

# **Human Rights at the State Level: National Human Rights Institutions and Ministérios Públicos in Latin America – beyond the Paris Principles**

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## **Introduction**

Engaged in a genuine academic interchange that links the great legacy of North American constitutionalism to the vibrant experiences of neo-constitutionalism in the new democracies of Latin America, especially following his privileged experience of, at the invitation of Carlos Nino, witnessing the democratic transition in Argentina, Owen Fiss published an article in 1989 based on a talk he delivered in Argentina in 1987 at a seminar on Criminal Justice and Human Rights. In this article, Fiss reminded his readers of the strategic use of injunctions by the North American movement for civil rights during the sixties, due to the particular aptness of that legal remedy to address (with the aim of correcting) structural, social, political and institutional obstacles that went far beyond individual criminal responsibility, without failing to affirm that civil and criminal tools for legal action were not mutually exclusive (Fiss, 2003 [1989]).

In another article, published twenty years later, Owen Fiss expressed his conviction regarding the inalienable duty of national states to protect their citizens from human rights violations, arguing that “the pursuit of justice is also a political obligation, for it defines the foundational commitments of a given regime” (Fiss, 2009, 66).

Both articles highlight the legal, political and ethical aspects of the concept of human rights (and, therefore, the indissociable nature of civil, economic, social and cultural rights), as well as the importance of adopting complementary strategies for their protection and promotion,

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by each and every nation, and inasmuch those works served as an inspiration for this contribution, in which we seek to analyse the National Human Rights Institutions (hereafter NHRI) in Latin America on the basis of three integrated lines of argument:

The first line of argument begins with the fact that Brazil, despite not having created any NHRI in compliance with the so-called “Paris Principles” (introduced in 1993 by UN Resolution n. 48/134), built the Brazilian Ministério Público (hereafter “MP”) into its 1988 Constitution with such a distinctive institutional design (that led to a distinctive operational performance). This makes one wonder whether the Brazilian MP, in fact, does not accomplish a mission normally attributed to an NHRI.

The second begins with the observation that an absolute majority of Latin American countries, while investing in the creation of NHRIs in compliance with the Paris Principles, have gradually expanded (with lesser or greater impetus) the institutional profile of their MPs and broadened their constitutional mandate so as to act far beyond their traditional roles in the penal process, moving ever closer towards the protection and promotion of first and second generation human rights.

The third holds that a strategic alignment between each Latin American MP – with their broadened mandate – and the officially accredited NHRI in compliance with the Paris Principles, is crucial to the effective protection and promotion of human rights by the national states.

These three arguments (involving the distinctiveness of the Brazilian MP’s institutional design, the gradual expansion of Latin American MPs mandates, and the crucial alignment of MPs and NHRIs) have not been duly explored, either in studies about the judicialization of politics, or in studies that analyse the institutional design and practical performance of NHRIs. To give an example, in some of the most comprehensive accounts of Latin American NHRIs

(Cardenas, 2014, Iráizoz, 2012, Reiff, 2000, 2004), there is no single reference to the present (or prospective) expansion of Latin American MPs, nor any hypothesis that their institutional performance might be intrinsically related to the main objectives of Latin American NHRIs.

On the other hand, studies that deal with judicialization of politics (or politicization of justice) concentrate, basically, on the role of the judiciary through its constitutional courts and, primarily, abstract judicial review. The problem is that, though the importance of the judiciary is indisputable, in the protection and promotion of human rights the judiciary, by definition and as a prerequisite to maintain its independence, has no initiative power, which is normally restricted to a list of actors to whom standing to initiate concentrated judicial review is conferred (certainly the generous access to the Supreme Court in Colombia and Costa Rica is far from a common standard in Latin America or elsewhere). Hence, scrutinizing the actors who activate the judiciary (and the reasons they do not) with regards human rights issues, whether at the abstract or concrete level of judicial review, nationally or locally, seems essential for a thorough analysis of the intersections of Law and Politics in Latin America.

## **1. Latin American NHRIs compliant with the Paris Principles and the growing mandate of Latin American Ministérios Públicos**

### *1.1. Latin American Ombudsmen and Human Rights Commissions' compliance with the Paris Principles*

Although the UN's Economic and Social Council had already invited member states to create national groups or committees "to collaborate with them in furthering the work of the Commission on Human Rights" in 1946, two years before the Universal Declaration (UN, 1946), it was only in 1993, during the World Conference on Human Rights in Vienna, that a resolution was approved establishing criteria for the recognition of national human rights institutions. The content of the resolution (n. 48/134, UN 1994) became widely known as the Paris Principles. In the same year, the International Coordinating Committee of NHRI (ICC) was

set up, which not only promotes the creation of new NHRIs – and is responsible for their accreditation – but also promotes cooperation among NHRIs, the UN and its international agencies, offers technical support for the satisfactory performance of NHRIs, coordinates material support, promotes training events (an annual meeting and a biennial conference), and so forth.

The Paris Principles that guide the identification of legitimate and credible NHRIs, can be summarized under six fundamental topics: a broad mandate for the protection and promotion of human rights, autonomy in relation to government, legally or constitutionally secured independence, adequate funding for regular activities, adequate investigative powers, plurality and diversity of actors participating in NHRI decision-making.

Despite the existence of many national institutions well before 1993, with features somewhat similar to the ones stipulated in the Paris Principles (the *Procuraduría de Derechos Humanos de Guatemala*, for instance, was constitutionally created in 1985 and regulated in 1987), it was only in the nineties that the NHRIs were created on a massive scale, following various models but with the common core of independence and a broad mandate to protect and defend human rights.

In Latin America, the accredited NHRIs were mostly structured as Human Rights Ombudsmen, either entitled as *Defensorías del Pueblo* (as in the Spanish model), or as *Procuradurías* (for instance, in Guatemala and El Salvador). In a few cases, Human Rights Commissions were created in Mexico and Honduras, as a local counterpart to the Human Rights Comissariat itself – now known as the UN Human Rights Council). More recently, Chile created an NHRI with the format of *Institute*. All of these institutions are primarily linked to the legislative branch, yet have been integrated into the organic structure of other state offices.

On January 28, 2014, there were 15 NHRIs in Latin America accredited by the UN ICC: 14 with “A” status (full compliance with the Paris Principles)<sup>2</sup> and one (Honduras), with “B” status, due to partial compliance with the Paris Principles.<sup>3</sup> Uruguay, the sole Hispano-American country without an accredited NHRI, initiated, in 2013, the activities of its NHRI,<sup>4</sup> created by law (and not by the Constitution), as in the Chilean and Costa Rican cases, but under conditions for full accreditation by the ICC.

The global expansion of NHRIs (conf. Pegram 2010) reflects the dominant view among international organizations, intellectual and activists that the efficacy of human rights protection and promotion lies much more on local action than on international efforts. It is no wonder, then, that the international organizations’ incentives (and sometimes pressure) for the creation and monitoring of NHRIs, emphasizes connection to an international network of cooperation.

Brazil, after spending 20 years in parliamentary discussion of a bill, and in response to reiterated charges made in international meetings,<sup>5</sup> is about to approve a law that creates a Brazilian NHRI (*Conselho Nacional de Direitos Humanos* - CNDH/National Council for Human Rights), whose objective is compliance with the Paris Principles.<sup>6</sup> The proposed law does not follow the Iberian models (neither the Spanish *Defensor del Pueblo* or the Portuguese *Provedor*

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<sup>2</sup> Argentina (*Defensoría del Pueblo de la Nación Argentina*), since 1999; Bolívia (*Defensor del Pueblo*), since 1999; Chile (*Instituto Nacional de Derechos Humanos*), since 2012; Colombia (*Defensoría del Pueblo*), since 2001; Costa Rica (*Defensoría de los Habitantes*, since 1999); El Salvador (*Procuraduría para la Defensa de los Derechos Humanos*), since 2006; Ecuador (*Defensor del Pueblo*, since 1999); Guatemala (*Procuraduría de los Derechos Humanos de Guatemala*), de 1999 a 2013 com status “B” e, since 2013, May, with status “A”; México (*Comisión Nacional de los Derechos Humanos*), since 1999; Nicaragua (*Procuraduría para la Defensa de los Derechos Humanos*, since 2006), Panamá (*Defensoría del Pueblo de la República de Panamá*, since 1999); Paraguai (*Defensoría del Pueblo de la República del Paraguay*), since 2003; Peru (*Defensoría del Pueblo*), since 1999; Venezuela (*Defensoría del Pueblo*), since 2002.

<sup>3</sup> Honduras (*Comisionado Nacional de los Derechos Humanos de Honduras*), de 2000 a 2013 with status “A” and, since May 2013, with status “B”.

<sup>4</sup> *Institución Nacional de Derechos Humanos y Defensoría del Pueblo* (INDDHH).

<sup>5</sup> In 20/12/2012, Brazil received eight recommendations from other states to finalize its process of creating its NHRI in compliance with the Paris Principles. (ONU, 2012 a e b).

<sup>6</sup> On March 23, 2014, the Senate was about to approve the final text of the bill (n. 4715/94) and chances are that it should be finally approved in 2014, in the 50<sup>th</sup> anniversary of the CCDPH.

*de Justiça*) and does not share one common feature of Latin American NHRIs (which is not obligatory, according to the Paris Principles): the institutional link to the legislative branch of government. The proposed Brazilian NHRI would be a transformation of a present Council (*Conselho de Defesa dos Direitos da Pessoa Humana* - CDDPH/Council for the defense of human person's rights), which was created by law (4319) on March 16, 1964, two weeks before the military coup, and has lived through an unsteady existence for more than 50 years. In order to comply with the Paris Principles, the proposed Council, although linked to the executive branch, would be composed of 20 persons, 10 from state sectors and 10 from representatives of civil society.<sup>7</sup>

In the next section, the extent to which the peculiar institutional design of the Brazilian Ministério Público (MP) has compensated, until now, for the absence of a Brazilian NHRI will be discussed.

### *1.2. The institutional and political model of the Brazilian Ministério Público and its substantial conformity as NHRI – beyond the Paris Principles*

On the occasion of its new democratic and constitutional order, in 1988 (or in its numerous amendments),<sup>8</sup> Brazil, unlike its Latin American counterparts, did not implement an NHRI in compliance with the Paris Principle, such as the *Defensor del Pueblo* or Human Rights Commissions. Instead, the Brazilian Constitution of 1988 chose to redesign the Ministério Público, providing it with a broad mandate, mission and prerogative similar in many features commonly assigned to NHRIs, although not completely in compliance with the Paris Principles.

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<sup>7</sup> According to the status of the bill on March 25, 2014, the composition of the Council would be as follow: a) Secretary of Human Rights, Republic's Prosecutor General, two Deputies, two Senators, representatives from the Ministry for External Affairs, from the Ministry of Justice, from the Federal Police and from the Federal Public Defender's Office [institution entitled to provide legal assistance for needy persons, not to be confounded with the Latin American *Defensorías del Pueblo*]; representatives from the civil society; one representative of the National Council of Prosecutors General and nine representatives of nationwide civil society organizations, with relevant activities related to human rights protection.

<sup>8</sup> On February the 11th, 2014, the Brazilian Constitution had 77 amendments.

Accordingly, Morlachetti acknowledges that “la Constitución ha otorgado al Ministerio Público funciones que en algunos países tradicionalmente son realizadas por las INDH” (Morlachetti, 2013, 53). For Hoffmann and Bentes, “the MP, in turn, acts as a powerful vanguard of judicial transformation and, in health and education, effectively fulfils the functions of a citizens’ ombudsperson” (Hoffmann e Bentes, 2008, 143).

Certainly, the uniqueness of its institutional design, which does not fit traditional taxonomies, the Brazilian Ministério Público (literally “public ministry”)<sup>9</sup> can no longer be punned a “public mystery” for academics, in Brazil and elsewhere (conf. Arantes 2002; Coslovsky 2011; Hudson 2010; Kerche 2007, 2009; Lopes 2000; McAllister 2008, 2009; Sadek 2003; Silva 2001). It has attracted the attention of a group of political scientists, in the growing subfield of comparative judicial politics, that places the Brazilian MP on the frontier of Law and Politics, between State and society. For Arantes, “the MP, one of the main agents in the judicialization of politics, has made use of its high level of independence by frequently suing politicians and governments in cases that range from administrative impropriety to attempts to force administrators to carry out public policies in the areas of health, education, and so forth” (Arantes, 2005, 248). Sadek considers the Brazilian MP as an instance of what Guillermo O’Donnell calls “horizontal accountability” (Sadek, 2003, 206), and asserts that “from an institutional point of view, changes in the powers and role of the Public Prosecution constitute the most significant reform embodied in the Federal Constitution of 1988; no other institution underwent such a profound reform or expansion of responsibilities.” (Sadek, 2003, 207).

The Brazilian Ministério Público cannot *simply* be understood as a prosecution service, an ombudsman, a branch of the justice system or an independent agency. The Brazilian MP

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<sup>9</sup> English-speaking authors (Hudson 2010; McAllister 2008, 2009; Taylor 2008) have preferred not to translate the term “Ministério Público”. Taylor writes that he uses the term Ministério Público, “rather than the awkward translation Public Ministry, to highlight the distinctive nature of the Brazilian prosecutorial service” (Taylor 2008, 73).

performs many functions that are normally attributed to the aforementioned institutions and agencies, as well as many other functions established in the Brazilian Constitution and subsequent legislation, with potentially profound social and political consequences. It is defined in the Brazilian Constitution promulgated in 1988 after the end of the military dictatorship as 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 rights” (Article 127). Brazilian prosecutors not only perform public-interest litigation (in criminal and civil cases) and challenge the constitutionality of laws, but they are also empowered to ensure that public authorities effectively respect the rights guaranteed by the Constitution (Brazilian Constitution, Article 129, II). Consequently, it can sue the state, its agencies and its authorities to ensure that public policies are implemented (or for failure to oversee the activities of non-state actors) in matters as wide-ranging and politically sensitive as the environment, health, education, security, childcare, assistance for the elderly or disabled, housing and urban issues, consumer and indigenous peoples, etc. Moreover, the Brazilian MP is one of the main institutions responsible for overseeing the fair use of the public purse, due electoral process, the prevention and prosecution of human rights violations, and the external oversight of police activities, *inter alia*.

As a national institution, which operates in a federative republic, both the state MP and the Federal MP have their structure detailed in one single law – law 8625/93 – with general principles that are applicable to the Brazilian MP as a whole, although *each* branch of the *Ministério Público* has its own organic law: a federal one (complementary law n. 75/93) and an organic law for each state MP. This means that federal and states prosecutors work in complimentary (rather than hierarchical) fashion. That is, members of the state MP are not subordinate to their federal colleagues. In fact, no Brazilian prosecutor is subordinate to any

other, or even to the Prosecutor General (*Procurador Geral de Justiça*, on the state level; *Procurador Geral da República*, on the federal level). The institutional mandates of MP members are distributed in accordance with the national principles of “unity”, “indivisibility” and “functional independence” (Article 127, paragraph one of the Constitution). In a figurative representation once employed in a conference by a political scientist who is an expert on the Brazilian MP, it was compared to an “army entirely made of generals.” This certainly brings special challenges for an integrated institutional performance, and is one of the reasons why the Brazilian MP has invested so much into strategic planning methodologies (see Hudson, 2010, 300).

The Republic’s Prosecutor General has special prerogatives and duties, notably legal standing (along with certain other actors outside MP) to file abstract judicial reviews at the federal level, although, *theoretically*, any case, state or federal, can reach the apex of the judicial system, either through appeal or by the use a vast array of constitutional and legal mechanisms, within a double (and complex) system of judicial review, on abstract or concrete level, many of them didactically described by Kapiszwesky (2011a).

Brazilian prosecutors are selected through very competitive entrance examinations and are granted life tenure after a two-year probationary period; their constitutional guarantees and remuneration equal those afforded to judges. Moreover, all positions in the Brazilian MP, at any level (including the Prosecutor General)<sup>10</sup>, are occupied by career prosecutors at the federal and state levels. That is, unlike many countries, the Prosecutors General, although chosen by the executive branch (in the case of state Prosecutors General, from a short list determined by internal election, in which every Prosecutor is entitled to vote), is necessarily chosen from the permanent staff of prosecutors.

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<sup>10</sup>As in Taylor (2008), I prefer to use “Prosecutor General” instead of “Attorney General” because I believe that the direct association of the Brazilian MP and its members to their possible American counterparts can be misleading.

As far as accountability is concerned, the Brazilian *Ministério Público* (as all public institutions) is subject to financial control by the Audit Court (administrative Court, independent but functionally linked to the legislative branch) and is overseen, in administrative and disciplinary matters, by the National Council of *Ministério Público* (CNMP). CNMP is a collegiate composed of 14 members, including representatives of the various branches of MP, plus representatives from the High Courts, lawyers indicated by the Bar, citizens indicated by the House of Representatives and the Senate. With the exception of the Republic's Prosecutor General, native member of the Council and its president, all the other members have their indication approved by the majority of the Senate, for a two year tenure. Created in 2004, with the constitutional amendment n. 45 (that also created the National Council of Justice– CNJ, related to the judiciary), CNMP cannot interfere on the autonomy and independence of MP members and, apart from its administrative and disciplinary overseeing roles, helps to the planning and integration of MP nationwide.

### *1.3. The gradual institutional redesign of Latin American Ministerios Públicos – beyond the criminal procedures and closer towards the NHRIs*

It is important to mention (something that many analysts ignore) that, regardless their name, institutions with a normative and political profile somewhat similar to the Brazilian *Ministério Público* (that, since 1988, has widened its mandate far beyond the traditional functions of prosecution services in the penal process), have been built, little by little, in several Latin American countries, generally through constitutional reforms.

When the Argentine Constitution was reformed in 1994, it not only consolidated the *Defensor del Pueblo* (Article 86 of the Argentine Constitution) – an institution fully accredited according to the Paris Principles – but also constructed a new institutional design for the Argentine *Ministerio Público*, giving it two faces: the *Ministerio Público Fiscal* (with mandate and mission that went beyond the traditional prosecutorial functions in criminal cases) and the

*Ministerio Público de la Defensa* (with mandate and mission that surpassed the traditional role of public defenders). Both faces are regarded as independent from the government and with complimentary institutional support to the protection and promotion of human rights.

The Colombian Constitution of 1991 consolidated a peculiar institutional model in which the *Defensor del Pueblo* (the leader of an NHRI also accredited as one with compliance with the Paris Principles), although appointed by the legislative branch from a short list proposed by the executive branch, is part of the *Ministerio Público* (Article 118 of the Colombian Constitution) and carries out its functions “bajo la suprema dirección del Procurador General de la Nación” (“under the ultimate control of the National Prosecutor General” under Article 281 of the Colombian Constitution). This institutional design, at first glance, seems to impair the independence and autonomy of the *Defensor del Pueblo*. However, on Iráizoz’ account, which draws from two other analyses, the peculiar institutional design of the Colombian *Defensor del Pueblo*, has not really resulted, in practice, in any hierarchical or functional subordination of the *Defensoría del Pueblo*, which has maintained its administrative and financial autonomy and independence (Iráizoz, 2012, 65).

In the Salvadorean Constitution (Article 191), the *Ministerio Público* is integrated into the *Fiscalía General de la República* (with classical functions of prosecutorial services), by the *Procuraduría General de la República* (with functions that, roughly, are similar to those attributed to the Argentinean *Ministerio Público de la Defensa*) and by the *Procuraduría para la Defensa de los Derechos Humanos*, an NHRI accredited with compliance of the Paris Principles. Therefore, similarly to the Colombian Constitutional model, the Salvadorean NHRI is also part of the *Ministerio Público*.

In the Venezuelan Constitutional model of 1999 (Article 273), the *Ministerio Público* is linked to a fourth power (*Poder Ciudadano*), alongside the *Defensoría del Pueblo* (an NHRI

accredited in accordance with the *Paris Principles*), and the *Controlador General de la República*.

In the Bolivian Constitution of 2009, the *Defensoría del Pueblo* (an NHRI accredited as in compliance with the Paris Principles), is situated, alongside the *Ministerio Público*, as an institution entitled to “defend society”, while other institutions are entitled to “control the state” (*Controladoría General*) and to “defend the state” (*Procuraduría General*). In a constitutional model that somewhat resembles the Venezuelan one, the “control functions” are listed in chapters apart from the legislative, executive, judicial and electoral branches of the state, in order to symbolize their independence from those branches.

In the Guatemalan Constitution, although the *Ministerio Público* possesses the classical institutional profile of the prosecutorial services (almost entirely dedicated to intervene in criminal procedure – Article 251 of the Constitution), it is the *Procuraduría para la Defensa de los Derechos Humanos*, an NHRI accredited as complying with the Paris Principles which, far beyond the traditional role of Human Rights Ombudsman, has broad standing to protect and promote human rights (Article 275 of the Constitution). Hence, despite the nomenclature, it is the *Procuraduría para la Defensa de los Derechos Humanos* – not the Guatemalan *Ministerio Público* – that is the institution more in tune with the evolving profile of *Ministérios Públicos* in Latin America.

Of the 17 Latin American countries here considered<sup>11</sup>, only in the Chilean Constitution could one reach the conclusion that *Ministerio Público*’s mandate seems exclusively dedicated to the traditional roles of prosecutorial services in criminal procedures. As a side note, it is important to mention that the Chilean *Ministerio Público* had been abolished in 1927, and was

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<sup>11</sup> Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, El Salvador, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, Venezuela.

only institutionally reestablished in 1997 (seventy years later), with the constitutional reform of 1997 (Duce, 2011).

In the Constitutions of the remaining countries, although one cannot expect to find, at least explicitly, as broad a mandate for the MP (as in the Brazilian and Argentinean Constitutions), they at least contemplate generic clauses, such as “to defend the society’s best interests.” In some cases, such as Ecuador (Article 194 of the Constitution) and Mexico (Article 102-A of the Constitution), although the texts expressly attribute to the MP traditional prosecutorial functions in the penal process, the wording contemplates generic, complementary clauses, such as “y cumplirá con las demás atribuciones establecidas en la ley” and “intevendrá en todos los asuntos que la ley determine”, which potentially allow broader mandates for the MPs to be specified by organic law.

The Uruguayan Constitution does not dedicate a chapter or a section to its MP (the only mention is when referring to positions their members can occupy in the judiciary) and, regulated only by the decree-law 15365/1982, it is surprisingly linked to the Ministry of Education and Culture where their members can fulfill consultancy and counseling functions to the executive and the judiciary (Article 1 of the decree-law 15365/1982). Nonetheless, there has been parliamentary discussion about a new institutional design for the Uruguayan MP (El País, 2013).

Exceptions apart, we have witnessed not only the expansion of Latin American NHRIs accredited as in compliance with the Paris Principle, but also Latin American Constitutions framed in a way to leave margin for the widening of mandates for MPs or, in some cases (Colombia and El Salvador), with NHRIs placed under the structure of the *Ministerio Público* itself. Besides, nearly all Latin American MPs have clear constitutional status (exceptions are Honduras, Uruguay and Costa Rica, which are solely regulated by their organic laws), all of them with clauses stipulating independence and/or autonomy and stability to the mandates of the

Prosecutors General, even if, in some cases, they remain hierarchically subjugated or linked to the judiciary or the executive branch.

## **2. Justice, politics and human rights beyond the judiciary and its High Courts: the distinctive nature of the Brazilian *Ministério Público* as a complicating factor in current accounts of “judicialization of politics”**

Calling attention to the importance of the Brazilian *Ministério Público* (and gradually, of other Latin American MPs) as an important actor in the processes of “judicialization of politics” – which is indissociably linked to the protection and promotion of human rights, notably the economic and social ones – serves to widen the theoretical horizons of Political Science and Constitutional Law, since analyses are commonly centered on the role of the judiciary and on the decisions of its high courts. In this sense, a useful academic exercise is to gauge the institutional design of the Brazilian MP in the protection and promotion of human rights, aimed at modifying or implementing public policies, in the light of a theoretical reference that uses the specific reality of the Brazilian judicial system as an analytical *corpus* in order to reach generalizable scientific findings. From there comes the idea – to be developed in this section – of considering Taylor’s *Judging Policy – Courts and Policy reform in Democratic Brazil* (2008), with regards strategic remedies used in the judicialization of politics by Brazilian courts, testing some of those findings in the light of the distinctive institutional design and operational dynamics of the Brazilian MP.

First, the hybrid Brazilian model of constitutional control (for action or omission) allows both the abstract, concentrated control exercised by the STF and the diffuse, concrete control exercised by any federal or state court. Hence, public policies – enacted (or not) at the federal, state or municipal levels of the executive branches – can be addressed by *any* federal or state court by provocation of *any* federal or state prosecutor. These cases can eventually ascend to the STF in a bottom-to-top constitutional control, of which Kapiszewski is well aware (2011a.,

loc. 4633). Therefore, abstract judicial review before the highest Brazilian court represents only *one* arena (actually comprising a minority of the total instances, despite its high-profile status) for judicial review of public policies.

In Brazil, myriad policy matters brought before the courts are addressed in multiple and diverse arenas by lower courts in public civil suits (*ações civis públicas* - ACPs), which are extensively used by the Brazilian MP (Arantes, 2002; Kerche, 2007; Mueller, 2010; Hoffmann and Bentes, 2008), although this recourse is also open to other “players,” including non-governmental organizations. Thus, despite Taylor’s specific scope (but drawing from his analysis of the Brazilian judicial system) in analytical frameworks that might be generalized to address starting point dynamics of the “judicial game” related to public policy discussions, the central role of BMP-like institutions in “activating” and “playing” this game in entry and appellate jurisdictions should not be overlooked.

Taylor focused his research on the use of “ADINs,” a legal instrument for abstract judicial review that, within the Brazilian Ministério Público, only a single prosecutor (the Republic’s prosecutor general) can initiate, even though the Prosecutors General at the state level can submit any given hypothetical abstract of unconstitutionality to the discretionary consideration of the Republic’s Prosecutor General. Therefore, if Taylor’s analysis had considered the extensive use of “ACPs” by thousands of BMP members nationwide, or at least the ACPs that reached the highest courts (STF and STJ), he could have incorporated into his research other insightful analytical premises with respect to court activation, especially when related to social, political and economic rights.

The Brazilian High Courts (STF and STJ) have assumed a more daring position in backing ACPs filed by the BMP that aim to oblige the executive branch of government to

implement social rights in areas as diverse as security,<sup>12</sup> public health,<sup>13</sup> education<sup>14</sup>, housing<sup>15</sup>, urbanism<sup>16</sup>, environment<sup>17</sup>, *inter alia*.<sup>18</sup> For instance, in a leading case<sup>19</sup> concurrently filed by both the state MP of Pernambuco and the federal MP (both state and federal issues were at stake), STF Justices sat *en banc* to reject the writ pleaded by the state of Pernambuco to suspend a provisional decision of a federal court (in the city of Petrolina, Pernambuco) ordering the prompt regularization of medical services in a local public hospital. Justice Gilmar Mendes stated that, due to the great number of writs of suspension filed by the executive branch of various governments using complex arguments concerning possible damage to the economy and

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<sup>12</sup> STF – Agravo Regimental no Recurso Extraordinário n. 367432 – State Ministério Público of Paraná v. State of Paraná. 20/04/2010.

<sup>13</sup> STF – Recurso Extraordinário n. 581352 – State Ministério Público of Amazonas v. Estado do Amazonas. 29/10/2013; STF – Agravo Regimental no Agravo de Instrumento n. 734487 – State Ministério Público of Paraná v. State of Paraná. 03/08/2010; STF – Agravo Regimental na Suspensão de Liminar n. 47 – State Ministério Público of Pernambuco and Federal Ministério Público v. Municipality of Petrolina and the Union. 17/03/2010.; STJ – Recurso Especial n. 1041197-MS. State Ministério Público of Mato Grosso do Sul v. State of Mato Grosso do Sul. 25/09/2009; STJ – Recurso Especial. N. 783185-RJ. State Ministério Público of Rio de Janeiro v. State of Rio de Janeiro. 24/04/2007 STJ – Recurso Especial n. 577836-SC. State Ministério Público of Santa Catarina v. State of Santa Catarina. 21/10/2010.

<sup>14</sup> STF – Agravo Regimental no Agravo de Instrumento n. 809018 – Estado de Santa Catarina v. State Ministério Público of Santa Catarina. 25/09/2012; STF – Agravo Regimental no Recurso Extraordinário n. 603575- State Ministério Público of Santa Catarina v. Estado de Santa Catarina. 20/04/2010; STF - Agravo Regimental no Recurso Extraordinário n. 594018 – State Ministério Público do Rio de Janeiro v. Estado do Rio de Janeiro. 23/06/2009; Recurso Especial n. 510598/SP – State Ministério Público of São Paulo v. Municipality of Santo André. 15/03/2007; STJ – Recurso Especial n. 753.565/MSP – Ministério Público do Estado do Mato Grosso do Sul v. Estado do Mato Grosso do Sul. 27/03/2007; STJ – Embargos de Divergência em Recurso Especial n. 485.969-SP. State Ministério Público of São Paulo v. Municipality of São Bernardo do Campo. 23/08/August 23/2006; STF – Agravo Regimental no Agravo de Instrumento n. 664053 – State Ministério Público of Rondônia v. Estado de Rondônia. 03/03/2009; STJ – Recurso Especial n. 736524-SP. State Ministério Público of São Paulo v. Municipality of São Paulo. 21/03/2006; STJ – Recurso Especial n. 718203 SP. State Ministério Público of São Paulo v. Municipality of Santo André. 06/12/2005.

<sup>15</sup> STF – Agravo Regimental no Recurso Extraordinário n. 634643 – Municipality of Rio de Janeiro v. State Ministério Público of Rio de Janeiro. 26/06/2012.

<sup>16</sup> STJ – Recurso Especial n. 1156209. State Ministério Público of São Paulo v. Herivelto Maraia and Sonia Maria Furlan. 18/08/2010.

<sup>17</sup> STF – Agravo Regimental no Recurso Extraordinário n. 417408 – Companhia Estadual de Águas e Esgotos – CEDAE v. State Ministério Público of Rio de Janeiro. 20/03/2012; STF – Agravo Regimental no Agravo de Instrumento n. 593676 – Municipality of Porto Alegre v. Ministério Público do Estado do Rio Grande do Sul. 28/02/2012; STF – Agravo de Instrumento n. 708667. Municipality of São Paulo v. State Ministério Público of São Paulo. 28/02/2012.

<sup>18</sup> For a more comprehensive analysis of the STF caseload on fundamental rights, see Vilhena (2006) and Hoffmann and Bentes (2008).

<sup>19</sup> STF – Agravo Regimental na Suspensão de Liminar n. 47 – State Ministério Público of Pernambuco and Federal Ministério Público v. Municipality of Petrolina and Union. March 17, 2010.

to public health policies, he would permit a public hearing on public health. In that public hearing, which took place at the High Court (STF), members of the judiciary; the MP; the Public Defender's Office; the Union, State and Municipal Attorney's Office; various public health authorities; academics; and leaders of entities and organizations of civil society had the opportunity to freely express their views and opinions about the "judicialization of public health" (a highly controversial issue, as attested in Young and Lamaitre's 2013 account) so as to support or legitimate the Court's decision, which happened to be favorable to the position held by the MP. In fact, Justice Mendes' scholarly opinion summarized the main constitutional debate with respect to the judicialization of politics.

It is appropriate to mention here Veríssimo (2008), who describes the Brazilian Supreme Court's posture as "judicial activism [in] the Brazilian way," noting that the peculiar institutional culture of the Brazilian judiciary has made the STF more consistently "abide" by the precedents of the lower courts (rather than the contrary), despite recent constitutional reforms aiming to achieve the opposite. However, Veríssimo does not consider this approach to be necessarily bad (no matter how peculiar it may be within comparative judicial politics), at least not as an initial step before the final consolidation of the STF's understanding (Veríssimo, 2008: 427).

Thus, a researcher of comparative judicial politics interested in investigating how the judiciary of a given country is politically engaged in ensuring social rights would gain valuable insights and better analytical amplitude of his/her findings if s/he used a bidirectional approach, including not only top-down politicization but also bottom-up politicization. In the Brazilian case, a bottom-up analysis of the High Courts as "social rights adjudicators" reveals the prominence of the Brazilian MP as a truly national, culturally gregarious institution and as an important catalyst of the decentralized politicization of the judiciary.

A second, but no less important, consideration regarding Taylor's model lies in the fact that the Brazilian MP does not always *need* or *wish* to activate the judicial system to challenge or enforce public policies. Constitution and subsequent legislation has granted the BMP important prerogatives to settle extrajudicial agreements (*termos de ajustamento de conduta* – TACs or “conduct adjustment agreements”), allowing the perpetrator (both state and non-state actors) in vast areas of collective and diffuse interest (economic and cultural rights) the possibility of immediate or conditional compliance, diverting the case from judicial contestation. In fact, through TACs, the BMP can reach compliance faster (in most cases) than when judicial recourse is activated by the Brazilian MP. That is why the Brazilian MP prefers successful TACs to normal ACPs.

Conciliatory mechanisms available to the BMP also provide the rights violator (including governmental authorities) with a cost-benefit analysis comparing immediate compliance to lengthy and expensive (in both economic and political terms) judicial litigation. Especially when the perpetrator is a politician, a pending judicial case can have disastrous effects for the defendant, which leads him/her to favor immediate compliance. As Hoffman and Bentes writes, “there are innumerable schemes in which the MP act *de facto* as a partner of public authorities, and the latter tend to see it as undue intervention, but frequently they still prefer to comply with the MP rather than face court proceedings” (2008, p 135) .

Public hearings with social groups (organized or not) are also common practice among Brazilian prosecutors. They are either for general purpose, as an opportunity to hear social demands, or focus on specific themes of public interest, normally involving the implementation of public policies. For these audiences public authorities are invited to an open discussion of alternatives (and difficulties) for addressing the problem and some agreement commonly results

from this open discussion. For more proficiency in monitoring the implementation of public policies, MP has made efforts to improve the measurement of socioeconomic indicators.

Therefore, the Brazilian MP can influence politics (especially with regards themes related to social and economic rights) even when it does not activate the judiciary. Consequently, scrutinizing case filings only tells part of the story in terms of the politicization of the judiciary or the judicialization of politics. The Brazilian MP quite often “plays” (and efficiently reaches many of its goals) in the prosecutorial arena rather than in the overcrowded, time-consuming and costly judicial arena.

These considerations on the institutional and cultural framework of the Brazilian MP bring out the constitutionally designed relationship between the MP and society. The MP, entrusted and empowered by society, must protect society’s best interest so that society can, in turn, support and defend “its” MP. Otherwise, the *de facto* power, autonomy and independence of the MP cannot endure, especially given the constant backlashes from political and economic actors attacks frequently meant to weaken the Brazilian MP’s power to act.

In this line of argument, it is worth mentioning a recent episode involving a constitutional amendment proposal (“PEC 37”) which would have removed investigative powers from the MP in criminal cases, entitling only the police to carry out such activity. When it seemed the amendment possessed real chances of being passed by the Congress, the Brazilian MP, with mass media support, developed several campaigns, clarifying the proposal to the general population, promoting debates, and seeking the support of social movements involved in various areas in which they had partnered with the MP. With the widening of the debate about “PEC 37”, its rejection became one of the demands in the series of massive demonstrations that swept across Brazil in June 2013. Fearful of the proposed amendment’s unpopularity (as a result of the greater understanding of it in the general population), the Congress rejected the proposal

for 430 votes against nine. The following day a headline in one of the most important newspapers of the country read: “After popular pressure, PEC 37 is struck down in Congress” (Jornal Estado de São Paulo, 2013).

This necessary alignment between MP and society – crucial to the very survival of MP’s radical institutional design – has led some authors to identify the Brazilian MP as an example of “associative democracy” (Lopes (2000), as a “political law enforcer” (Arantes, 2002), as a locus of “relational regulation” (Coslovsky, 2011) or as an example of “democratic professionalism” (Hudson, 2010). As Arantes remarks, “although it is a state body, not subject to political or electoral control, the MP considers itself a legitimate representative of society and has become known for its ‘political voluntarism’ (Arantes, 2002), leading the defense of diffuse and collective rights, and fighting political corruption” (Arantes, 2005, 231)

Of course, the actions and activities of the Brazilian MP are not immune to criticism. It has been especially criticized for a less proactive performance in guaranteeing defendants’ rights in criminal procedures, in defending the human rights of people arrested, in addressing systematic police abuse – topics in which the Brazilian MP (despite its efforts) has a long road ahead, for in these areas its achievements are much more modest than its record for the protection and defense of social and economic rights for the general population. Kapiszewski summarizes the criticism commonly made of the MP, adding that “there is not full consensus on how effective the MP is,” (Kapiszewski, 2011a, pos. 5272), and pointing out, as an example, the different visions of Arantes (2002) and Kerche (2007).

Partnerships of MPs with other institutions entitled to promote and defend human rights (primarily the Public Defender Office - *Defensoria Pública*)<sup>20</sup> are also essential. In fact, Public Defenders have an institutional mission that make them ideal counterparts to the hybrid role of

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<sup>20</sup> Institution primarily entitled to provide legal assistance for the needy, not to be confounded with the Latin American “Defensorías del Pueblo”, ombudsmen of human rights.

MP in the penal process, eventually filling gaps of the institutional action of MP in protecting human rights in issues related to crime and punishment. That is one of the merits of the Argentinean constitutional reform that established a structural alignment between Prosecutors and Public Defenders, as discussed earlier. In Brazil, where the institutional design was especially generous towards the MP, the Public Defenders, in a questionable strategy for institutional strengthening, have been seduced by the continued social prestige of the MP in protecting collective rights. As a result, they obtained (after a successful political lobbying) the approval of a new organic law (complimentary law n. 132/2009), broadening their mandate to promote and protect social rights as well, creating an overlapping position in relation to the MP. However, in a country with such great demand of access to justice for the poor, especially once the criminal system is entered, it might be considered a luxury to channel resources and energies of the Defensoria Pública to “dispute” the defense and promotion of social rights with the Ministério Público. It would seem more reasonable that both institutions worked in complimentary fashion, with the *Defensoria Pública* more concerned with aspects of protection and promotion of human rights where the MP has been *less* efficient (not the opposite).

### **3. The best of two worlds: the crucial importance of a strategic alignment among NHRIs and MPs in Latin America**

Examining the innovative features of the Brazilian MP (as if it were a differentiated NHRI), the faint but continued tendency of Latin American MPs to expand the scope of their mandates, and the necessary interaction of the MP with civil society and other institutional actors to protect and promote human rights, not only affords valuable *insights* to analysts of comparative judicial politics, constitutional law, law and society, but can also inspire action and strategies for human rights activists. Perhaps the most important aspect is to acknowledge that, whereas NHRIs in compliance with the Paris Principles have made extensive (and successful) use of the “naming and shaming” strategies (de Beco, 2013, 17), particularly suited for the

protection and promotion of civil rights, with the growing acceptance of the *justiciability* of economic, social and cultural rights, the strengthening of independent institutions, ones particularly suited for operating *within the justice system*, has become especially opportune.

In line with this vision, the UN's Committee on Economic, Social and Cultural rights, at its 51st meeting, which took place on 01/12/98, issued two general comments to guide the implementation of the International Covenant on Economic, Social and Cultural Rights that are essential to the discussion in this paper of the complimentary mission of NHRI and MPs in Latin America.

General Comment n. 10 ("The role of NHRIs in the protection of economic, social and cultural rights"), after taking notice of the low priority that NHRIs traditionally gave to the protection and promotion of economic, social and cultural rights, listed seven types of actions for raising awareness of those rights, "both within the population at large and among particular groups such as the public service, the judiciary, the private sector and the labour movement" (UN, 1998b, 2).

General Comment n. 9 ("The domestic application of the Covenant") reaffirmed that there is no economic, social and cultural right listed in the covenant that cannot be considered at least minimally *justiciable* and that, although the right to an effective legal remedy cannot be interpreted as the obligatory judicialization of the questions related to economic, social and cultural rights, *court action* should be taken whenever necessary (ONU, 1998 a, 4). To support this guideline, the document cites the principle of good faith inherent in the acceptance of every treaty (Article 27 of the Vienna Convention of the Law of Treaties) and Article 8 of the Universal Declaration of Human Rights, where it is stated that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

Therefore, if the protection and promotion of human rights rely, more and more, *not only on political action* (that traditional NHRIs have performed competently), *but also on the judicial apparatus*, at different levels, with different legal remedies, the role of institutions such as the Latin American *Ministerios Públicos*, with their institutional profile of independence and their broader and broader mandates, appears crucial. This reinforces the decisive importance of reciprocal cooperation among independent state institutions and, although this cooperation can (and must) be done regardless of the Paris Principles, it is time to reopen the discussion about the Paris Principles, so that they can better define “quasi-jurisdictional” NHRIs, taking in consideration new, important institutional designs that have emerged in the late decades that did not exist (or were in plain operation) at the time the Principles were enacted. Although these neo “quasi-jurisdictional” NHRI, due to its institutional profile (and as a safeguard of their very independence), cannot fully comply with all the requirements of the Paris Principles (notably a composition with “pluralist representation of the social forces”), they serve as important bridges between the state and society, in the local protection and promotion of human rights. Notwithstanding it is also opportune to discuss the legitimacy of this claim for better visibility and qualification of neo “quasi-jurisdictional” NHRIs, such as the emergent “neo” MP in Latin America, considering the reality of the judicial systems in Latin America.

It is undeniable that significant literature on Latin American judicial systems already exists. On the one hand, we find literature emphasizing the renewed role that post-transitional Latin American judicial systems have assumed, with much more concern over the protection and promotion of individual and collective fundamental rights. Here the Colombian and Costa Rican Constitutional Courts are frequently cited (e.g. Yepes, 2007, Wilson, 2011). On the other hand, there are works that emphasize the lethargy, inefficiency and time-consuming processes to deal with chronic issues such as police brutality, corruption or prison conditions (see, for example,

Brinks, 2008, about Argentina, Brazil and Uruguay). Other research explores the political compromise of Latin American judicial systems (e.g. Rodríguez-Raga, 2011, about Colombia; Brinks, 2011, Kapiszewski 2011a, 2011b, about Brazil; Hilbink, 2007, about Chile). Additionally, we have less controversial (fact-based) accounts not on how the Latin American judicial system operates, but rather on the political context in which it operates. Helmke e Staton (2011) provide a list of political interventions in the regular functions of Latin American judiciary: Justices being coopted by Menem, the dissolution of the Peruvian Supreme Court by Fujimori, the impeachment of judges in Ecuador under President Gutierrez, Hugo Chavez' intervention on the Venezuelan Supreme Court, Evo Morale's intervention in the Bolivian Supreme Court (Helmke and Staton, 2011, pos. 8606). In the words of Helmke and Ríos-Figueroa, "never before has there been so much scholarly interest in how Latin America's courts function or why they fail to function" (Helmke and Ríos-Figueroa, 2011, 198).

In this context, of inconsistent performance of the Latin American justice systems and great political challenges to secure *de facto* independence to the Latin American justice systems, building an argument (as we have done here) claiming greater recognition of the growing prominence of institutions such as the *Ministério Público* (in its Brazilian version or in its gradual Latin American redesign) in the protection and promotion of human rights, may seem naïve. One could argue that the problems and challenges of the institutions which operate within the justice system would reinforce the need to strengthen traditional NHRI which complies with the Paris Principles, instead of enlarging the concept of NHRI to encompass new institutional design of "quasi jurisdictional" NHRI (what we have called neo NHRI), since the former can develop, more freely, political actions which are necessary not only to promote and protect human rights, but also to secure the regular functioning of the justice system.

However, the challenges that accredited Latin American NHRIs have to face are also significant, and result, ironically, as a side effect of their main force (their freedom for political action) and of their institutional design that link them either to the legislative or to the executive branch, despite their *de jure* independence. Since we lack the space here to review the comprehensive, critical account of Cardenas (2014) or Iráizoz (2012), a brief summary of Pegram's main criticisms (2012) will suffice: a) ordinary financial restrictions to NHRIs: with the exception of the Mexican Commission of Human Rights, the resources dedicated to Latin American *Defensorías* or *Procuradurías del Pueblo*, in general, are not sufficient for the straightforward fulfillment of their mandates (Pegram, 2012, 214); b) political manipulation of the appointments of *Defensores del Pueblo*, with political actors trying to change the institutional profile of the NHRIs (Pegram, 2012, 217); c) special vulnerability of *Defensorías*, when they face politically sensitive issues, such as elections and corruption (Pegram, 2012, 221); d) conflicts (rather than cooperation) with other agencies of horizontal control, when there are overlapping attributions (Pegram, 2012, 224); e) eclipsing of legitimate actions of representatives of civil society, including sources of external financing aid. (Pegram, 2012, 226); f) crucial dependency of media partnerships, although media's political and economic interests not always coincide with the institutional objectives of the NHRIs (Pegram, 2012, 227); g) strategies of political action, adopted by the NHRIs subject to more intense criticism, by NGOs (Pegram, 2012, 225).

In sum, as Pegram writes, despite constitutional or legal safeguards, when NHRIs are created, "the evidence suggests that formal design principles provide little protection against interference when confronted by entrenched and adverse informal norms and practices" (Pegram, 2012, 237). Accordingly, for Cardenas (2012, 34), empirical evidence suggest that "numerous states, especially those subject to human rights pressures or poor human rights records, have

created NHRIs largely to appease powerful critics”, although Cadernas observes that quite frequently, even in adverse conditions, related to unforeseen or unexpected historical circumstances, some NHRIs manage to revert political expectations of inaction or compromise. In this line of argument, Pegram cites cases of *Defensores* who, surprisingly, do not play the role or follow the script written for them by the political parties that promoted them (Pegram, 2012, 222).

As they greatly rely on the individual merits of its leaders (the *Defensores*), for better or for worse, Pegram observes that “political vocation is not necessarily bad for the *Defensoría*; rather it is the appointment of partisan or incompetent individuals that poses the greatest threat.” (Pegram, 2012, 223). More worrying, according to Cardenas, is the creation of an NHRI at a very premature stage, when the other institutions that could be partners of the NHRI have not overcome the crucial challenges of the transitional period or, even if those challenges have been met, when there is a too large gap between the expectations raised and the real capacities of the NHRI to fulfill its expected role, “perpetuating the view that human rights belong purely to the realm of rhetoric” (Cardenas, 2012, 48).

Therefore, if strengths, weaknesses, challenges and opportunities can be identified both in traditional NHRIs and in what we have been called “neo NHRIs”, quasi-judicial institutions with a design similar to the Brazilian MP (and the variants that have been developed in Latin American, as the Argentinean MP), both types of NHRIs must consolidate a strong strategic alignment. This alignment would represent the “best of two worlds” in terms of national protection and promotion of human rights. After all, unlike traditional NHRIs, where energies are mostly channeled to the *political accountability* of state actions (not primarily for legal action, but potentially necessary), neo NHRIs channel their forces to the *legal accountability* of state actions (not primarily for political action, but eventually necessary). Joining specialized

legal action (and ease of use in the judicial arena) with specialized political action (with a diversity of tools neo NHRIs are normally not entitled to use) can be decisive in the effective promotion and protection of human rights.

An eloquent example of this strategic partnership between neo NHRIs (such as the Brazilian MP) and civil society (which can be represented by the pluralist requirement of the Paris Principles) is cited by Hudson (2011), when she recalls the fact that Brazilian prosecutors, jointly with social movements in the city of Londrina, Paraná, were awarded the Integrity Awards 2001, for their mutual efforts to fight against corruption involving the mayor of the mentioned city. Hudson observes that Transparency International, “in their report on Brazil’s ‘integrity system’ gave the Ministério the only wholly positive assessment among all the major institutions of government and civil society (Hensler 2005)” (Hudson, 2010, 293). The headline announcing the award on the site of Transparency International reads “The public prosecutor’s office and the people of the city of Londrina – Paraná”, with the following summary:

The prosecutors sought the help of Londrina's civil society organizations. As the number of investigations and support from the community grew, the Movement for the Moralization of Londrina's Public Administration was formed. A coalition of civil society organizations, numbering 80 at the height of the campaign, began holding weekly meetings to support the investigations and put pressure on the administration. Never before had so many disparate organizations rallied around a common cause. (Transparency International, 2001)

With this concrete, internationally acknowledged example of a successful intervention by the Brazilian Ministério Público, working together with civil society to fight corruption in a major city in the south of the country (corruption which takes resources away from the promotion and protection of human economic, social and cultural rights), we have sufficiently demonstrated the potential of the new institutional design of Latin American MP, the strengths of their alignment with civil society and other independent agencies, and the case for an expansion of the concept of NHRI (neo NHRIs) far beyond the Paris Principles.

## Conclusion

When we call attention to the innovative institutional design that has been slowly emerging in Latin America through institutions whose requirements of autonomy, independence and legitimacy to protect and promote fundamental human rights (individual and collective ones) could justify a widened concept of NHRI, we do not proclaim, pretentiously, that the Brazilian Ministério Público should be considered a “model” to be prescribed to other nations, although Theodore Lowi does tell us that “each article and book can be a story of its own beloved country.” The importance lies in emphasizing that what we have been calling “neo NHRIs” share with traditionally Paris Principle accredited NHRIs the idea of “an imagined space somewhere between the state and civil society; they cooperate with and contribute to the efforts of both government and civil society, yet they are to remain wholly independent of government and other actors” (Mertus, 2009, 3).

Therefore, these neo NHRIs should be studied further for their ingenious capabilities using power to counter power in an intermediate space between the traditional notions of “horizontal accountability” and “vertical accountability” (as in O’Donnell, 2003), of “societal accountability” (as in Smulovitz e Peruzzotti, 2003) or more radical concepts, as with Santos’ “cosmopolitan law,” that involves “both state official law and non-state (or quasi-non-state), unofficial (or quasi-unofficial) law played out in forms of confrontational or complementary legal pluralities and interlegalities” (Santos, 2005, 337).

“Neo-INDHs,” with their institutional design similar to the Brazilian Ministério Público, *almost* fit the more dynamic, fluid concept of “diagonal accountability”, since they use traditional mechanisms of “horizontal accountability” to support dimensions of “vertical” and “social” accountability. We wrote “almost” due to inherent limitations of neo NHRIs such as the

Brazilian MP to completely satisfy the concept of “diagonal accountability”<sup>21</sup> as identified in the example of participatory budget in Porto Alegre, cited by Santos (2005) and Ackerman (2004).

Quasi-judicial NHRIs as the Brazilian MP, though open to democratic pluralism, has lesser discretion and interaction with political actors than public officials from the executive or legislative. In the complex institutional architecture of the Brazilian MP (the necessarily long descriptive section above gave an idea of this complexity), while requiring maximum interaction with society (a theme developed throughout this paper), also requires (unlike political actors from the executive and legislative branch) a reasonable degree of independence in relation to pressures of civil society itself, with whom they must interact, intensely, but not being uncritically “driven” by it. But this is a qualified reflection to be treated in another paper.

Regardless, using state actors to confront the very state in issues of social, economic and cultural relevance, with the inspiration and partnership of the civil society, is something to which academics of Law and Society, constitutionalists, political scientists should dedicate more time (Arantes, 2002, is an exception) as it represents a truly innovative and fruitful topic – for action/reflection, either in Law or in Politics, either by academics or by activists, and is of crucial importance in the local implementation of an international system built to protect and promote human rights.

Last but not least, when highlighting the importance of a strategic alignment among traditional NHRIs (the ones which comply with the Paris Principles) and neo NHRIs (quasi-judicial NHRIs, such as the Brazilian Ministério Público, which do not comply with the Paris Principles), we emphasized that the protection and promotion of human rights depend not only on *political actions* of civil society agents, but also on *legal actions* (and vice-versa). This

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<sup>21</sup> Ackerman, drawing from Goetz e Jenkins (2001) writes that “in addition to pressuring from the outside and reinforcing existing control mechanisms within the state, civil society actors can participate directly in the government’s own institutions of horizontal accountability” (Ackerman, 2005)

brings us back to the beginning of this paper, because it echoes to another timely article of Owen Fiss, published in the Harvard Law Review 27 years ago:

In another world things might be different, but in this one, we will need the state. In eschewing the tired and familiar presumption against the state, we risk circularity, and a number of other dangers, but only to save our democracy. We turn to the state because it is the most public of all our institutions and because only it has the power we need to resist the pressures of the market and thus to enlarge and invigorate our politics.” (Fiss, 1987, 794).

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