



Lesley K. McAllister. *Making Law Matter: Environmental Protection and Legal Institutions in Brazil*. Stanford: Stanford University Press, 2008. xix + 264 pp. \$55.00 (cloth), ISBN 978-0-8047-5823-9.

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## The Birth of a New Actor in Environmental Policy

This book presents a thorough, well-researched, and compact account of a rather complex subject—the emergence, in the mid-1980s, of a new actor in the field of environmental policy in Brazil. The collective name of this actor, in Portuguese, is *membros do Ministério Público* (MP). This term applies to all members of two ranks of federal and state district attorneys or prosecutors (*promotores de Justiça* and *procuradores de Justiça*, in Portuguese). However, Lesley K. McAllister has trimmed the group of protagonists to a subgroup of these legal professionals—the ones dedicated to the enforcement of environmental laws and regulations, calling the members of this subgroup “environmental prosecutors” (p. 4). The biography of this actor is a somewhat intriguing story that demands careful explanation and interpretation. McAllister is up to the task.

McAllister's selection of subject is not an obvious one. She decided to focus not on well-established actors, such as environmental agencies, green lawmakers, regulators, citizens' groups, grassroots activists, nonprofit organizations, advocacy groups, political parties, or business/science lobbies. Instead, she chose an actor that is public, and yet it does not belong to any of the traditional branches of government. However new it is, it did not come out of the blue, either; in fact, it has a background and has assertively redefined itself and shaped its niche in the environmental policy arena. Its profile and roles resemble few non-Brazilian institutions, and yet it differs even from all of them.

Environmental prosecutors are a subgroup of the members of the MP, a nationally based and preexisting institution to which all federal and state prosecutors belong. This institution, except for its national coverage, resembles the district attorney offices in the U.S. legal system. The author notes that the role of environmental prosecutors is reminiscent also of “public interest lawyers” in the United States. However, these

U.S. lawyers are not employed by government, while Brazilian environmental prosecutors are. Not incidentally, these prosecutors do not belong to either the judicial, legislative, or executive branches of government—they are fully independent.

McAllister focuses on what has been the environmental prosecutors' mission to defend collective or “diffuse” interests, as distinct from individual ones. Cadres of these specialized prosecutors have been formed inside each federal and state MP office and take on matters involving those diffuse interests, which include most environmental issues. Several circumstances and opportunities have allowed a group of prosecutors to shape themselves into independent and strong actors in the field of environmental enforcement. The MP has national coverage. There is a federal MP and there are twenty-six state MPs, whose members do not necessarily work together, as the first deal with federal law issues and the others with state law issues. However, federal and state environmental prosecutors have been known to coordinate their actions occasionally, in complex cases in which federal and state laws, agencies, and regulations are involved.

The emergence of environmental prosecutors resulted from the lobbying efforts of a small group of MP members. McAllister identifies three moments in which they successfully lobbied for environmental prosecution as a distinct pursuit among the many duties entrusted to the members of the MP. The first moment occurred in 1985, when Brazil's twenty-one-year military dictatorship came to an end. The country was ripe for a regime based on the rule of law and for institutions committed to support this regime, independently from the executive, legislative, and judicial branches. Thus, the Public Civil Action Law (*Lei de Acao Civil Publica*, Law 7.437, July 24, 1985) was enacted. This law entrusted prosecutors to defend the rights of the citizenry, among which is the right

to a clean, safe, and healthy environment. This law assigned a specific mission to the members of the MP who chose to become environmental prosecutors. MP prosecutors are involved also in other matters related to disperse rights, such as consumer protection, the preservation of the cultural patrimony, and many others that are outside the scope of this study.

Subsequent steps for the emergence of environmental prosecutors began with the 1988 Constitution. The 1986-88 Constitutional Assembly wrote the MP's mission into the constitutional text and created an encompassing new organizational format for the institution, under which all prosecutors would work. The next step came in 1993, when Federal Law 8.625 (February 12, 1993) defined the new organizational base for the MP, and spelled out the rules, roles, and careers of prosecutors and their staff. Prosecutors gained career incentives that until then were reserved only to judges: lifelong appointments, no salary reductions, no unsolicited transfers, and several other career incentives. These elements and the MP's budgetary autonomy soon led to a nickname for prosecutors—members of the “fourth power.” Prosecutors commonly use it in a self-congratulatory manner, but others have used it derisively and even in an accusatory tone.

The successful 1985 drive to go beyond the defense of individual interests was in itself a novelty in the Brazilian legal world. Several recent bills presented in the Brazilian Congress have tried—unsuccessfully, so far—to cut down the autonomy of the MP. These efforts have targeted especially its environmental prosecutors, trying to limit their independence and curtail the MP's investigative powers. Without this power, environmental prosecutors would be seriously weakened. They would be thrown back to the passive position of common prosecutors, because they would have to wait for the results of police investigations and for indictments (if there are any results and indictments) before springing into action.

What, after all, did and do environmental prosecutors bring to the table of environmental law enforcement and environmental policy in Brazil? The opening words of the author's preface provide her condensed view: “This book is about Brazilian prosecutors who function much like public interest environmental lawyers in other countries. They sue polluters and government to enforce environmental laws. They accuse environmental agencies of shirking their duties because of political pressure. They form alliances with local environmental groups and the media. They attend professional meetings to share strategies about how to be more effective environmental advo-

cates” (p. xi).

Thus, environmental prosecutors intervene in the enforcement of environmental laws and regulations. They intentionally place themselves in the middle of the controversies involving other actors. They make their presence felt in four basic ways. First, they initiate investigations by requesting information from any agency suspected of allowing the environment to be degraded, or from any private or state-owned company suspected of causing such degradation. In many cases, information is requested from both agencies and companies. This may result from allegations made by citizens or environmental organizations, or from the prosecutors' own suspicions. In either case, prosecutors do not need judicial consent to investigate. Environmental prosecutors of São Paulo, for example, initiated 36,000 investigations between 1984 and 2004, about 1,800 per year. This figure does not include investigations made by federal MP prosecutors stationed in the same state.

Second, if investigations find that environmental degradation has occurred, prosecutors summon the responsible parties and require them to sign an extrajudicial document called conduct adjustment agreement (*termo de ajuste de conduta*). This is a public document by which violators admit their violations and commit themselves to change practices that harm the environment. Agreements may involve only companies, but lax environmental agencies may need to sign them also. Prosecutors have ample power to draft these agreements and monitor their effects, again without judicial consent. Another figure gives an idea of the use of this procedure—one thousand agreements were negotiated by the São Paulo state MP in the year 2000 alone.

If the information the prosecutors requested have not been released, or if the targeted actors have refused to enter into an adjustment, or if the adjustment did not result in the desired behavioral changes or in environmental recovery, prosecutors may move to a third step. They file a public civil suit in a court of law against violators, in the defense of the diffuse interests harmed by agency and/or company behaviors. If prosecutors make a good case, judges rule against violators, who may be condemned to pay for damages and/or for the recovery of environmental quality. Judges may also stipulate daily fines that last as long as the harmful conduct persists. Violating companies may even be shut down, although this has been rare. Individual agency heads or staff members may also be cited in those suits and fined by judges. A fourth step, which happens only in cases in which criminal law applies, is the criminal prosecution of compa-

nies and agencies. In these last two steps, environmental prosecutors resort to the judiciary and the outcome of their interventions depends on judicial decisions.

It is no wonder that environmental prosecutors have gained the nickname of members of a fourth power. They initiate investigations and force violators into legally binding agreements, concerning matters that are typically wide ranging and highly visible. Additionally, they have standing to file suits in the name of the collective or diffuse interests that they are chartered to defend. Many environmental prosecutors regularly go public with their investigations and agreement negotiations. Judicial secrecy considerations do not apply to them before they file suits. The media in general loves environmental prosecutors as reliable, authoritative, and well-informed sources, giving them plenty of space and time. Besides fearing investigations, adjustment agreements and civil suits, many companies and agencies make extra compliance efforts just to avoid the negative publicity generated by environmental prosecutors' scrutiny.

What has been the end effect of environmental prosecutors' actions? In the words of the author, "negotiated non-compliance" was substituted with "prosecutorial compliance" (p. 2). This means that weak or lax environmental agencies that came to tolerate non-compliance with environmental rules were spurred into more forceful behavior, as more and more cases fell under MP scrutiny. Another way of putting this is that lax administrative enforcement became stricter by means of prosecutorial pressure.

This becomes clear from McAllister's information and analysis derived from her internships in the MP offices and in the environmental agencies of two Brazilian states (São Paulo and Pará). Using archival materials, internal reports, and notes from staff meetings, besides the texts of conduct adjustments and suits, she gauges how much investigations, adjustment agreements, and prosecutorial efforts changed (or did not change) the behavior of agencies and polluters. She uses additional primary data derived from almost one hundred interviews conducted with prosecutors, agency staff members, scholars, and members of citizens' groups involved in prominent cases. What emerges from her investigation is that environmental prosecutors have been usually successful in making agencies and companies uphold the law, or at least in changing complacent attitudes.

Although she values the role of environmental prosecutors in the improved enforcement of environmental laws and rules, McAllister dedicates important portions

of her book to some of its limitations and attrition. She focuses mainly on how prosecutors may have their autonomy and efficiency hampered. State governors and legislators who threaten budget cuts or appoint head prosecutors who are friendly to business interests may compromise autonomy, for instance. In this case, the state executive and legislative branches try to curtail the energies of local MP offices. Another example of dependence in relation to the executive branch is the fact that a weak environmental agency may swamp the prosecutors' agenda, making them hostages to the agency's inefficiency. Stated differently, prosecutors are more efficient when environmental agencies themselves are more efficient.

Additionally, prosecutors strongly depend on the judicial branch, a consequence of the division of powers and of Brazil's less than elaborate system of checks and balances. Prosecutors ultimately derive their strength from their rate of success in convincing judges to issue punishments to violators. A weak prosecutorial record will have less probability of compelling violators to sign adjustment agreements, as violators will not be as fearful of judicial punishment. Another potential problem is that prosecutors may become overzealous and abuse their powers, preempting environmental agencies and perhaps perpetuating their weaknesses.

Nevertheless, the usually young and dynamic environmental prosecutors, whose numbers have swollen to hundreds and who are supported by qualified technical and administrative staffs, are making a difference in the enforcement of environmental regulations and of other rules that protect collective interests. McAllister shows that they are a force to be reckoned with by agencies, polluters, and other environmental violators. Environmental activists and common citizens regularly approach environmental prosecutors as allies. Several national public opinion surveys taken over the last years show that the MP and its prosecutors are constantly near the top of the ranking of the most trusted and admired Brazilian institutions. Environmental prosecutors are thus helping to "make law matter," as the title of the book suggests.

This is not an introductory book, although it is clearly written and very well organized. It will appeal more to knowledgeable readers and advanced students of law (particularly of comparative legal institutions), political science, and environmental policy. Members of the legal professions and advocates of collective interests may also benefit by acquiring information and analysis about a unique legal institution.

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