way to create incentives to constrain prosecutors to follow a common purpose and to control eventual abuse of an individual member of Procuracy.

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