

The Ministério Público of the State of Minas Gerais and the ADR Experience

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*A porta da verdade estava aberta,
mas só deixava passar meia pessoa de cada vez.*

*(The door of truth was open,
but, each time, only half a person could pass through it.)*

— From “A Verdade Dividida” (The Divided Truth), by
Carlos Drummond de Andrade, one of the greatest
Brazilian poets, from the state of Minas Gerais

Although the use of alternative dispute resolution (ADR) methods may be familiar to many readers, the way in which ADR is employed in Brazil, most notably at the Ministério Público,¹ deserves to be spotlighted. In particular, the use of ADR by the Ministério Público of the State of Minas Gerais (MPMG) helps highlight one of the goals of the Global Forum on Law, Justice and Development: the implementation of the science of delivery.

The Regulation of ADR in Brazil

In the Federative Republic of Brazil, there are no laws that specifically treat or regulate ADR methods. There are some laws on arbitration; on conciliation, which in many cases is treated in the Code of Civil Procedures; and on specific negotiations, which can take place at the Administrative Council for Economic Defense,² between the federal government and companies that violate free market laws. Still, there are no laws clearly stating that ADR can be used in Brazil.

Notwithstanding this situation, it is important to note that in Brazil, as in many countries that observe the rule of law, while some people may think that

1 The authors have kept the name of the institution in Portuguese (the language of Brazil), instead of using a direct translation (“Public Ministry”) to emphasize its unique and broader role in the Brazilian constitutional system in comparison with other countries. Although a public institution, it is totally independent of and unattached to any branch of the government and possesses an unusually diverse range of attributes in its role as “society’s attorney.” Its functions are explained throughout the text.

2 In Portuguese, Conselho Administrativo de Defesa Econômica (CADE).

the use of ADR is not legitimate, it is in fact strongly supported by principles contained in the Federal Constitution.³

One constitutional principle that upholds the possibility of the use of ADR methods in Brazil is access to justice. This constitutional guarantee should be understood as each person's right to have access to an effective solution for his or her problem. It should be interpreted as a guarantee of access not only to the established judicial system but also to any of the multiple ways to effectively resolve a conflict. To have access to justice is to have available all the possible ways to attain real justice. The use of ADR in other countries and in private institutions has produced so many positive results that Brazil's "Judicial Power," through a National Council of Justice regulatory act in 2010, established that every member-state of Brazil must have judicial mediation as one of the possible methods offered to parties in conflict resolution. (The independent functions of the Brazilian republican state are distinguished as "Powers," and they are here termed the "Executive Power," the "Legislative Power," and the "Judicial Power.") Also, in 2012, the federal government, through its Ministry of Justice, created a School of Mediation and Conciliation (ENAM, the acronym based on its Portuguese name, *Escola Nacional de Mediação e Conciliação*).

In short, although there is no specific law on ADR, the Judicial Power has determined that each of its tribunals has to offer judicial mediation and conciliation to parties that want to use those methods of conflict resolution.

The Name of the Rose

In the final years of the 16th century, Shakespeare's Juliet famously declared:

What's in a name? That which we call a rose
By any other name would smell as sweet.

Her observation remains as true today as it ever was.

The MPMG prefers to call the rose "*tratamento adequado de conflitos*" (adequate dispute treatment; ADT), but in essence, what the institution applies are the methods of ADR, albeit adapted to the local context.

What Distinguishes the Ministério Público's Rose?

Some characteristics of the Ministério Público and the way it, as an institution, uses ADR methods, are unique. This chapter explains this uniqueness and seeks to inspire those who face similar situations when dealing with conflicts in which ADR can be applied.

3 The authors call Brazil's Constitution "Federal" because each of the 27 member-states also has a constitution; these state-level constitutions are subordinated to the federal one.

The Ministério Público of Brazil

Functions. The Ministério Público is a public institution whose members are in charge of ensuring that the law is applied. It operates independently from the three powers of government. The institution comprises public prosecutors, called “members,” and civil servants who assist the prosecutors and perform administrative functions but, because they are not prosecutors, are not referred to as “members.” The prosecutors’ main job is to uphold justice. Put simply, Brazilian prosecutors can be defined as society’s attorneys. However, the Ministério Público functions not just in the area of criminal law; it also protects civil rights, including those concerning the environment, health, education, anticorruption, governance, and consumers.

The prosecutors’ duty is to bring criminal charges and try criminal cases, but they also can request the acquittal of a charge if during a trial they become convinced of a defendant’s innocence. Prosecutors have the last word on whether criminal charges are filed, except when Brazilian law permits civil prosecution. In those rare cases, the prosecutors act as *custos legis* (law supervisors) and ensure that justice is actually delivered.

Besides that important task, Article 129 of Brazil’s Federal Constitution establishes that it is part of the Ministério Público’s job to protect society in many of the cases in which collective rights are involved. Another of the institution’s missions is to protect children, teenagers, elderly people, and any others who are unable to give genuine consent.

Article 127 of the constitution states that the Ministério Público “is a permanent institution, essential to the jurisdictional function of the State, and it is its duty to defend the juridical order, the democratic regime and the inalienable social and individual interests.”⁴

The Ministério Público, an institution that has enormous popular credibility, is one of the institutions that generated the “Brazilian Spring” (a popular protest movement that reached its apex in June 2013), precisely because there was a bill whose objective was to change the Federal Constitution to reduce some of the functions of the Ministério Público. Millions of people throughout the country went to the streets in protest, and the bill was ultimately voted down by federal legislators.

The Various Ministérios Públicos. As in the United States, some Brazilian institutions are federal and others exist at the state level. The Ministério Público of Brazil consists of multiple branches: the federal Ministério Público, where all criminal and noncriminal matters involving the federation are treated, and the 27 state-level Ministérios Públicos (one for each of the federation’s member-states), where all the other issues are dealt with (i.e., crimes that do not involve the national interest, as well as state-level civil matters).

4 Official translation by the Federal Supreme Court (Supremo Tribunal Federal; STF), http://www.stf.jus.br/repositorio/cms/portaStfInternacional/portaStfSobreCorte_en_us/anexo/constituicao_ingles_3ed2010.pdf.

The MPMG is one of these 27 state-level *Ministérios Públicos*. The state of Minas Gerais is located in the southeast of Brazil and has an estimated population of 20.5 million.⁵ The state's main economic activity is mining (Minas Gerais, loosely translated, means "general mining"); its gross domestic product (GDP) in 2012 was US\$199,726 million.⁶

An Independent Institution. The *Ministério Público* is considered by the Federal Constitution completely independent. It is not part of the Executive Power at the federal, state, or municipal levels. Nor is it part of the Legislative Power or the Judicial Power. So, in which of these three powers of the republic does it fit? The answer: in none of them. The *Ministério Público*, in its present form, emerged in 1988, the year in which the Federal Constitution was proclaimed. And it was created as an entirely autonomous body, so that it could protect all Brazilian citizens regardless of the identity of the violator of their rights. Members of the *Ministério Público* can file a lawsuit against any of the Powers of the republic if they violate (by acting or by being absent from their obligation to act) any civil right of a citizen.

At this point, Brazil's *Ministério Público* becomes different from other public prosecution services that exist in other countries. It is important to point out this feature because it is one of the reasons that, in Brazil, prosecutors believe that it is their duty to help people obtain access to justice in all possible ways, not just through the judicial system.

How Does One Become a Member of the Ministério Público? All members of the *Ministério Público* are public prosecutors. Individuals who want to join the *Ministério Público* must already have established themselves as legal professionals and must demonstrate their competence in a meritocratic selection process. Being a prosecutor is not a political decision. Prosecutors are not elected by the population. If a citizen wants to be a prosecutor, he or she has to earn a law degree and have at least three years of experience in a legal practice. Applying for the job means undergoing very demanding and competitive examinations, which include legal, medical, and psychological tests, both oral and written. Candidates with the best test results become prosecutors, following a period of rigorous training. This training is conducted by the *Ministério Público* and includes practical and theoretical classes. At the MPMG, for example, the process of selecting new prosecutors can last eight months. Of 3,523 applicants in 2013, only 33 were accepted; they then went through a two-month training course at the MPMG's institutional school. During this course, the new prosecutors are prepared to deal with the problems they will face in their work and in society. Upon completion, they go to offices in different parts of the state of Minas Gerais, where they put into practice what they

5 See Instituto Brasileiro De Geografia e Estatística, <http://www.ibge.gov.br/estadosat/perfil.php?sigla=mg>.

6 See http://en.wikipedia.org/wiki/list_of_brazilian_federative_units_by_gross_domestic_product.

have learned. Their performance is periodically evaluated during their first two years of employment.

At the time of writing, the MPMG had 1,049 active prosecutors, 2,857 civil servants assisting them, and 1,919 interns, who also help with legal and administrative duties.

A member's career typically consists of two sequential steps: first, one serves as a "promotor de justiça," a public prosecutor who can act on criminal and noncriminal cases before a judge of the first degree; subsequently, one becomes a "procurador de justiça," a public prosecutor who can act on criminal and noncriminal cases before a court (judges of the second degree, or courts of appeal).

Members of the Ministério Público do not become judges or public defenders; in Brazil, these professions follow completely different and separate career paths.

Again, to ensure operational independence, the nomination of members to the Ministério Público does not depend in any way on any of the three Powers; neither the governor (of a member-state) nor the president (of Brazil) chooses the members of the Ministério Público.

What Is the Difference between ADT and ADR?

The right of access to justice is a right that is guaranteed in Brazil's Federal Constitution (i.e., it is one of the most important rights), and filing lawsuits through the Judicial Power is regarded as only one way to resolve conflicts. Hence Brazil's readiness to use ADR. But to avoid using the words "alternative" and "resolution" in the English-based ADR, "tratamento adequado de conflitos" (adequate dispute treatment; ADT) was born.

The word for "alternative" in Portuguese means that there is a choice between two or more options. But, in Portuguese, "alternative" can also mean one thing being chosen as a second option, a Plan B, and one of the Ministério Público's goals in applying ADT methods is to start generating new values, so that when a citizen has a problem, he or she does not think first about going to court. It is important to nurture the idea that a citizen faced with a conflict should not ask a stranger to decide the best way to resolve it. Instead, the person should first think about solving his or her own conflicts.

For these reasons, the authors of this chapter chose the word "adequate" to supersede the idea, already ingrained in society, that the use of dispute settlement methods is something that should be undertaken only when one does not have access to the judiciary. Our purpose is to promote the opposite logic. We want to clearly convey the idea that conflicts can be resolved without constantly knocking on the door of the Judicial Power.

"ADT" is the term being used in Brazil by many institutions, including the Judicial Power. Also, the word "treatment" was chosen based on the prosecutors' mission, which is to protect society. "To treat" can be something larger

than “to resolve.” And “treatment” can be different from “resolution.” In the majority of cases, nonadversarial methods are effective in resolving a case, but when they are not, they still have done their job, because even when a settlement is not reached, the conflict has still been treated. And the treatment consists of making the conflict more bearable (until it can be presented for a judge’s decision, if a lawsuit ultimately has to be filed) and of teaching the parties that respectful conversation is possible.

If a conflict is viewed as a process, the value of “treatment” becomes more apparent, because one treats the conflict in totality, rather than focusing on solving a crisis.

Nonetheless, the well-known English term “alternative dispute resolution” is used in this chapter instead of “adequate dispute treatment,” so as not to confuse readers, most of whom are more familiar with “ADR” than “ADT.”

The Use of ADR Methods

Within the MPMG, ADR is seen as one of the ways in which all citizens can be guaranteed the effective resolution of their conflicts. The use of ADR is not a way to sidestep the judiciary. It is a way to give citizens an opportunity to resolve their conflicts by agreement, by moving toward solutions that will meet the interests of all the parties involved, before asking a judge to decide, as a third person, who is right and who is wrong—the well-known win-lose sentence. (The Judicial Power of the state of Minas Gerais, it should be noted, is effective in solving matters that need to be resolved by a third, public party—the judge—an authority who will decide how the conflict will be resolved.) It is also a way to build a more pacific society, because the use of ADR methods has the implicit objective of teaching people how they can resolve their own conflicts at home, at work, with their neighbors, and with others.

With this purpose in mind, the MPMG has invested in training all of its members in ADR methods. Moreover, for the first time in the history of this institution, citizens who intend to apply for a career as a prosecutor will have to study the subject, because they will have to answer questions about it during the selection process. This is a way to privilege and encourage the study of such an important matter to the country.

Negotiation

Negotiation of Civil Matters, Including Environmental Issues.

The Federal Constitution and other laws allow prosecutors to use all possible ways to protect the many fundamental rights within the purview of the Ministério Público. Besides investigating violations of protected rights, a prosecutor can file a lawsuit to pursue either protection (asking the judge for a decision, if necessary) or negotiation with the violator of the right.

Scholars have made two arguments. One is that negotiation is not possible in Ministério Público cases because, as a public institution, the Ministério Público is not equal to the other party involved in the conflict. The second argument is that negotiations are not based on the will of the parties, because if an agreement is not reached, a lawsuit can still be filed.

Concerning the first of these arguments, the Ministério Público is indeed not equal to other parties because, as a public and special institution, it has some prerogatives that private entities and other institutions do not have. However, “not equal” does not mean “no balance.” Not being equal does not mean that it is impossible to work together in a balanced way to consider the interests of everyone involved.

Concerning the second argument, filing a lawsuit is not a prerogative of the Ministério Público; a lawsuit can be filed by anyone who feels that his or her civil rights have been violated.

Members of the Ministério Público believe that knowing how to negotiate based on interests, not power, can lead to balanced negotiations and that through negotiation, legitimate, sustainable agreements can be reached.

The Brazilian Public Civil Action Law lists the Ministério Público as one of the qualified representative plaintiffs of these actions. However, before starting an action, the Ministério Público can try to reach an agreement with the offender (of an environmental right, for example). This agreement is called a “term of conduct adjustment” (TCA). The Public Civil Action Law does not mention the word “negotiation” itself, but as Shakespeare’s Juliet might say, “TCA is just another name for a rose.”

The Ministério Público cannot, as society’s attorney, agree to “give away” the rights of the Brazilian people during the negotiation period. Giving away is not what good collaborative or integrative negotiation is about. However, as has been done in many cases, the Ministério Público can agree to the conditions under which these societal rights will be respected by the offender. Here again, negotiating does not mean giving away. It means finding ways to address all interests. For example, in a conflict between, say, society’s interests and the interests of a mining company, what can be done is to find common or complementary interests of both parties and to work on them, bearing in mind that the company itself is clearly also part of society and the economy.

In the cases in which the Ministério Público can act, a settlement means (a) a faster solution for society, (b) a more effective solution, and (c) a solution that recognizes the importance of the interests of all parties of a conflict (whether persons or companies).

The MPMG tries to implement methods learned from the well-known Program on Negotiation,⁷ as well as from transformative mediation⁸ and narrative mediation.⁹ These concepts are better applied to mediation than to negotiation, but they also can be very useful when sitting down at the negotiation table.

Civil Negotiation Cases

A TCA is a kind of out-of-court settlement whereby a party (a person or a company) that puts collective assets—environmental quality, for example—at risk or causes harm to them assumes an obligation to cease the unlawful activity, to adapt its conduct to the law, and to repair the damage.

The use of TCAs has contributed to removing the red tape from the usually complex processes of environmental conflict resolution. Court disputes can drag on for years, but TCAs offer speedier resolution of disputes and avoid contributing to the backlog of unresolved cases. (In 2013, 13.7 million lawsuits were filed, but only 12.2 million were concluded in courts of first instance, leaving a backlog of 1.5 million lawsuits.)¹⁰ In the environmental area especially, the “effective problem-solving” role of the Ministério Público overshadows the “court demanding” role, and environmental conflicts are normally resolved without the intervention of the judiciary by defining terms and conditions that are consolidated in the TCA.

7 “The Program on Negotiation (PON) is a consortium program of Harvard University, the Massachusetts Institute of Technology, and Tufts University, and serves as an interdisciplinary research center dedicated to developing the theory and practice of negotiation and dispute resolution in a range of public and private settings. PON’s mission includes nurturing the next generation of negotiation teachers and scholars, helping students become more effective negotiators, and providing a forum for the discussion of ideas.” See the Harvard Law School’s *Program on Negotiation* website, <http://www.pon.harvard.edu/>.

8 “Two main goals of transformative mediation are to empower the disputing parties, and to enhance each party’s recognition of the other. Recognition and empowerment are then key concepts in the theory of transformative mediation. To empower the disputing parties, the mediator seeks to ‘strengthen people’s capacity to analyze situations and make effective decisions for themselves.’” These goals reflect two basic premises of transformative mediation theory. First, the authors claim that mediation is more than just a tool for settling disputes. Mediation has the potential to produce valuable transformations in the character of the participants. That is, participation in the mediation process has the potential to make individuals more empowered and responsive to others. Second, the authors claim that this transformative potential can best be realized by mediators who use certain attitudes and practices to guide the mediation process. See Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13(4) *Mediation Q.* 263–78 (Summer 1996), <http://www.colorado.edu/conflict/transform/folger.htm>.

9 “Cobb investigates and critiques current concepts of empowerment, and current mediation practices designed to empower parties. She then suggests a narrative understanding of empowerment, and describes several mediation practices which follow from the narrative approach.” See Sara Cobb, *Empowerment and Mediation: A Narrative Perspective*, 9(3) *Negotiation J.* 245–55 (July 1993), <http://www.colorado.edu/conflict/transform/cobb.htm>. Summary by Tanya Glaser. Copyright ©1997 by the Conflict Research Consortium.

10 See http://www.cnj.jus.br/images/imprensa/apresentacao_secretario_geral.pdf.

To expand the MPMG's effective conflict-solving performance, which increases the institution's level of efficiency, emphasis has been placed on theoretical refinement and implementation of a set of techniques aimed specifically at the resolution of environmental conflicts involving the defense of collective ("meta-individual") rights and inalienable rights.

In practice, priority is given to remediation of the damaged environmental area in natura and in situ. In the event that a complete or partial remediation proves impossible, the resolution of the conflict is guided by the definition of in natura and ecological compensation, which involves repairing the environmental damage through restoration or improving another similar area.

Finally, if environmental remediation or the establishment of ecological compensation is impossible, financial compensation will be established as an indirect way to repair damage. In this context, methods of assessment of environmental damage in terms of money should be used just as a reference. It is important that the methods should not aim at generating direct profit for the environmental systems, in accordance with the determinations of the Brazilian Constitution and the National Environmental Policy.

Transforming the multiple, cumulative, and synergistic impacts of environmental damage into monetary values is difficult. This difficulty is not due to lack of valuation methods but to the variety and diversity of damage caused and of methods of quantifying it. This situation creates legal uncertainty, which hinders the adoption of agreements because of the frequent vagueness of the clauses of the settlement estimating financial compensation for the irreparable damaged caused.

In conclusion, giving priority to ecological compensation has proved to be the most appropriate way to resolve many socio-environmental conflicts. This method takes into account both the need to recover the damaged area and the interest of the party responsible for the damage in wanting to preserve its good institutional image.

Following this line of thought, the agreements in recent cases concluded by the MPMG have had ecological compensation as their priority, instead of exclusive financial compensation. This approach has enabled, for example, the creation of protected areas donated by the mining sector as compensation for irreparable environmental damages. This adjustment had the necessary official approval of the state government. Another good example, dealing with the urban environment, involved the construction of roads as compensation by real estate companies found to have impaired urban mobility in the building of a shopping center and multifamily dwelling units.

Another innovative form of ecological compensation, involving payment for environmental services (PES), has been given to farmers for the following actions: conserving areas of environmental significance within their rural farmland; recovering historical sites, assets, or works of irreplaceable cultural value; constructing roads that divert traffic away from a historic city center; creating private reserves of natural heritage; establishing wild animal sorting

centers;¹¹ relocating a historic building from an area set apart for mining to another site within city boundaries to be transformed into a museum; and expanding the boundaries of permanent preservation areas and forest reserves within farms.

These initiatives, like many others throughout Brazil, deserve to be widely disclosed and discussed because they represent important innovations in fulfilling out-of-court resolutions of environmental conflicts.

Negotiations in Criminal Matters

In Brazil—unlike in the United States, for example—the Ministério Público has limited bargaining power when it comes to criminal offenses. It can engage in such bargaining only when criminal law permits or when a public prosecutor proposes the application of a penalty (which can never be imprisonment) prior to the criminal trial itself. The proposal is offered in the preliminary hearing and, if denied, can be repeated at the beginning of the trial hearing. If accepted by the defendant, it cannot be offered again in the event of a second infringement. This kind of proposal is not essentially a penal mediation, as in the American judicial system.

Mediation

As discussed earlier, the Ministério Público has many functions, all of which converge to protect the most important rights and interests of society. When defending these rights, the Ministério Público can act either as a party (filing a lawsuit as the legitimate plaintiff of the action) or as a *custos legis*. As a *custos legis*, the Ministério Público acts not as a party but as a surveyor and has to express an opinion about the case. This occurs only in judicial cases allowed by law, or where an incapable person is involved.

At the MPMG, there is an understanding that if, by law, some rights or interests require intervention, it is better if the institution intervenes before the conflict escalates to the point of going to the Judicial Power.

In many conflicts, the more promptly a prosecutor can intervene, the more promptly a solution can be found. That is why the Ministério Público treats some conflicts with mediation before the parties involved pursue a judicial resolution.

Mediation is one ADR method, and it can be defined as assisted negotiation, where a third-party neutral (the mediator) helps the parties involved in a conflict to generate options and choose the best solution for that conflict. Mediation in the Ministério Público is different from judicial mediation, which starts when a party goes to the Judicial Power looking for a solution

11 Wild animal sorting centers (Centros de Triagem de Animais) are places managed or supervised by public environmental institutions, with the goal of treating rescued wild animals and reintroducing them into the environment.

for the conflict. It bears repeating that the Ministério Público is not part of the Judicial Power.

In Brazil, the only act that regulates mediation is a resolution issued by the National Council of Justice that explains how a judicial mediation should be conducted. However, when it comes to out-of-court mediation, such as the type promoted by the Ministério Público, there is still no regulatory law or normative act. In the MPMG, the creation of a normative act is under discussion, but it has not yet been published. In the eyes of the Ministério Público, the use of either mediation or negotiation is based on the constitutional guarantee of access to justice, and as such, no other law or regulation is necessary.

When promoting mediation, the Ministério Público draws on global concepts and accepted procedures, applying internationally accepted techniques, including the Harvard, transformative, and narrative methods. All prosecutors at the MPMG are trained in mediation, which makes them more efficient in all their work, not only when working on mediation cases.

Conclusion

In a world of more than 7 billion people, the MPMG believes that the only way to achieve a peaceful society is to learn to respect all differences. Those who are not part of one's own community must still be recognized as human beings. By recognizing the existence of the other as a different person, one recognizes one's own identity. However, this recognition does not mean that the other should be discriminated against or segregated. It means, instead, that society is formed by a rich diversity of cultures and that all people can learn from one another.