

The Resolution of Land-Use Conflicts in Sao Paulo

Salo Coslovsky

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Abstract

São Paulo, Brazil, is a densely populated, globally connected urban center whose rapid growth has been associated with an increasing number of land-use conflicts. In this paper, I use interviews and ethnographic observations to examine the legal processes through which these conflicts are resolved. While mainstream analysts conceive of the law as a technology, public litigation organizations as cohesive bureaucracies, and the state apparatus as separate from society, I find that the law acquires a specific meaning only when enforced by those officials who operate at the front lines of public service. Crucially, their professional behavior is not formulaic. This is so because law-enforcement organizations are not bureaucracies but rather heterarchies with distinctive network properties. Moreover, the borders between the state and society are so porous that, at times, it is difficult to determine where one ends and the other begins, and this web of mutual connections influences officials' behavior.

Keywords: Enforcement; urban planning laws, affordable housing, environment, São Paulo

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The Resolution of Land-Use Conflicts in Sao Paulo

Introduction

This paper examines the enforcement of land-use law and the resolution of attendant disputes in São Paulo, Brazil. Urban centers are hubs of order and cooperation, spontaneous as well as formal. Yet they also harbor many conflicts. People live in narrowly circumscribed areas and often contest the same space. As part of this competition for territory, low-income residents are pushed out to marginal land with limited infrastructure, long commutes and unstable terrain. Increases in urban density create other conflicts. Though urban density raises the value of public goods such as parks, unimpeded sidewalks and flowing traffic in urban centers, density also makes urban centers vulnerable to the “tragedy of the commons,” in which public goods are under-provided and over-utilized. In São Paulo, both the struggle between high- and low-income residents for urban space and the tragedy of the commons in public resources are evident.

Stakes in such conflicts tend to be high, and not amenable to compromises or positive-sum outcomes. As a result, contending parties fight bitterly and resort to a wide variety of responses including street protests, media campaigns, political action, bribery, and even physical violence. In a democracy, these confrontations are eventually channeled into the legal system where public officials and ultimately judges assess the evidence, apply their interpretations of law and issue a decision.

Analysts from across the political and disciplinary spectrum concur that a functional and legitimate legal system is intrinsic to economic and social development. However, they disagree about how legal systems work, why they differ, and how a legal system can be improved. On one side of the disagreement, international development experts compare legal systems to a set of instructions—an algorithm or a technology that helps people prevent or resolve conflicts. According to this view, laws constitute the rules of the economic game, and the courts, litigators, and law enforcement organizations ensure that laws are implemented accurately and cost-efficiently. On the other side, legal sociologists admit that laws are the result of political compromises and are drafted in vague language on purpose. Moreover, legal provisions contradict each other so frequently that “conflict of laws” is the subject of a long-standing legal discipline. Making matters even more complicated, many laws are never formally revoked. Although they are often forgotten, they nevertheless remain on the books and may reemerge after decades or even centuries of dormancy and become available levers for a contemporary conflict. For these reasons, legal directives can rarely be derived from the text alone (Silbey and Bittner 1982). Rather, laws, rules and regulations only acquire their specific meanings through the actions of officials such as judges, police officers, government lawyers and prosecutors who are at the front lines of public service. To understand what the law is and the effects it produces one must study the process through which laws are mobilized for conflict management and resolution.

This paper uses qualitative data to analyze the actions of two public organizations responsible for enforcing land-use laws in São Paulo, namely the *Ministério Público* (the prosecutors’ office)

and the *Defensoria Pública* (the public defenders' office). It is based on two series of interviews (performed in Portuguese, 2006–08 and 2012) with prosecutors, public defenders, judges, social activists, government bureaucrats, urban planners and entrepreneurs. The paper makes three points. First, as legal sociology suggests, the law rarely acts as a series of straightforward directives or the attribution of rights. Rather, the law presents itself as an instrument whose meaning and use are both contextual and contestable. Second, neither the *Ministério Público* nor the *Defensoria Pública* can be accurately depicted as “actors” in the sense that they take unified and purposeful action towards a given goal. Instead, like the law, they are better characterized as arenas or battlegrounds in which different groups of bureaucrats and activists jockey for advantage and try to impose their vision concerning the proper role of the state. And third, even if these organizations are formally autonomous and insulated from outside influence, the boundaries that separate state from society are so porous that it is often difficult to identify where one ends and the other begins. Interpenetration is the norm, and it is an important variable in explaining how these organizations operate and the results they achieve. Ultimately, these findings suggest that anyone interested in understanding urban policy, the determinants of urban form, and opportunities for social inclusiveness ought to pay attention not to those offices of delimited responsibilities represented in formal organizational charts, but to networks of activists and public officials who may act as “sociological citizens” (Silbey, Huising and Coslovsky 2009).

In the remainder of the paper, Section 2 presents the two conflicting visions of the law and its role in state and society; Section 3 introduces the city of São Paulo, Brazil, and two of its leading public litigation organizations, namely the *Ministério Público* (prosecutors' office) and *Defensoria Pública* (public defenders' office); Section 4 analyzes the empirical findings. Section 5 concludes.

Two Contending Visions on the Law, State and Society

Legal Determinism: Law as Technology; Bureaucracies as Machines

Since the mid 1990s, scholars of international development have examined how legal institutions influence economic growth. To a large extent, the success of this research program can be credited to Douglass North (1990), who conceived of institutions as the “rules of the (economic) game”. In this sense, rules are good when they favor innovation, investment and growth. Conversely, rules are bad when they lead to waste of economic resources. According to this view, legal systems should secure property rights, protect contracting partners against abuse, increase the predictability of economic interactions and decrease transaction costs (Posner 1998, LaPorta et al 1998, Haggard et al 2008, Romer 2010).

Scholars who subscribe to this view suggest that legal systems are composed of two parts: (a) written laws, which assign rights and duties to all legal persons,¹ and (b) a set of bureaucracies responsible for implementing these laws. To promote economic development, the law must be impartial (treat all legal persons the same), precise (no ambiguities), exhaustive (no loopholes),

¹ “Legal persons” are all those entities that possess legal rights and duties, including not only natural persons of flesh and blood but also corporations.

and stable. Yet the law is not self-executing. Rather, it requires some sort of transmission mechanism that enforces the established mandates accurately and without waste, corruption or delay. Ideally, enforcement is conducted by competent bureaucracies,² which Max Weber famously described as “*the most rational known means of exercising authority over human beings*” (1978, p. 223). To conform to the Weberian ideal, bureaucracies must possess hierarchical structure, clear lines of authority, documented rules of action, meritocratic recruitment and predictable career ladders (p. 956–958). Existing research shows that close conformity to Weber’s prescriptions correlates with and may even promote economic development (Evans and Rauch 1999).

This conception of legal systems as technology is particularly explicit in Paul Romer’s advocacy for “charter cities” (2010), which are partnerships between developing countries and advanced nations. In this proposal, developing countries provide vacant land and a population eager for progress. The advanced nation brings its own legal system, whose rules have already been shown to produce economic growth. Together, the partners demonstrate how good rules, properly enforced, promote economic development. Despite the utopian nature of this proposal, one country, Honduras, has taken the initial steps to try it out (The Economist 2011).

Law and Governments as Arenas or Battlegrounds

A number of scholars disagree with the view that laws are like instructions and the organizations that interpret and enforce them can be reduced to neutral transmission mechanisms (Upham 2002). These analysts claim that the interactions between laws and enforcement organizations resemble an arena or a battleground, where different groups (including public servants) struggle to impose their vision of the law and the proper role of government in society. These scholars base their claim on the observation that laws are frequently vague, contradictory, and outdated. Moreover, in any given factual controversy, it is rarely clear which laws will apply and what verdict will result. As stated by Duncan Kennedy (1991), “*no one involved in academic legal theory believes anything quite so simple as the primal argument that judges apply rather than make law*”. Benjamin Cardozo, US Supreme Court Justice in the 1930s, further illustrates the uncertainties of judging (1921 p. 9–10):

“The work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times or more. Nothing could be farther from the truth. What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the caldron of the courts, all these ingredients enter in varying proportions.”

² I am using the term in its technical sense and not to signify red tape or organizations in general

If legal certainty and predictability are to be dismissed as chimeras, does it mean that every legal case is completely different from all others, that there is virtually no built-in standardization in the legal process, and that the personal proclivities of judges, prosecutors, government lawyers and zoning authorities determine observed outcomes? Not so. In practice, judges, litigators, and bureaucrats are constrained by many variables, most prominently the organization and the environment in which they work. These variables help explain both the decisions they take and the results they achieve.

Further, most government agencies are not unified actors characterized by hierarchical structures, clear lines of authority and other Weberian features that suggest unity of purpose. Rather, they more closely resemble heterarchies, which are “*the sites of competing and coexisting value systems*” (Stark 2001, p. 26). In practice, public organizations may harbor not only competing camps or factions but also co-existing logics and frames of action (p. 24). To date, heterarchies have been observed among manufacturing enterprises in post-socialist economies, new media companies in New York and trading firms on Wall Street. In the private sector, the coexistence of multiple evaluative principles in a single organization allows for more flexibility and innovation in the face of uncertainty. Though these counter-intuitive and emergent organizational forms have not yet been observed or described in public service, the concept of heterarchy will still help illustrate how public litigation organizations work and the varying results they produce.

Finally, and in the same way that public sector bureaucracies are not necessarily monolithic or internally homogeneous, public sector organizations are not strictly separate from civil society. In fact, interpenetration between state and society seems to be fairly prevalent. Channels of mutual influence include formal complaints, official policy councils, public hearings and—most crucially—a number of informal connections between public officials and outside agents that may be consequential even if not readily detectable from the outside. As in the private sector, these networks may create a form of distributed intelligence that increases performance even in the presence of extreme uncertainty (Powell 1996, Stark 2001).

In short, there are two contending visions regarding the role of law in society. Some scholars see the law as a set of instructions and adopt an Enlightenment-type outlook on the state that favors separation of powers and clear lines of authority. According to this view the law, when properly implemented, disciplines behaviors and determines economic outcomes. Other scholars see the law not as a tool to resolve disputes but as a *product* of disputes that spill over into enforcement organizations and beyond. According to this alternative view, observed outcomes are explained by social relations and organizational constraints in addition to the law, per se.

São Paulo, Land-Use Conflicts and Relevant Legal Institutions

São Paulo and Its Land-Use Conflicts

With 11.3 million inhabitants, São Paulo is the most populous city in Brazil, the largest in the Americas, and the 7th largest in the world. Its metropolitan area is composed of 39 municipalities with a combined population of 19.8 million. São Paulo is a business powerhouse and the

economic engine of Brazil. Its GDP per capita is R\$35.2 thousand, more than double the national average (IBGE 2009³). In 2011, Price-Waterhouse Coopers listed São Paulo as one of 26 global “cities of opportunity” (PwC 2011). According to this report, São Paulo has more “economic clout” than other thriving cities such as Abu Dhabi, Istanbul, Johannesburg, Mexico City and Santiago (p. 54). In a University of Rosario report on the investment climate in cities across Latin America,⁴ São Paulo ranked first as a result of the sheer size of its economy, the number and quality of its institutions of higher education, its large stock market and commodity exchanges and the number of multinational companies that choose it as their base (p. 7).

All this wealth notwithstanding, São Paulo also has the largest slum population in Latin America (UN-Habitat 2010 p. 74). Almost four million people live in *favelas*, *cortiços* or illegal allotment schemes throughout the metropolitan region. *Favelas* are squatter settlements of owner-occupied, self-constructed, substandard houses. Many *favelas* are located on occupied land that was previously vacant because of environmental constraints or because of risks to the health and safety of occupants. According to recent estimates, São Paulo has almost 1,600 *favelas* housing 1.6 to two million people (p. 76 and p. 114). *Cortiços*, or tenements, are highly congested multi-family dwellings with shared facilities. They tend to occupy decaying buildings that retain access to urban infrastructure but often violate zoning, housing and rental regulations. Approximately 600,000 people live in *cortiços* in São Paulo, and almost 40,000 of these people (about 7%) live downtown. Illegal allotment schemes, known as “*loteamentos ilegais*” come in many forms. Typically, they share the fact that private developers have not provided a modicum of urban infrastructure (such as sidewalks, drainage and sanitation) as required by law. Many also lack access to public transportation, clinics, schools and other facilities. An estimated 1.7 million people live in illegal settlements on the outskirts of the city. Finally, approximately 10,000 people are homeless and simply live on the streets.

To understand these figures, one must consider the history of the city. In simplified terms, São Paulo’s economy has gone through four main phases. Between the 1850s and 1930s, the city’s economy revolved around the production and export of coffee. During those years, richer citizens lived in mansions in the upper parts of town while the poor lived in workers’ villages below. From the 1930s to the 1980s, São Paulo spearheaded Brazil’s push towards industrialization. At that time, national policies encouraged massive urban migration, and the city’s population mushroomed. In 1950, São Paulo was the 24th most populous city in the world, but it rose to 5th place in 2007. The city did not provide incoming migrants with appropriate housing, so the slum population multiplied as well. In the 1970s, one percent of São Paulo’s population lived in *favelas* (UN-Habitat 2010 p. 74). By 2012, this figure had risen to almost 20%. During the 1980s and 1990s the situation got even worse. During those years the national economy declined and manufacturing industries either left the city or closed down. Poverty rates in São Paulo increased sharply from 20% in 1990 to 39% in 1999 (p. 26). As workers lost their jobs, they moved into *favelas* and *cortiços*. The areas around Guarapiranga and Billings, two reservoirs that supply São Paulo with fresh water, were particularly affected. Even though Brazilian environmental law decrees that reservoirs and their immediate catchment areas must be left untouched, more than two million people, overwhelmingly poor, moved onto their banks.

³ http://www.ibge.gov.br/home/estatistica/economia/pibmunicipios/2005_2009/tabelas_pdf/tab01.pdf

⁴ http://www.urosario.edu.co/urosario_files/e4/e4b39936-b5f0-42c7-bf2e-f30c34018ef2.pdf

Favelas started to spring up in central areas as well. As stated in a UN report, “any empty or unprotected urban space, whether private or public, on solid ground or highly precarious areas, was vulnerable to invasions of poor inhabitants” (UN-Habitat 2010 p. 75–76). In downtown São Paulo between 1997 and 2004, nearly 10,000 families occupied 44 vacant buildings (p. 77).

In the early 2000s, the situation changed again. Renewed economic growth and decreasing poverty rates throughout the country stemmed the inflow of migrants and limited the expansion of the city’s *favelas* and *cortiços*. Yet prosperity also intensified conflicts. The recent upsurge in real estate prices brought investors and higher-income homeowners back into the city. Several Brazilian real estate developers transformed themselves into publicly traded companies and raised staggering amounts of money. With this inflow of capital, they acquired equally large amounts of land for future construction. The land occupied by *favelas*, *cortiços* and other substandard housing began to be reclaimed with unprecedented fervor. Prosperity and higher-income property owners also prompted the municipal and state governments to build new avenues, parks, tunnels and bridges throughout the city; these projects entailed mass evictions. The “*Águas Espraiadas*” project, which includes an enlarged avenue and other road construction, will dislodge 40,000 people.⁵ Likewise, improved road access to “*Arena São Paulo*,” a new soccer stadium being built in Itaquera, will evict four thousand families. “*NovaLuz*,” a project intended to redevelop 48 blocks in downtown São Paulo, will raze 89 buildings and evict their inhabitants. Those with formal property title may receive some compensation, but renters, squatters and those employed by the affected businesses are not afforded the same kind of legal protection. As an urban activist I interviewed summarized, “*there has never been so much money in São Paulo, and there has never been so much violence.*”

These conflicts are eventually channeled into the legal system. Prominent actors in these disputes include the secretary of planning (SEMPA), the secretary of housing (SEHAB), municipal and state-level environmental agencies and the city council. In this crowded field, two organizations stand out for their peculiar mix of ubiquity and below-the-radar activism: the *Ministério Público* (MP) and the *Defensoria Pública* (DP).

Ministério Público

Typically, prosecutors are public officials who represent the state in criminal proceedings for acts, such as larceny, assault or murder, that society considers so egregious that the state, and not the victim, acts against the alleged perpetrators. Brazil’s *Ministério Público* has more than 10,000 prosecutors⁶ who are aided by almost 20,000 clerks and support staff (Ministério da Justiça 2006 and MPSP 2006). The *Ministério Público* is a deconcentrated organization with a large proportion of its prosecutors working in field offices spread out throughout the country. The São Paulo State *Ministério Público* is the largest in Brazil. It employs 1,700 prosecutors and has permanent offices in 250 different municipalities (MPSP 2006).

⁵ <http://www.estadao.com.br/noticias/impresso,moderno-e-arcaico-juntos-na-maior-remocao-de-favela-da-historia-de-sp,481143,0.htm>

⁶ I use the generic term “prosecutor” to refer to all those officials that in Brazilian Portuguese are called, at the entry level, “promotor(a) de justiça” or “procurador(a) da república.”

In addition to prosecuting common crimes, these officials may sue both private businesses and government agencies to protect vulnerable populations and defend the public good. Not surprisingly, given their significant powers, prosecutors leave a noticeable mark on Brazilian public affairs. Rarely does a day go by that a major newspaper does not report on a significant prosecutorial action. For instance, a search for “*Ministério Público*” in the database of the local daily newspaper *Folha de São Paulo* returns 846 hits between January 1st and June 15th 2011, an average of 5.13 mentions per day. Public officials from all levels of government readily admit that before any major decision, they consider how the prosecutors are likely to respond.

Prosecutors are particularly influential in matters pertaining to land policy and the so-called “right to the city.” They are particularly concerned with illegal parceling schemes, environmental depredation and other abuses of the city and its infrastructure as a public space. In 2009 alone, São Paulo prosecutors affiliated with the Housing and Urban Planning group oversaw 2,532 class-action lawsuits (MPSP 2010). According to this metric, this group is the third largest in the agency, after citizenship rights and environmental preservation.

Defensoria Pública

In Brazil, the “Defensoria Pública,” or “Public Defender’s Office,” is a government agency devoted to representing low-income individuals in legal proceedings. Worldwide, public defenders’ offices ensure representation of low-income citizens accused of a crime. Brazil’s approximately 4,500 public defenders, employed mostly at state-level agencies, espouse a larger mission and represent eligible citizens in all kinds of legal disputes, including not only criminal defense but also civil disputes between private parties, including divorce, child custody, debt collection, contracts and eviction (Ministério da Justiça 2009, p. 104). In many cases, public defenders represent low-income citizens in conflicts against the state.

The São Paulo branch of the Public Defenders’ Office is a fairly new organization. Created in 2006 with 87 public defenders, it now has approximately 400 public defenders, plus support staff. Despite the DP’s existence, most low-income defendants who are eligible for public assistance are still represented not by career public defenders but by private lawyers paid by the state. Not surprisingly given its short history and small staff, the DP has not (yet) acquired a prominent public profile. It does not feature prominently in public debates and has not gathered the same amount of praise and criticism as the prosecutors.⁷ Still, the *Defensoria Pública* plays a central role in land-use conflicts, and it is particularly diligent in protecting low-income citizens against eviction.

How Prosecutors and Public Defenders Enforce Land-Use Law

Logan and Molotch (1987) described cities as characterized by conflicts between pro-growth coalitions that attempt to maximize return on their investments and citizens who value use and

⁷ The Brazilian newspaper *Folha de São Paulo* has recently made its entire archive available online. Simple searches for “Ministério Público” and “Defensoria Pública” indicate that, between the years 2000 and 2010, a reader could expect to see “Ministério Público” almost five times a day, while “Defensoria Pública” appeared on average once every 10 days.

community over exchange. These conflicts are often mediated by the legal system, but the workings of the legal system are notably opaque. As foreshadowed on section two, some scholars claim that legal disputes are resolved through the “flick of a switch,” and that well-functioning legal systems produce predictable verdicts in a speedy, reliable and definite manner. Other scholars disagree and claim that this view hides the exact phenomenon that it should explain, namely the area of legal uncertainty and ingenuity that allows for protracted legal disputes and helps determine their outcomes.

In São Paulo, this space becomes visible in disputes over legal procedure, the inner workings of public-sector organizations responsible for enforcing land-use laws and the connections between these organizations and society at large. São Paulo prosecutors, public defenders and activists see two boundaries to this space of legal uncertainty and ingenuity. One boundary is constituted by the fairly progressive national and local laws that regulate housing and urban development. The other boundary is defined by conservative judges with an expansive interpretation of executive privileges and a narrow reading of the law’s distributive provisions. Between these two boundaries, ingenious prosecutors, public defenders, housing activists and urban planners find room for maneuver.

Identifying the Space for Legal Action

In Brazil, three sets of laws regulate land use in urban areas: (a) the Constitution of 1988, particularly the provision that private property should fulfill “a social function,” plus two articles in the urban chapter; (b) the 2001 “*Estatuto da Cidade*” (“Statute of the City”), which covers the whole country; and (c) any applicable municipal master plan (“*plano diretor*”), which municipalities with more than 20,000 inhabitants are legally mandated to design and adopt. Naturally, a number of other laws might also apply to any given situation. For instance, consumer rights laws regulate the buying and selling of real estate, tenant law regulates landlord-tenant relationships, environmental laws apply to deforestation and construction in protected areas, etc.

Brazilian housing activists readily admit that written laws meet most of their aspirations. By and large, activists have been fairly successful in obtaining the legal text that they have sought (Bassul 2010). Or as an experienced community organizer said, “*Brazilian laws are very modern. From 1988 onwards, our laws became a reference all over the world thanks to their emphasis on redistribution and the democratization of the access to urban land.*”⁸

And yet legal change requires more than ink on paper. Independent of what urban planners, housing activists and legal scholars think the law says, only the courts can determine the authoritative meaning of a provision and whether it applies to a given situation. Activists, government lawyers, plaintiffs and defendants promptly acknowledge that Brazilian courts are conservative and rarely give expansive readings to the housing rights listed in the Constitution or the Statute of the City. As stated by an urban activist “*the courts do not value the right to housing.*” A public defender further substantiated this point: “*the courts are not acquainted with urban planning laws; many of these laws are municipal laws, the judges simply don’t know*

⁸ This is not unique to urban affairs. Labor and environmental activists generally agree that Brazilian laws are fairly progressive. On labor rights, see French (2004)

[them].” Judges may also lack the time or motivation to learn. As a result, and as explained by a public defender: “*in the courts, we lose; we lose in the lower courts, and if we appeal the decision it is even worse. Judges refuse to acknowledge the ‘social function of property’ [as determined by the Brazilian Constitution]. Instead, they think that the right to property is absolute. It is very difficult to find a judge that is sensitive to this claim.*”

Lawyers have created a special jargon to make sense of this divergence between a progressive legal mandate and a conservative reality. A public defender explained, “*when you initiate a case concerning the right to housing, or when you ask whether some private property fulfills its ‘social function’, a question always comes up: are these rights aspirational [‘programático’] or actionable [‘eficácia imediata’]?”* By separating legal rights into aspirational and actionable, these officials preserve the integrity of the legal system while admitting that laws are just the beginning of a larger struggle.

The Law is an Instrument Whose Use is Both Contextual and Contestable

In the US, legal commentators (and humorists) offer novice lawyers the following advice: “if the facts are against you, argue the law; if the law is against you, argue the facts; if both are against you, call the other lawyer names.” While this strategy may work in some circumstances, Brazilian judges tend to give elected leaders of the executive branch enormous discretion in managing urban affairs. As a result, a fairly progressive set of laws assumes a rather conservative tone and one who argues against the city government, either on the facts or the law, is not likely to prevail. Public defenders and prosecutors have learned this lesson. Instead of arguing facts or substantive legal provisions, they contest whether the proper legal *procedures* have been followed. One interviewee associated with the *Ministério Público* provides two examples:

“You may argue that the authorities in charge did not hold a public hearing. If there was a public meeting, it may not have been participative enough to qualify as a public hearing. It may have been a farce, without opportunity for real participation. You see it a lot. They say ‘we held ten public hearings.’ But did these hearings count? There was no consultation. The local authorities organized one-sided presentations in which they brought a computer, a projector, a powerpoint presentation, showed the plan, but did not ask for people’s opinions, did not engage anyone. So you challenge them on this point.”

“In other cases, the problem resides in the expert testimony. Nowadays, Brazilian public universities are so underfunded that academic departments have created foundations on the side.⁹ Faculty members get hired by these foundations to work as consultants, or to provide expert testimony. These written testimonies come under the letterhead of a respected public university, but they represent the personal opinion of an individual who makes a living as a consultant. So we send a letter to the university’s president to ask whether the expert speaks for the institution. The university obviously disowns the report, and we motion to expunge the testimony from the record.”

⁹ Foundations have more flexibility to hire and fire, sign contracts and pay consultants at market rates than a public university.

While many believe that a resounding legal victory is everyone's goal, these officials' chosen strategy suggests an attempt to delay the proceedings, create negative publicity for the mayor or real estate developer, and extract a better settlement for the affected population. As a public defender noted, "*these cases [of eviction] are tough to win, but we try to stall for time until a permanent solution can be found.*"

This carving of a legal space between progressive laws and conservative judges corroborates the idea that the law is not a technology but a battleground. Yet disputes over legal procedure, public image and negotiated agreements are just the tip of a much larger iceberg. Or, in perhaps a more apt analogy, they are the visible front lines of a more pervasive conflict that reaches deeply into the inner workings of the state, its law-enforcement ability and its power to shape the development of the city. To understand why public litigation agents act as they do, one must understand the networks in which they participate.

Public Litigation Organizations Are Not "Actors" but Battlegrounds

Analysts of public sector performance often suggest that public sector organizations are (or ought to be) Weberian bureaucracies that exercise rational-legal authority. To merit the label of "bureaucracy," an organization must be characterized by hierarchical lines of authority, a clear division of labor, and meritocratic career ladders. My interviews with government officials and activists involved in land-use disputes in São Paulo suggested that both the *Ministério Público* (MP) and the *Defensoria Pública* (DP) deliver results because they are not bureaucracies but *heterarchies*. David Stark (1996 p. 22) defines heterarchy as "*an emergent organizational form with distinctive network properties, asset ambiguity, minimal hierarchy, and multiple organizing principles.*" This subsection describes the inner workings of the MP and the DP, with emphasis on their internal dynamics of conflict and distrust and the results they produce.

Ministério Público

The Brazilian Constitution of 1988 granted prosecutors expansive rights and duties and shaped the current *Ministério Público*. Under the Constitution, prosecutors are entitled to act on their best legal judgment (and not directives from above) and can only be dismissed if convicted of a crime that is affirmed at appeal. But though the Constitution marks an important milestone in the creation of the contemporary MP, the process through which the organization acquired its current status was protracted and fairly contentious.

The current MP traces its roots to the early 1970s, when a small group of activist prosecutors from São Paulo started envisioning an activist role for the organization. They conceived of a *Ministério Público* that did not simply pursue individuals accused of a particular crime, but tried to identify important social problems and solve them. To do so, they needed an expanded legal mandate, professional privileges, and a thoroughly reformed organization. As examined elsewhere (Coslovsky and Nigam 2012), activist prosecutors joined forces with less activist but equally ambitious colleagues who aspired to high professional status, enhanced privileges and compensation. This alliance produced some remarkable achievements but it did not last long. By the mid-1990s, prosecutors had acquired the ambitious mandate and powerful legal tools requested by the activists, and also the high professional status and privileges desired by their

collaborators. Activist prosecutors wanted to build on this success and deepen the reforms, but conservative prosecutors were satisfied with the new status quo and returned to business as usual. Since then, the MP has remained a mismatched organization. On one hand, prosecutors have high status, a lofty mandate and powerful legal tools. On the other hand, the organization retains conservative structures, as well as processes and incentives that favor a reactive, case-by-case approach.

While conservative prosecutors take advantage of the status quo and assume a studied silence, their activist colleagues are loud in their dissatisfaction with the situation. As a disappointed reformist expressed it:

“What does a prosecutor do? She does whatever she wants. This is the problem. We behave like paper-pushers, and not like someone committed to delivering results. The prosecutor writes legal opinions and meets the deadlines, but she is not committed to being an agent of political change, not committed to finding solutions to important problems. That’s how it has always been, and that’s how it is, with rare exceptions.”

Another prosecutor colored this picture with a series of derogatory remarks:

“They are narrow-minded, small-town, redneck, hillbilly prosecutors, concerned only with individual cases. They cannot see the structural causes of crime, they cannot see how a reformed institution might fit into this bigger whole, they cannot see how the MP ought to be reformed so it can be proactive and more efficient in solving big, important social problems. They write legal opinions and move on.”

Interestingly, these kinds of internal disagreements may enhance accountability. An activist prosecutor (not involved with land-use disputes) explains how this informal mechanism for accountability works:

“There are people within the Prosecutor’s office who dislike us, they are jealous of us. So we must always be careful not to make any mistake, because that’s what they are waiting for to jump on us. And the businesses we prosecute are ready to come after us as well. Sometimes they try to obtain an injunction against you, or present a complaint to internal affairs.”

In brief, the prosecutor’s office embodies some of the conflicts and idiosyncrasies that are visible in the laws and that pitch conservatives against progressives. As argued below, the DP is a much younger, smaller and therefore homogeneous organization, but it shows initial signs of the same mismatch.

Defensoria Pública

The *Defensoria Pública* of São Paulo is a young and still fairly homogeneous organization. However, its story parallels the transformation of the MP in many ways that point to a possibly mismatched future. Acting on the provision of the Brazilian Constitution of 1988 that gives all citizens a right to legal representation, state legislatures throughout the country created or

empowered public defenders' offices to serve low-income citizens. São Paulo, the richest state in the nation, was the second-to-last to create a public defenders' office, and the contentiousness of this act both illustrates and foreshadows the conflicts examined in this paper.

Until 2006, São Paulo had two complementary systems of free legal representation. Most low-income citizens accused of a crime were represented by private lawyers paid for by the state. In addition, a tiny number of citizens were represented by government lawyers employed by the legal assistance division (*“Procuradoria de Assistência Judiciária—PAJ”*) of the state's justice department (*“Procuradoria do Estado”*), which advises the governor and represents the government in court. For many years, government lawyers associated with the PAJ complained about their inability to perform their job: *“We had no autonomy, we were not committed to popular causes and we could not contest entrenched state interests.”*

In 2002 a small group of frustrated but committed government lawyers joined forces with scholars, social activists and representatives of social movements, progressive religious groups and NGOs to launch the so-called “Movement for the Creation of a Public Defenders' Office.” Gradually, the movement came to incorporate roughly 400 different organizations. After four years of seminars, pamphlets, protests and lobbying throughout the state, the movement succeeded in convincing the governor of São Paulo to create a stand-alone public defenders' office.

Government lawyers were given the choice of transferring to the new organization, and of several hundred eligible officials, 87 decided to take the leap. For the most part, these lawyers were a cohesive group who knew each other, had lobbied for the creation of the DP and shared an outlook on the role of the state. But 87 is a puny number against the demand for legal representation in a state of more than 40 million people. Between 2006 and 2012 the public defenders' office expanded its legal staff to 400, and this process put some stress on the organization. On one hand, the 87 “pioneers” wanted to design an entrance exam that selected only candidates who were as committed to social causes as they were. On the other hand, the recruiters had to comply with strict regulations concerning fairness in public service entrance exams. The organization remains fairly homogeneous, but some internal cleavages and ideological disputes over the proper role of the DP have started to erupt. At the broadest level, some public defenders think they should limit themselves to representing low-income citizens in court. Others, more closely associated with the “founders,” think that public defenders ought to address the structural causes of urban poverty, inadequate housing and exclusion.

To sum up, both the MP and the DP embody some of the conflicts that permeate the legal system. Moreover, the internal fights that characterize these organizations suggest that law enforcement is not so much a technology as a battleground. Furthermore, the conflicts within these agencies reflect deeper conflicts that permeate civil society. To understand how activist prosecutors and public defenders work and how the law is enforced, one must look beyond the boundaries of their agencies and take their broader alliances into account.

Porous Boundaries and Distributed Intelligence

As mentioned in the previous section, activist prosecutors and public defenders want to identify important social problems and solve them, but their organizations outfit them with limited resources. Moreover, and as Michael Lipsky (1980) argued, the daily pressures of work compel street-level bureaucrats to ignore the larger whole in favor of a one-case-at-a-time approach. These features of their organizations present activist enforcement agents with a sizeable challenge. As an environmental prosecutor said, *“It is one thing to indict a hundred stickup artists; it is another thing to bring a hundred cases of environmental pollution against Shell. [...] You cannot hope that the structure that allows you to prosecute a pickpocket will help you confront the governor.”* Another prosecutor describes how certain problems seem impossible to resolve:

“Let’s say there is an invasion here [she points to a map of on the wall, her finger on the shoreline of a fresh water reservoir]. I take legal action and the squatters are evicted. They move over here [her finger now points to a different point in the reservoir]. These are the fresh water springs that feed the reservoir, so the problem got worse. As the prosecutor in charge, I would like to solve this problem, but I do not know how.”

To move beyond these perceived limitations and propose pragmatic solutions to the problems they face, prosecutors and public defenders often rely on a network of outside supporters that includes community activists mid-level officials from various government bureaucracies and representatives of NGOs, religious groups, neighborhood associations and think tanks. These connections help explain what prosecutors and public defenders do, how they find meaningful legal space to act and how the law is perceived by the actors in these disputes.

This permeability in law enforcement and policy-making manifests itself in three ways. First, at the simplest level, external actors influence the behavior of public litigation officials by presenting them with formal complaints. Both prosecutors and public defenders have the equivalent of “office hours,” in which they meet with the public. Representatives from various civic organizations know that, by bringing complaints, they can influence what gets done.

Prosecutors and public defenders also need pertinent domain-related (i.e., non-legal) data to decide on the best course of action in any given situation. Both organizations have a small team of urban planners, geographers and other experts on staff, but their ranks are too small to meet the demand. For this reason, prosecutors and public defenders sometimes try to obtain additional support through formal cooperation agreements with universities and research organizations. This is easier said than done. The MP, for instance, recently signed an agreement with the *Instituto de Pesquisas Tecnológicas* (IPT), a state-owned research center, but the MP has no budget to pay for the IPT’s services and cannot provide valuable favors in return. As a result, it cannot always count on receiving the technical support it needs. As an MP staff member said, *“IPT researchers are not always forthcoming. They do not want to work additional hours for the same pay.”*

Fortunately, some other organizations are willing to provide prosecutors and public defenders with technical support even in the absence of a formal agreement. For instance, urban planners

associated with a local university have recently started a partnership with the public defenders' office to map and publicize ongoing evictions throughout the city. The public defenders identify the cases, and the urban planners plot them using GIS software. Likewise, mid-level technical staff members in government bureaucracies reach out to prosecutors and public defenders to ensure that their best technical opinion will be given proper attention throughout the policy-making process. A bureaucrat in an environmental protection agency reported that, "*We know the prosecutors. When the pressure [to change a report or ignore some hard data] gets too intense, we reach out to them. But I do not call them from my work phone. I call them from home.*" Likewise, representatives of not-for-profit and community organizations have also learned to cultivate relationships with prosecutors and public defenders. The representative of one of these organizations explained how these relationships come about:

"I am a fairly well informed person, but I did not know how these things worked, urban planning prosecutors, environmental prosecutors and all that. They operated on a different plane than me. But then colleagues from other groups who went to the MP showed me how it was done. Now, we are partners; [I call on the prosecutors for legal support] and I help them with technical data. The same is true for many other organizations and campaigns in the city. We all join forces with the MP."

Finally, perhaps the most relevant and influential forms of support and influence are not tied to a particular controversy or readily visible from the outside. As recounted earlier, social movements and community organizations lobbied for the creation of the São Paulo public defenders' office. Once the organization was created, they made sure to establish links to the public defenders themselves and help them establish an organization that conformed to the activists' expectations. Thus the *Defensoria Pública* created a division devoted to housing and urban affairs. "*The division was demanded by the social movements that had supported the creation of the DP,*" explained a public defender.

None of the 87 public defenders who created the agency had any experience with housing laws or urban planning laws, but one of them took over this division and embarked on what could be termed an eye-opening journey into the problems of the city, in which local activists played the role of teachers and guides. This public defender explains the process of discovery:

"I was introduced to this sad reality that I did not know existed. One knows about poverty and all that, but I did not have a sense of the city without citizenship, the favelas and cortiços. It was a powerful introduction. Marcos [pseudonym for a local housing activist] took me by the hand and showed me around. He became more than a friend, he became like a brother to me."

"Our beginnings were very humble; I did not even have an office. But I had this alliance between the idealist lawyer and the pragmatic activist. It was a discovery. He took me around and showed this world that I did not know. Next thing you know, activists started to avail themselves of the institution, and we initiated large joint projects that are fundamental to our mission, such as the Dignified Housing Conferences ('Jornada da Moradia Digna')."

Thanks to this kind of relationship and public support, according to a public defender, the office kicked off its activities with “*an explosion of litigation. There was no day or night. We used legal tools to defend everyone who was at risk of losing their home, from a small favela of 500 people to a massive eviction of 30,000 people. It was so intense that I am still exhausted [several months after stepping down].*”

To sum up, a rich network of interlocking ties link social groups to these two public litigation organizations. Together, these entities help create a form of distributed intelligence, plus a set of impromptu devices for motivation and accountability, that no bureaucracy could hope to produce on its own.

Conclusion

This paper challenges a number of prevailing assumptions about the role of law in public policy and public management, particularly the view that laws are like a technology, that the organizations that interpret and enforce them are (or ought to be) cogent bureaucracies and that state autonomy is a reasonable goal to pursue. The ethnographic methods used here suggest that law is more like an arena or battleground, and that legal provisions only acquire a specific meaning when they are enforced by a set of organizations. Naturally, judges occupy a privileged place in these systems, but even conservative courts allow some room for maneuver. Importantly, public litigation organizations themselves also appear to be battlegrounds (or heterarchies), in which different factions of public officials fight it out to impose their particular visions of the law. In the end, and in contrast to those who suggest that state “capture” is a problem to be avoided, the concrete actions of law enforcement organizations can only be understood if one takes the initiatives of social movements, community groups, non-governmental organizations and relatively powerless technical bureaucrats into account. To put it simply, the state does not present itself as a set of clearly delineated offices with defined interests and responsibilities, but as a network of channels of information and influence. These channels help explain what these organizations do and how, despite the constraints that they face, they impart the law with a certain shape, direction and thrust. A number of public litigators and social activists have a clear sense of this distinction and see relational interdependence where others would rather impose disembodied rationality. Not surprisingly, these agents seem to be the most effective in harnessing the power of the law and producing social change.

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