

# The Role of the Public Ministry in the Defense of the Environment

## Hydrogeographical Regions and Attitudes for Coping with Socioenvironmental Conflicts

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The Brazilian Constitution of 1988, the first constitutional text since the fall of the Brazilian military dictatorship, devotes significant attention to the idea of democracy. The constitution entrusts the Public Ministry, a permanent institution that is crucial to the jurisdictional function of the state, with the defense of the legal order, the democratic regime, and so-called metaindividual interests and rights—rights belonging to society as a whole. The protection of the environment, claimed as a common possession for use by the people and recognized as essential to a healthy quality of life for current and future generations (Article 225), is a metaindividual right.

The defense of rights fits into the larger scope of implementing the essential principles of the Federative Republic of Brazil. As Marcelo Goulart reflects:

The strategic goal of the Public Ministry is to defend the project of participative, economic and social democracy outlined in the 1988 Constitution through achievement of crucial objectives for the Republic, synthesized in Article 3, from Section I to IV (construction of a free, fair and solidary society in which cultural and socio-economic development should be directed towards the eradication of poverty and marginalization, thus reducing social and regional inequalities and promoting the welfare of all).

In order for the Public Ministry to fulfill this task, the Brazilian Constitution gives it legitimacy to adopt measures of civil and criminal liability against the violators of environmental rules.<sup>1</sup>

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The authors would like to thank Mr. Matt Moorhead, the editors of this volume, Dr. Nigel Quinney, Gustavo Abreu, and Alessandra de Souza Santos, who collaborated on the technical revision and translation of this text.

- 1 M. Goulart, *Princípios institucionais do Ministério Público: A necessária revisão conceitual da unidade institucional e da independência funcional MPMG Jurídico*, 14 Belo Horizonte 13 (Oct./Dec. 2008).

The expansion of the power of the Public Ministry and other public agencies to protect the environment is vital in a country undergoing intense economic development. The use of law as a means of environmental protection is a way to compensate for the negative impacts of the increasing demand for natural resources. In this sense, the constitution of 1988 established “state activism” in regard to ecological matters in Brazil.<sup>2</sup>

According to the 1988 constitution, the Public Ministry’s functions are to promote, on an exclusive basis, public criminal action and to institute civil investigations and public civil actions for the protection of the environment and other metaindividual interests. As the legitimate defender of these interests, the Public Ministry plays the role of “society’s attorney” even against the state itself, because, in the Brazilian legal system, the Public Ministry is assured of operational independence. Thus, the Public Ministry is a public institution, attached to the state, but, as constitutional defender of society’s interests, it is independent from the state. This feature guards against any forms of violation of metaindividual rights, including violations committed by agents of the state. Goulart notes that the operational independence of the Public Ministry “is a social guarantee because it was created to give people security of having a political agent which, while acting for the defense of social interests, can work independently, immune to the pressures of power.”<sup>3</sup>

This chapter looks at the ways in which the Public Ministry, and especially the Public Ministry of the State of Minas Gerais, has used innovative legal mechanisms to address and resolve environmental and social conflicts. The chapter focuses in particular on a successful initiative to reorganize the ministry’s environmental work so that it corresponds to natural, rather than administrative, boundaries.

### **The Problem-Solving Public Ministry: The Extrajudicial Activities of the Public Ministry**

The Public Ministry has the power to resolve environmental conflicts without demanding the intervention of the judiciary. This power is exercised via two instruments:

- A recommendation, through which the Public Ministry sends the state guidelines to improve the provision of a service of public interest
- A “conduct adjustment,” a type of out-of-court settlement through which a person or company that has put at risk or has caused damage to the public interest (for example, environmental quality) assumes obligations

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2 This chapter is based on a draft of a chapter from a forthcoming book tentatively titled *Law, State, and Development: New State Activism in Brazil in Comparative Perspective* and edited by David Trubek, Helena Alviar, Diogo Coutinho, and Alvaro Santos.

3 Goulart, *supra* note 1, at 12.

to cease the illegal activity, to conform conduct to legislation, and to repair damage done

The out-of-court settlement, known as a term of conduct adjustment (TCA), has helped remove red tape from the processes of environmental conflict resolution, which are frequently complex, thereby avoiding court disputes that could drag on for years. The Public Ministry thus plays a problem-solving role: it offers quick responses consistent with the socioenvironmental demands of the society.

### The Drainage Basin as a Territorial Unit for Analysis, Planning, and Action

An analysis of socioenvironmental processes and planning strategies cannot be isolated from the context of the natural systems in which they occur. In this context, the drainage basin is suitable for an investigation that aims to integrate physical, biotic, social, cultural, and economic aspects, providing an understanding of the ways in which different environmental aspects—such as vegetation cover, geology, and agricultural production systems—interact.<sup>4</sup> Drainage basins are multilevel systems that encompass political, economic, and cultural practices and as such are an important environmental and social area for analysis and planning. As Francisco Barbosa, João Antônio de Paula, and Roberto Monte-Mor comment:

[A] “basin” has considerable merit as a physical and economic unit for analysis. Actions or policies external to the “basins” (pricing policies, for example) can have important effects within a system defined in them, and an economic analysis, even incorporating the issue of welfare, can capture only a part of the relevant interactions within the system. Appropriate management requires, therefore, that the basins be considered as “multilevel” systems that include water, soil, and sociopolitical components, internal and external. Thus, a typical “basin” would consist in the overlap of natural and social systems. The natural system would be defined on aquatic and terrestrial (fauna, flora, water resources, and minerals) bases. The social system would determine how these bases are used. Government policies as an extension of social and institutional organization influence local patterns of using natural resources.<sup>5</sup>

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4 R. G. M. Botelho, *Planejamento ambiental em microbacia hidrográfica*, in *Erosão e conservação dos solos: Conceitos, temas e aplicações* 269–300 (A. J. T. Guerra, A. S. Silva, & R. G. M. Botelho ed., Bertrand Brasil 1999); and F. V. F. Castro, L. J. Alvarenga, & A. P. A. Magalhães Jr., *A Política Nacional de Recursos Hídricos e a gestão de conflitos em uma nova territorialidade*, 1(1) *Geografias*, Belo Horizonte 37–50 (2005).

5 F. A. R. Barbosa, J. A. Paula, & R. L. M. Monte-Mor, *A bacia hidrográfica como unidade de análise e realidade de integração disciplina*, in *Biodiversidade, população e economia: Uma região de Mata Atlântica* 258 (J. A. Paula coord., UFMG/Cedeplar/ECMXC/PADCT/CIAMB 1997).

Brazilian law recognizes the drainage basin as the territorial unit for environmental planning, management, and analysis. Law 8,171/1991, which concerns agricultural policy in Brazil, states, "The drainage basins constitute the basic units for planning [for] the use, conservation, and recovery of natural resources" (Article 20). Law 9,433/1997, known as the Water Law because it established the National Policy of Water Resources, also focuses on the drainage basin as the territorial unit (Article 1, Section V).

Although the Water Law presents several innovations, such as the adoption of socioenvironmental parameters, its application, like the application of environmental laws in general, has been marked by conflicts. Some of them derive from the coexistence of territorial units corresponding to the administrative units of Brazil's federation (union, member states, municipalities, and Federal District) with the natural divisions of drainage basins and ecosystems that they encompass. In other words, the geographic areas covered by the administrative units do not correspond to the geographic area of drainage basins. As Jorge Thierry Calasans et al. point out:

[B]ecause the implementation of water resources management by basin does not coincide with the political-administrative division of the country, it creates a potential conflict between the entities that are part of SINGREH [National System of Hydric Resources Management]. The so-called water resources management agencies must now give up their administrative autonomy over the management of water resources in the state's territory to share their autonomy with the new deliberative body represented by the Basin Committees.<sup>6</sup>

Similar conflicts have been identified regarding the environmental protection provided by the Public Ministry. The Public Ministry is organized, like the judiciary, by counties, which creates several obstacles to prosecutors' work to protect environmental and water resources. These obstacles are identified by Antônio Herman Benjamin and include

- "County likeness," the concept that environmental and water resources can be safeguarded using the geographic and legal organization into counties, despite the fact that this method of organization is incompatible with the natural division of the natural systems.
- "Spontaneism," which prevents proactive and prospective action by the Public Ministry, whose work is reactive and retrospective. Thus, ministerial intervention is "always hostage to the degradation which has already occurred or is just about to occur, subjugating the institution to the *fait accompli* dictatorship."
- "Lack of specific techniques for the correct interpretation of environmental issues," which substantially restricts activities by the prosecution offices in defense of the environment. Lacking technical and scientific

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6 J. T. Calasans et al., *A Política Nacional de Recursos Hídricos: Uma avaliação crítica*, in *Congresso Internacional de Direito Ambiental 7º*, Anais 585–602 (Imprensa Oficial 2003).

resources, the prosecution offices have problems identifying and measuring complex environmental problems.

- “Generalism,” which hinders the expertise of prosecutors with regard to knowledge of environmental law, “hampering the implementation of environmental legislation and providing an inadequate service to our customers, the community, and the future generations.”
- “Isolationism,” which precludes the “efficient use of the institution’s energies, leading to a shortsighted implementation, if not devoid of any real practical results, because it lacks the overall vision,” that is, the view on the drainage basin to be protected as a whole.<sup>7</sup>

Benjamin is convinced that “environmental problems recognize neither the historic strength of the criterion of administration of the jurisdictional rules that guide the division of the state into counties, nor the political fragmentation of the territory.”<sup>8</sup> Proposals for the territorial reorganization of the Public Ministry in the interest of environmental protection are gaining acceptance. The idea that ministerial action should have drainage basins as a basis—that action should be taken not on the basis of political units (counties) but on the basis of hydrogeographical regions (drainage basins)—would foster, in geographical and socioenvironmental terms, a more comprehensive view of ecological problems and their socioeconomic and cultural constraints and implications. It would also encourage the development of ecologically effective solutions that are socially appropriate.

The Public Ministry of Minas Gerais State (MPMG) pioneered the implementation of a drainage basin approach. In 2001, with the support of the federal government, MPMG created the Prosecution Office of the Rio Sao Francisco Drainage Basin and started planning and enforcing actions to protect natural and water resources associated with Rio Sao Francisco, considering the drainage basin as a whole. Before that, MPMG actions occurred in a fragmented way throughout the several counties (administrative geographical divisions, as opposed to natural ones) in the state. The Prosecution Office of Rio Sao Francisco is subdivided into five regions devoted to the preservation and restoration of natural and water resources from the drainage basin. In 2009, this working model was extended to all other basins and sub-basins within the territory of Minas Gerais state, effectively coordinating regional prosecution offices in their work to defend the environment. This reorganization of MPMG received social and institutional recognition in Brazil when it was awarded the Innovare Prize in 2010 in the Public Ministry Award category.

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7 A. H. Benjamin, *Um novo modelo para o Ministério Público na proteção do meio ambiente*, 10 *Revista de Direito Ambiental* 7–13 (Apr./Jun. 1998). The quoted material is from page 11.

8 *Id.*, 10.

## Conflict Resolution and the Promotion of Environmental Quality

Using the drainage basins of Minas Gerais as its basis and applying a problem-solving approach, the reorganized MPMG has been effective in resolving environmental conflicts in the state, as evidenced by a number of programs.

Between November 2008 and November 2011, prosecutors considered a total of 13,906 cases but submitted only 4,795 of them—that is, just 34 percent—to the courts. Conflict resolution through the formalization of out-of-court settlements, employing TCA, was used in 66 percent of cases (9,111 procedures). MPMG was involved in the defense of protected areas (53 percent of TCAs), the repair of environmental damage (22 percent), pollution control (8 percent), the protection of wildlife (3 percent), and the control of irregular mining (2 percent).

MPMG thus expanded its conflict-resolution role by implementing a set of extrajudicial techniques geared specifically toward the negotiation of environmental conflicts involving the protection of metaindividual and unavailable rights. In parallel, it instituted environmental damage valuation as a reference for the evaluation of “ecological compensation”—in other words, for an evaluation of procedures aimed at the improvement of environmental well-being according to the provisions of the Brazilian Constitution (Article 225, paragraph 1, Sections I, II, and VII) and the National Environmental Policy (Federal Law 6,938/1981, Article 2, Sections I, II, IV, VIII, and IX, and Article 4, Section VI).

It is difficult to translate into monetary terms the damage that environmental degradation can cause. Such degradation has multiple, cumulative, and synergistic impacts. Many valuation methods exist, but none can cope with the diversity and variety of the damage caused. The inability to predict the value of compensation for environmental degradation hinders the adoption of agreements.

For this reason, ecological compensation has become the most appropriate way to solve many socioenvironmental conflicts, especially in regard to the need to restore the damaged area. Ecological compensation also helps the company responsible for the damage to determine how to conduct its future activities so that it abides by the law, in the sense that by being held responsible for ecological damage, the company will be reeducated in environmentally friendly ideals.

### ***Serra da Moeda***

An example of the success of this approach can be seen in the Serra da Moeda (Mountain of Money) case. As a result of the decisions made in this case, a mining company whose activities could have caused serious damage to the environment stopped extracting ore in areas relevant to biological diversity conservation. These areas were turned into “conservation units”—that is, areas given special protection by environmental legislation.

In the Serra da Moeda, a mining company sought to carry out activities in an area believed to have high environmental value. The ensuing debate revolved around the question of how one can reconcile environmental preservation with the generation of jobs and income, considering the socioeconomic development of the region, in accordance with Federal Law 6,938/1981, Article 4, Section I.

MPMG defined the area that would be crucial to environmental preservation. No mining activities—indeed, no human activities that cause environmental damage—would henceforth be allowed in this area. Following careful studies, the company identified other areas in which it wanted to mine and presented an initial schedule for the extraction of ore. Subsequently, the company submitted to a regular environmental licensing process, carried out by Minas Gerais State, obtaining an authorization for mining in the areas defined as exploitable in the agreement signed by the Public Ministry.

### ***Oasis***

The Oasis project is another example of MPMG's role as a protector of the environment. This project was implemented through an agreement signed in 2011 by the Public Ministry and a mining company from the town of Brumadinho. In the course of a civil investigation, MPMG found evidence of environmental damage and quantified the environmental compensation. The compensation consisted of payments to 75 small producers around the mining venture whose farms included Permanent Preservation Areas (PPAs)—for example, river banks and hilltops—and Legal Reserve Areas—portions of property deemed necessary for the sustainable use of natural resources, biodiversity conservation, shelter, the protection of native flora and fauna, and the preservation of the quality, amount, and circulation of water resources in the environment.

In partnership with the Foundation O Boticario, MPMG developed a methodology to specify the monthly amount to be paid to each farmer, as well as an efficient system of inspection that demonstrated whether beneficiaries were afforded adequate funds to maintain the Legal Reserve and the PPAs. The partnership between MPMG and the foundation is innovative: this is one of the first projects in this state based on payment for environmental services (PES). It also contributes to social and environmental justice because it remunerates farmers who contribute to the implementation of environmental legislation.

### ***Belo Horizonte***

A third example of MPMG's expanded role involves the protection of the quality of life in the urban environment. In 2011, entrepreneurs from the real estate market in the southern section of the Minas Gerais capital, Belo Horizonte, signed a breakthrough agreement with MPMG. The civil building sector has a number of negative consequences with regard to the quality of urban environment, especially for urban mobility, and it increases demand

for public services. Again, environmental compensation was the solution: 20 entrepreneurs committed themselves to a road construction project in the neighborhood, considered a priority by the associations of local residents. The agreement with MPMG was made with input from Minas Gerais State and the consent of the city of Belo Horizonte, representing the local community. Thus, there was a widespread effort to improve the quality of life in the urban environment.

## Conclusion

The Public Ministry, notably in Minas Gerais State, has distinguished itself as an institutional defender of Brazil's environment. It enhances the effectiveness of the state's response to various types of socioenvironmental conflicts in two major ways: it prioritizes conflict-resolution work—that is, work that does not require the intervention of the courts; and it recognizes the need to reconfigure the territorial organization of institutions so that they are consistent with the organizational pattern of the natural systems. The Public Ministry has thus been able to expand access to justice and to implement the laws that protect natural and water resources in Brazil.