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Between the legal technique and the social question: the plural commitments of public defenders in Argentina

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Abstract

The criminal process in the Province of Buenos Aires has been affected by radical reforms in the last decades. Beginning with the complete replacement of the criminal procedure code in 1998 to the introduction of pre-trial hearings and simplified procedures for cases declared in flagrante delicto in 2004 the reforms have impacted more than legal procedures; they have changed the way judicial actors perceive themselves and their relations with the institution. Based on interviews with ten public defenders of the PBA this article offers an exploratory analysis on how public defenders' perceptions have been impacted by those reforms and to what extent those internal changes have affected the internal dynamics of the PD. Drawing from the sociology of Bernard Lahire and Laurent Thenevot we identify in the public defenders' responses how these changes affected their personal commitments. Mapping those commitments allow us to describe the *subjective folds* of the PD through which it is possible to better understand the decisions of public defenders by considering the internalization they make of the judicial world and its relationship with the institutional context.

Keywords Criminal courts · Public Defense · Judicial reforms · Criminal process · Pragmatic sociology · Argentina

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Introduction

In 2020, in the Province of Buenos Aires (PBA), the most populous in Argentina, concentrating almost 40% of the country's population (15,625,084 inhabitants), there were 29,283 criminal investigations in which someone has been formally accused and 296,712 in which someone has been identified as a suspect (MPPBA, 2021). 40,671 of those individuals accused or investigated were represented by the public defense (PD) (MPPBA, 2021). Furthermore, 57,449 individuals were detained in prisons and police stations of the PBA and 54,385 of them were represented by PD (MPPBA, 2021). These figures show the relevance the PD has in the criminal justice system of the PBA.

In recent years, more studies on the criminal courts in Argentina have been published with significantly disparate results (Kostenwein, 2017, 2020a, b). New lines of research have emerged using a variety of methodological approaches (Kostenwein, 2020b). That said, certain limits can also be observed in the study proposals, which on occasions tend to be linked more to the interests of national and international organizations sponsoring reforms, than with the goal of building a systematic field of local and comparative studies on the functioning of criminal courts (Garland, 2019). This article seeks to contribute to the development of this field by exploring public defenders' perspectives on their work and the reforms recently implemented in the criminal courts. We argue that public defenders must constantly face the tensions between their commitment to their clients and their institutional belonging. The adversarial reforms have intensified those contradictions. Public defenders navigate these tensions by developing a professional identity which, rooted in their understanding of their legal duty, sets them apart from the other legal professional peers, i.e., public prosecutors and judges. This places them in a liminal institutional space where they find the necessary independence to work on their client's best interests. However, institutional demands and managerial logics attempt against such arrangement.

This study adopted a qualitative methodological approach based on ten semi-structured interviews conducted with public defenders of the PBA centered on public defenders' perceptions around different aspects of their daily work. Interviews took place between April and May 2021. We selected two judicial departments of the PBA: Mar del Plata and La Plata. Mar del Plata is significant because it was there that the last round of procedural reforms, such as the implementation of pre-trial hearings, were first implemented. Subsequently, public defenders of Mar del Plata trained on these new procedures to those in other departments. Ever since, it has become a reference point for criminal procedures' innovation. La Plata, the other judicial department selected, is particularly relevant because it is the seat of the Public Ministry, the institution within which the PD works. Therefore, public defenders in La Plata are more politically exposed, but their practices also tend to have more repercussions and influence on other judicial departments. We used a nested sample design to select our interviewees which aimed at capturing the scope of different experiences among public defenders (Onwuegbuzie & Leech, 2007). There are 20 public defenders appointed in the judicial department

of La Plata, and 12 in Mar del Plata (MPPBA, 2021). We recruited five participants from each department ensuring there was an equal amount of female and male informants.

Following Howes (2014), we argue that perceptions have shaped and reproduced social positions and cultural hierarchies. The interviews consisted of open-ended questions aimed at capturing the diverse "worlds of meaning" that inform public defenders' views while recognizing that those views were influenced by interviewers' questions themselves (Guber, 2009). The questions covered the following areas: public defenders' perspectives on their role and duties; their daily working routines; their relations with their clients and their families, other judicial actors and police officers; and their personal views on plea bargaining, diversion, expedited trials, public oral trials, and pre-trial detention.

The article is structured in two parts. In the first part, we begin by describing the criminal process in the PBA and the reforms that have taken place in the last decades. Then, we move to discuss the main issues discussed by the literature on the PD. In the second part, we present the analysis of the interviews with public defenders. We start by exploring the conventions, conflicts and agreements unfold in the public defenders' daily work. Then, we examine the ideas of public defenders on their role, particularly on what should be their priorities. Finally, we analyze how public defenders relate to the other judicial actors, i.e., judges and public prosecutors, and to what extent these relationships have any influence in the public defenders' practices.

The criminal process in the PBA: judicial actors

In the mid-1990s the PBA government undertook a series of reforms of criminal justice. In that context, along with the police, criminal courts were prioritized for reform (Saín, 2008, 2009). Thus, in 1998, a new criminal procedure code (CPC) was introduced in the PBA. The reform followed a global movement, which had a particularly strong impact in Latin America, to replace the old inquisitorial CPCs with adversarial-based ones (Langer, 2007). [1] The new CPC put the criminal investigation, previously directed by investigating judges, in charge of the Public Prosecutor 's Office (Art. 6 CPC). [2] In this sense, the shift to an adversarial system not only strengthened the public prosecutors, but also the defenders, since the procedural law

[1] The inquisitorial model of the criminal process is characterized by prioritizing the interests of social defense, the use of the case file, the lack of immediacy between the actors involved in the criminal process, and the concentration in the hands of the judge of the functions of investigating and controlling the investigation. On the contrary, the adversarial model is defined on its emphasis on ensuring the due process, the separation of functions between prosecutor and judge, and the ensuring the parties equality of arms and that the dispute is decided in a public and oral trial. In any case, these models can hardly be found in their pure state, as there are mainly mixed systems (Levene, 1993).

[2] The investigating judge not only directed the investigation but also ordered coercive measures during the process and decided whether there was enough evidence for the suspect to face trial.

guaranteed the participation of the accused during the trial, as well as in the preliminary investigation phase.

This procedural reform was well received by the judicial actors who considered it necessary to adapt the criminal procedure to constitutional standards, to legitimately renew the officials within the criminal courts and to separate the tasks of investigating those of ensuring the due process (Kostenwein, 2016, 2019; Ciocchini, 2018).

Though the reform of the CPC promoted changes of great magnitude, these changes failed to be adopted by judicial actors in their daily practices (Palmeri et al., 2004). Faced with the continuity of practices associated with the previous procedural system, the promoters of the reforms proposed gradual changes previously agreed with the members of the courts to advance in the implementation of the adversarial system. The most relevant of these reforms occurred in 2004 with Law 13,183 which, among other innovations, introduced the "procedure in case of flagrancy" [3]. In the preliminary recitals of this law, it was stated that the goals were: (a) to optimize the state interventions of the penal system, granting them greater efficiency, without detriment to individual guarantees, and (b) to simplify the procedure and speed up the processes, through the best coordination of the activity of the parties, the concentration of requests and the simplification of formalities. Although the procedure established by Law 13,183 proposed modifications, it kept unchanged the way in which the processing was carried out, which was in writing and using the case file. As such, the law did not contribute to the replacement of writing procedures with oral hearings, a pillar of the adversarial system that the reform to the CPC 1998 sought to promote. Thus, at the end of 2004, a new reform was made to introduce pre-trial oral hearings. These hearings were meant to force judicial actors, i.e., the judge, the public prosecutor, and the defender, to meet in person with the accused; and secondly, to incentivize the parties to reach an agreement on an alternative dispute resolution, such as diversion or plea bargaining, so as to alleviate the court's workload.

The plan was successful and three years later, in 2007, a special protocol for cases declared in flagrante delicto was drawn up,[4] which in turn, was consolidated by Law 13,811. This started a new reform strategy which departed from previous top-down approaches in which law was passed to impose changes, to pass laws based on practices previously developed by the judicial actors in their daily work.

Two decades after the replacement of the CPC, and one since the implementation of the pilot plan for pre-trial hearings and procedures for flagrancy cases, there

[3] According to the CPC, there is *in flagrante delicto* when the perpetrator of a criminal act is caught at the moment of committing it or immediately after, or while being persecuted by the public force, the offended party or the public, or while he has objects or presents traces that presume that he has just participated in a crime (Art. 154). And it is for this type of cases that the flagrancy process was foreseen, provided that the crimes are intentional, and their maximum penalty does not exceed fifteen years in prison or seclusion, or that in the case of a concurrence of crimes, none of them exceeds that amount. of years (Art. 284 bis).

[4] This protocol was designed by members of the Ministry of Justice, the Attorney General and Magistrates and Judicial Officers from different Judicial Departments.

are mixed results. While the negotiation between the parties in pre-trial hearings has been received well, deep-rooted practices associated with the previous system -such as the reliance on the case file - are still common (Ciocchini, 2013; Kostenwein, 2016). That said, judicial actors have fully embraced the adversarial logic of the new CPC. This logic emphasizes the judicial division of labor, in which each role is associated with a particular set of ideas. Testimonies from judicial actors have shown how the place they occupy in this judicial division of labor conditions their perception of the flagrancy process (Ciocchini, 2018; Kostenwein, 2020c). In this regard, prosecutors have offered the greatest support to the flagrancy process, showing themselves to be more permeable than the defenders and judges to the reformist discourses that since the end of 2004 have promoted the implementation of pre-trial hearings (Kostenwein, 2018). Judges, for their part, have highlighted the virtues and disadvantages of the flagrancy process without prioritizing one over the other (Kostenwein, 2016). On the one hand, they have praised oral hearings because it allows them to meet and talk with the accused and to dispose of cases with strong evidence in a short time (Ciocchini, 2018; Kostenwein, 2020c). On the other hand, they have criticized the way politicians have used this process to address the population fear of crime; how the simplified procedures deepen the already existing bias of the criminal justice system against the most vulnerable groups of the society; the weakening of the due process protections; and the large number of recidivisms it produces, fundamentally of young people. The defenders have shown the greatest skepticism on the consequences of the flagrancy process, primarily emphasizing the class bias of the crimes that can be framed within this process (Kostenwein, 2017).

This association of certain ideas and values to each role of the judicial division of labor is particularly interesting in the case of public defenders for several reasons. Firstly, because their role demands them to act in accordance with the interests of their clients, even if these are opposed to the public interest represented by the State. This forces them to position themselves to some extent outside the institutions to which they belong. On the other hand, their role involves pointing out errors or omissions in the work of their colleagues, public prosecutors, and judges. In other words, although in the institutional design adopted by the PBA they are part of the same institution which prosecutors belong to, their daily work encourages them to expose the weaknesses of judges and prosecutors. This paper explores how public defenders navigate these contradictions and tensions and to what extent their perceptions on the criminal process and their own work are influenced by them.

Therefore, to better understand public defenders' perspectives, we first explore how the adversarial reforms have affected four key aspects of the PD: the legal duties and responsibilities of public defenders; the implications that being a public servant has for public defenders; how the criteria to evaluate their work has changed; and finally, the impact of the structure of the institution they belong to.

Criminal defense in the new CPC

In the previous CPC, the defense had a very limited participation, focused on the technical discussion about legal aspects of the case. Due to the adversarial character of the new CPC, the criminal process is now understood as a dispute between the parties, and therefore both the role of the prosecutor and the defender are more relevant. It is expected that the parties adopt a more proactive attitude, presenting their 'case' in front of the judge or tribunal.[5] With the incorporation of alternative dispute resolutions, such as plea bargaining, mediation or diversion, the defenders gained even greater prominence as they carried the negotiations with the prosecutors. Previously, the role of the defense, whether assumed by a public defender or a private attorney, was merely to control that the investigation was carried out in accordance with the law, and to later present the legal and factual arguments to demonstrate his/her client's innocence. Therefore, the defense adopted a merely reactive role, in which the legal technicalities were the defender's main tool to control the punitive power of the state. Nowadays, under the new CPC, while the legal-technical arguments still occupy a central role in their defensive strategies, there is a much broader activity of the defense involving gathering evidence to offer an alternative narrative to the one presented by the prosecution.

Public servants or private attorneys

Public defenders must constantly navigate through the tension created by opposing interests. There are the interests of the defendants they represent but also those of society expressed as common interests. The PD and the Prosecution Office are located within the same institution, the Public Ministry. The law 12,061 that regulates the Public Ministry establishes as an institutional objective, without differentiating between defenders and prosecutors, to act in defense of the interests of society (art. 1). Harfuch (2002), himself a public defender from the PBA, argues that this institutional definition is controversial and generates conflicting positions. There are those who consider that the defense of the accused in the criminal process, concerns not only to the defendant him/herself, but also to the whole society. Others argue that there is only one relevant interest, that of the defendant, but they recognize that ensuring a proper defense in court is important for society at large. However, more radical arguments state that "the defense should only be concerned with the *exclusively individual interest* [of the defendant] which is related to the fundamental human right to defense during trial" (Harfurch, 2002: 73 our emphasis). This last perspective seems to be the one taken by most public defenders from the PBA, who have strongly identified with their defendants, developing judicial practices that in some cases can prioritize the interests of those who they represent over those of the society (Binder et al., 2015).

[5] Whether the case is heard by a single judge or a tribunal depends on the seriousness of the crime and the penalty established for it in the Penal Code.

Besides the tensions related to the institutional space that the PD occupies, there are also contradictions arising from the position of public servants. In his classical comparative study of the lawyers in the United States and Germany, Rueschemeyer (1973) argues that American lawyers identify themselves with the interests of their clients, while German lawyers distinguish between professional and business values, prioritizing their commitment to the law and the values of good public administration. According to Rueschemeyer, this difference can be explained by the relationship of German lawyers with the State. He argues that because lawyers in Germany develop their professional practice under the tutelage of the State, they perceived themselves as 'state officials,' and consequently, the legal practice is associated with a public servant duty, a conservatism that emphasizes State's interests, a certain distance from emotional issues or political controversies, and a tendency to see the law as the ' absolute truth'. In the case of the PD of the PBA, there are elements of both traditions, and yet, perhaps due to the impact of the development of human rights as a response to the violence of previous military dictatorships, the result seems to differ from both. Public defenders in the PBA seem to identify strongly with the interests of their clients, not despite being public officials, but on the contrary, because they are. In other words, as Harfuch (2002) has said, they interpret their work as ensuring the protection of their clients' human rights.

From a focus on due process to a 'results-based' management

Procedural reforms in Latin America have been the result of a long and cumbersome process marked by the resistance of judicial actors to changes, especially judges who lost power with the reforms. In the case of public defenders, the new CPC empowered them by expanding their participation during the pre-trial phase. However, later reforms have paradoxically weakened the due process (Ganon, 2008; Gutiérrez, 2017). Over time, thereforms, and the narrative that justified them, shifted from centering on strengthening the constitutionally guaranteed due process towards improving the management of the criminal process with an emphasis on the speedy disposal of the case. Although a speedy trial is essential both for the defendant and the victim, it has been achieved by reducing the opportunities of the defense to question the prosecutor's requests and the judge' decisions. This shift was apparent in the discourse of the networks of regional experts that promoted these reforms. The replacement of inquisitorial-type CPCs with adversarial ones in the 1980 and 1990s was presented as part of the larger process of transition to democracy and the strengthening of the rule of law (Ciocchini, 2013). The Argentinean scholars Julio Maier and Alberto Binder were the main promoters of the replacement of the old CPCs in Latin America, building around them a network of legal experts committed to these reforms (Langer, 2007). Among these reforms it was key to the strengthening of the defense by ensuring from the first statement of the accused that she/he was legally represented. But subsequent reforms, promoted mainly by a group of Chilean scholars, including Mauricio Duce, Cristian Riego and Juan Enrique Vargas Vivanco, who formed the CEJA in Chile, shifted the focus from the changing the

law to modifying routine practices and centered their efforts in developing a results-based management (Guarda, 2020).

Although in the PBA there were institutional (e.g., the resistance from judges to lose control over the courts' personnel), political (e.g., the lack of political consensus on the need for the reform), and material factors (e.g., budget constraints, lack of courtrooms available to conduct the hearings, etc.) that prevented the implementation of a managerialism as the one present in Chile, the reforms managed to impact on judicial actors' daily practices and the results-based management was partially adopted by the Public Ministry. The modification of daily practices took place mostly through the implementation of pre-trial hearings and the promotion of alternative dispute resolution mechanisms (Ciocchini, 2017; Kostenwein, 2020c). Regarding the defense, the pre-trial early hearings first implemented in flagrante delicto proceedings and later partially implemented for the rest of the criminal cases, left them with no time to other strategies than obtaining a diversion or a conditional sentence in a plea bargain (Ciocchini, 2017). Meanwhile, results-based management was introduced by establishing the duty of the Attorney General, the head of the Public Ministry, to evaluate the prosecutors and public defenders' performance (art. 13 inc. 28 law 12,061). According to the law, the criteria for evaluation are its "quality, efficiency and effectiveness…" (art. 13 inc. 28 law 12,061). The Attorney General will elaborate performance reports "which will contain the results of the evaluation of their [prosecutors and public defenders] performance and how it compares with the average result of their peers" (art. 13 inc. 29 law 12,061). This results-based management policy has expanded over time, as recently shown in the General Attorney's resolution No. 572 /19 in which it is stated the need to "raise quality standards, using processes to measure the degree of satisfaction of the user of the [justice] service and optimizing processes through the use of technological tools, protocols, and instruction manuals." Consequently, public defenders must be held accountable for their performance before the General Attorney, presenting their achievements, which will be compared with those achieved by their colleagues to determine the quality of their work.

Institutional design

The institutional position of the PD within the structure of the Public Ministry has been widely criticized (Harfuch, 2002; Binder et al., 2015). It is worth pointing out that the socio-legal literature documented that legal professionals when working closely in criminal courts tend to develop working routines that promote cooperation and avoid conflicts in their everyday work (Rengifo & Marmolejo, 2020). Reformers in Latin America have argued for the institutional autonomy of the defense to prevent these types of practices that attempt against the adversarial character of the criminal procedure. Following these ideas, at the national level it was adopted a clearly institutional differentiation between the PD and the Public Prosecutors' Office. However, despite the constitutional reform in the PBA taking place at the same time as the national one, the PD was not given institutional autonomy. In 2012, a new reform took place in the PBA, and the PD acquired institutional autonomy

through the creation of a new Public Ministry of the Defense, headed by a General Defender. However, this law was never implemented. When it entered into force, the Attorney General challenged it before the Supreme Court for considering it unconstitutional. In 2019, six years after being sanctioned, the Supreme Court finally rejected the lawsuit, but due to political reluctance, it was only in 2021 that the process for appointing the General Defender began.[6] This debate around the institutional structure has profound implications for the work of public defenders. Zaffaroni (2002) argued that the degree of autonomy of the PD is an indicator of the strength of the rule of law. This is so because of the PD general strategy, i.e. which cases should be prioritized, what criteria should be used to negotiate plea bargaining, and so, it's decided by the office of the Attorney General, the same office that sets the strategy of public prosecutors.

Another serious flaw of the institutional design that can impact the public defenders' performance is lack of transparency in the recruitment and promotions of their personnel. Career trajectories are not decided on meritocratic basis. Nepotism, political patronage, and reciprocity between senior officers decide legal professionals' career advancements (Sarrabayrouse, 2015; Gutierrez, 2013). It is common for legal professionals to move among different offices during their careers, e.g., from the PD to the Prosecution Office (Gutiérrez, 2013). When a vacancy occurs, the head of the office, i.e., the public defender in case of the PD or the judge in case of a criminal court, will usually appoint the candidate proposed by another colleague in exchange of her/his support on his/her future promotions or the promotion of those employees he/she sponsors (Sarrabayrouse, 2015). Therefore, public defenders have incentives to restrain themselves in their interventions, so as to avoid conflicts with their fellow prosecutors or judges that might risk their career prospects.

In consequence, both the character of public officials, the lack of institutional autonomy, and the lack of transparency in recruitment and promotions, tend to promote a corporate-type attitude among the judicial actors that could eventually affect the quality of the defense.

Conventions and distinctions about the PD in Argentina

To better understand how the reforms of criminal courts impacted on public defenders, we start by analyzing what these public defenders describe as their most relevant professional commitments and how these commitments are expressed in their daily practices. Following Lahire (2005), we aim to capture through their answers how these commitments configure the public defenders' *subjective fold*, i.e., how their perception as public defenders is the result of a series of dispositions associated with the different forms that judicial relations adopt. The subjective fold refers to the individuals' internalized judicial world which is directly related to the external manifestation of the judicial world. Thus, by observing these institutional manifestations, e.g., the discourses and practices produced within courts, we can better

[6] As of the time of writing this article, the process had not been completed.

understand the public defenders' internalized judicial world (Lahire, 2005). This approach should not be read as an attempt to reconstruct of the PD as an institution based on the perceptions of public defenders because as Pierre Bourdieu has argued we would fall into an autobiographical illusion inspired "by the desire to give meaning, give reason, extract a logic that is both retrospective and prospective, a consistency and a constancy, establishing intelligible relationships […]" (Bourdieu, 2011: 122). Nevertheless, we are interested in individualizing certain distinctions made by public defenders to produce a 'thick' description of their daily work that help us better understand the logics that drive their interactions.

What has been changing

All the interviewees have been working in the PD for more than ten years. Their seniority is significant for two reasons. Firstly, because it ensures they have enough experience to offer a more complete depiction of their insiders' perspective. Secondly, because they have become public defenders after the adversarial reform was already consolidated (it was done in 1998), but when the second most significant change, the introduction of pre-trial hearings and speedy trials, was still in process of being internalized by the legal professionals.[7] When asked on whether they had noticed changes since they began working in the PD, some public defenders answered by describing their own history within the history of the institution while others alluded to the history of the institution as a framework of analysis of the PD. In this regard, this approach of starting from a personal narrative instead of an institutional one reveals us some of the judicial conditions for the production of a public defender (Lahire, 2005), since this approach tends to identify normality with identity, this latter understood as fidelity to oneself of a responsible being, that is to say predictable, or at least intelligible, in the manner of a well-constructed story (Bourdieu, 2011: 124).

> I noticed quite a few changes because I graduated and shortly after I started in the defense, so I was quite young when I started, and from then until now I have had many years […]. As I feel more secure in the decisions I make, I am more solid in the performance of the position, but it has to do with my growth in terms of experience […]. I now feel less formalistic, I try to be less bureaucratic, less ritualistic in some things, try to accommodate the language so that it is plain (later comes the wear and tear thing) (Interview 3).

In this trajectory, it seems that the role of public defender is the support on which the *official* development of a judicial attribute is taking place associated with the rejection of some traditional features of the courts: formalism, bureaucracy, ritualism, and cryptic language (Bourdieu, 1987). That is to say, that the proper name as a fixed point that some public defenders design in a mobile *judicial* world – with its

[7] Whilst the reform was firstly implemented in Mar del Plata in 2005, it was not until 2010 that it was fully operational in the whole PBA (Kostenwein, 2020c).

own contexts and dynamics (Ziff, 1960) – is supported by critical appraisals about what they consider to be part of the judicial idiosyncrasy.

When the registry to analyze the changes in the PD goes from the biographical to the institutional, important differences arise in the interviewees' narratives such as: the level of institutional strength, the more active role in the criminal process, the relevance of specialization, and the impact of the problem of gender violence. For some public defenders, the PD is under an ongoing process of institutional strengthening due to the emergence of organizations that bring together PD from around the region and to the change of perspective and attitude regarding the commitments of the institution.

> Some changes are linked to the strengthening of the PDs in the country and in the countries of the region, from the creation of regional organizations such as AIDEF [8]. Others, derived from the redefinition of the PD's mission, […]. In general, the changes point to the proactivity of the defense, the design of strategies that require investigative activity, and the need to have the support of investigation teams. Also, the comparison of public defenders to other actors in the process in remuneration and hierarchical matters has led to the creation of the defense career, and the vocational choice of the role (Interview 2).

According to this testimony, the changes that have occurred in recent times are highly relevant to the PD. From the strengthening to the redefinition of the mission, through the comparison with other actors in the process, we are in the presence of elements that seem to give this institution a 'semantic security' (Boltanksi, 2011) that it did not previously possess, in the sense of deploying operations that manage to transform features of concrete judicial actors into attributes of the PD as an institution. The elements mentioned do not refer to specific public defenders but to the PD as such, to said institution as an *abstract being*.

> "Constant properties are thereby attached to beings whose life is highly fleeting and changing, as is that of human beings and especially those who (…) see the contours of their identity alter depending on the situation in which they are immersed" (Boltanski, 2011: 79).

Therefore, it is important to highlight the improvement of the public defenders' status that they claim they did not have in previous decades, and that, according to some of the testimonies we collected, led to a more active role. Thus, the strengthening enabled another capacity to act, a repertoire of actions that offers public defenders more options regarding the paths that can be followed. Together with the strengthening of the PD and the more significant role they play, the interviews reveal the emergence of a need for a pronounced specialization that requires a more detailed judicial division of labor.

> It has been many years in which we went from jurisdiction in all matters to the specialization of defenders with criminal jurisdiction and with jurisdiction in civil

[8] AIDEF is the Inter-American Association of Public Defenders created in 2003.

> matters, then for those in the jurisdiction of juvenile criminal responsibility, and currently, in some judicial departments, those in the stage of the execution of the sentence. The organization also changed with the appearance of the figure of the departmental ombudsman (later called the departmental ombudsman in the new public ministry law 14,442), and the provincial ombudsman, a position still pending designation. This year a contest has been called to cover it. The organization of each judicial department in the form of a large legal study, and the confluence of departmental defenders in a council of defenders, made it possible to link all the PD at the provincial level, and even act jointly (Interview 4).

By mentioning this testimony, we do not intend to suggest that this necessarily factually true, but to identify and analyze how for some public defenders a process of specialization similar to that proposed by Émile Durkheim (1984), regarding the development from a society with mechanical solidarity to another with organic solidarity, took place in the PD. Specifically, there seems to be a relationship between the *judicial division* of labor and its organization, whose function is, at least in part, integrative. Therefore, the strengthening of the PD, its active role, and the trend towards specialization are factors that in recent years have helped to develop a more cohesive and better prepared judicial organization of the PD. This professionalization and cohesiveness manifests in the consensus found among public defenders regarding the approach taken by criminal courts to deal with gender violence.

> In the substance of everyday work, the issue of gender violence is something that led to the exploitation of the system. Many cases are true and correctly condemned, but many others are part of an abuse of the system by the victims […]. Many complaints after a few days ask for the case to be dismissed, or they do not want to continue them, or they retract when declaring. But it is very difficult in a case of gender violence the accused to be acquitted or the case dismissed (Interview 5).

This testimony presents objections both to the material and symbolic consequences of the approach to gender violence, i.e., they highlight both the problem of presenting the punitive response as the only response and the harm this type of response produces. In this regard, public defenders interviewed suggest, as argued by the critical feminist literature (Bernstein, 2014), that there is an excessive use of the penal tool with prison strategies gaining prominence while *welfarist positions* are dismissed. By openly voicing their disagreement with this punitive turn in such a sensitive topic, they show the strength of their commitment to the defendants and their confidence in the institutional position they occupy.

The Public Prosecutor's Office: the adversary

As previously mentioned, public defenders and prosecutors work within the same institution, the Public Ministry. Consequently, public prosecutors are colleagues, who simply play a different role within the institution. Furthermore, both prosecutors and defenders are, together with judges, part of the administration of justice. Therefore, public defenders' perspective and practices are strongly influenced by

a shared organizational culture (Ackermann & Bastard, 1988, 1993; Ostrom et al., 2007). As we have mentioned before, relationships are even deeper since professional careers within the institution are usually based on family relationships and exchanges of favors (Sarrabayrouse, 2015). This sometimes generates strong commitments between defenders, judges, and prosecutors, which discourage conflict and accentuate a sense of belonging.

On the other hand, in the adversarial system, prosecutors present themselves as the adversaries they must face in their daily work. This generates a constant tension between the closeness and empathy derived from sharing a professional identity and being part of the same institution, with the consequent social position that said profession grants, and the antagonism that the adversarial process demands. These tensions are presented in the interviews in the form of dichotomies, such as, for example, ideological differences under the dichotomous classification between *garantismo* (guaranteed-safeguards model) and *mano dura* (tough on crime) (Anitua, 2005, Gutierrez, 2017). The term *garantismo* acquires different connotations depending on the social space in which it is used. While in the legal sphere it refers to a doctrine that prioritizes fundamental rights over the punitive power of the state, in the political and media sphere it is used to derogatorily point out those legal professionals who are considered protectors of criminals despite the popular demand for punishment. On the other hand, *mano dura* is used almost exclusively with negative connotations, to point out those who propose interpretations of the law that favor convictions and accentuate its punitive nature. For this reason, we found it interesting to explore the perception of the public defenders about the prosecutors, since it tells us indirectly about how the defenders construct themselves in relation to the other judicial actors that intervene in the criminal process.

Regarding the above, all the public defenders interviewed criticized the work of the prosecutors. As one public defender summarized: "[they do not give] an answer or solution to the [causes], they (unnecessarily) delay the important cases, they do not issue defense citations seriously and quickly." (Interview 5). However, the explanation of the causes of these professional deficiencies differentiates the defenders interviewed into groups in which the tension between ideology and sense of belonging is observed.

A group of defenders privileges the sense of belonging, the understanding of prosecutors as colleagues, empathizing with them, and maintaining that the problems of the prosecution are the result of police work. As one defender justifies: "the police (…) do not collaborate, that causes evidence to be lost, witnesses are never cited, testimonials are not clear." (Interview 3). This support for the prosecutors should not be read as a rejection of the *garantismo*, after all, they are affirming that there is a problem of weak evidence in most criminal cases. But they prioritize belonging to the institution and their relations with the prosecutors over the antagonism that the criminal process demands from them.

For another group, the performance of the prosecutors in the process is often highly problematic, but instead of arguing it is due to police failures or other external factors, they claim is due to prosecutors themselves. They explain that there are prosecutors who are "judicious and sensible", that is, those who agree with their way of seeing criminal cases and act with "objectivity". On the other hand, there

would be those who "lose objectivity" by pursuing a *mano dura* policy. (Interview 1). These prosecutors are committed to their work but, from the perspective of the defenders, they are wrong to adopt "positions of exaggerated severity" (Interview 9). In turn, for this second group public defenders, most prosecutors are "lazy", that is, "bureaucrats (…) [who seek] to get rid of the case because they get paid at the end of the month" (Interview 1). This reference to laziness is significant because it coincides with a dominant discourse among those who have promoted criminal justice reform. For example, Binder, one of the most recognized voices within the promoters of procedural reforms, critically characterizes the administration of criminal justice for its "preeminence of the procedure, formalization, culture of secrecy, rigid and verticalized judicial organization, lack of management control, disregard for results, depersonalization, corporate vision" (Binder, 2003, p. 15).

Finally, there is a group of more critical public defenders to whom the confrontation with prosecutors has a strong ideological and moral component. One of them said that prosecutors are "not very human, they always condemn the defendant already at the stage of the investigation, they do not listen to those involved in the criminal process" (Interview 9). Going beyond the individual level, another public defender claims that the Public Prosecutor's Office lacks an "explicit and clear criminal policy" (Interview 9) and therefore "there is no clear criteria [guiding their decisions], little use of the compositional system, bad investigations, a disregard for the efficacy in the selection of cases to bring to trial, excessive punitive demagoguery" (Interview 2). Several public defenders highlighted this "chaotic management" of the Public Prosecutor's Office, with arbitrary appointments and displacements of both prosecutors and those who work with them, to which is added the lack of resources and institutional support. These critical public defenders tend to define themselves as *garantistas*, i.e., supporters of *garantismo*, and describe prosecutors' position as *mano dura* or punitive.

The relevance of defense, the priorities of those who defend

In a work on socio-professional classifications, Laurent Thévenot proposes to analyze different forms of characterization of individuals around activities, considering that the latter "are based on a plurality of forms of legitimation and justification, whose validity is not limited to the professional sphere" (2015: 47). He takes as a reference the complexities that the nursing occupation entails because it is cross through different relationships: one of a hierarchical nature with the doctor who holds the authority, another of a technical nature linked to diagnostic services, and one with a certain domestic matrix generated with the relatives of the sick. This is particularly interesting for us because those who occupy the PD seem to carry out a series of displacements in their employment relationships. Specifically, these displacements are articulated with four elements: the defendant, the defendant's family, the social vulnerability, and the prison conditions. Although all these elements have as a source the defendant, they show links with a series of parameters of legitimation and justification, whose validity, as Thévenot insinuates, is not limited to the strictly professional sphere. This gives rise to a plurality of commitments or involvements

that can range from expert to assistance, from official performance to personal convictions. Thus, when we consult public defenders about the most relevant commitments for the PD, their answers emphasize the specific cases on which they work with references to broader institutional and social problems.

> The most relevant tasks would be to apply a good defense strategy, and always to obtain the release of the accused. And if you have never been detained, reach the best agreement, guide legally and humanely those who come to the public defense, who are generally people in a situation of great vulnerability. It is a multidimensional task that goes through the entire process, from the stage of investigation, trial and execution, control of detention conditions, information to defendants, family members and close friends. (Interview 3)
>
> I consider that the most important thing is to have contact with the detainee, understand their context, their life and follow an interdisciplinary approach, since many times a legal approach to the case is not enough, and we need to take into consideration the social and family aspects. For me it is very important to support detainees if they wish to study at the university or any at other institutions, by helping them with administrative issues such as requesting analytical certificates, identification cards and other documentation, as well as contacting the student centers inside the prison units, until they can start their studies. (Interview 7)

The involvement of those who are part of the PD is centered on the defendants, but it is not restricted to them alone, but rather their trajectories and that of their closest environment. As Thévenot (2016) suggests, the involvement tends to transform dependency into power, and those who work in the PD seem to corroborate this: the demand of their role is complemented with a commitment that goes beyond the strictly legal representation, or in a public defender's words, "guide legally and humanely those who come to the PD, who, in general, are people in a situation of great vulnerability" (Interview 8).

Therefore, the exploration of public defenders' involvements helps us to focus on issues that are often not considered when analyzing the work in the PD and by doing so, to move away from studies aimed at pointing out the institutional shortcomings (Harfuch, 2002) or evaluating its performance and effectiveness (Rengifo & Marmolejo, 2020). Our approach is mainly interested in understanding how public defenders internalize their role, how they justify their work and what type of criticisms they raise. In this sense, it is crucial to pay attention to the actors' own criteria used to evaluate their working environment and the duties and responsibilities they associate with their role because "the form perception adopts determines the access to reality and the modality according to which it is experienced" (Thévenot, 2016: 255).

> As lawyers we are better prepared to deal with legal aspects and perhaps, they [the defendants] are more satisfied with our legal performance than what we do regarding their welfare. To deal with the welfare aspects [of the case] you must learn to build links and bridges with institutions that can help you when defendants have problems that go beyond the legal dimension (Interview 1).

In the exercise of their duties, those who belong to the PD are perceived as something more than mere judicial technicians, since their legitimacy is based not only on their legal knowledge but also in their power to grant access to social assistance (Feeley, 1979). And it is from this relation, in which cognition and emotion coexist, that they end up introducing labor conventions in a criminal process within which their performance results something closer to the common good than to strictly personal interests (Thévenot, 2016).

The role of defenders in the division of judicial labor

When analyzing the commitments of the judicial actors, it is not the same to work in the PD as in a criminal court or in the Prosecutor's Office, and precisely, delving into the differences and nuances between the different roles of those who work in criminal justice serves to *undo the generality of the judicial* (Thévenot, 2015), so to achieve a more detailed cartography between the various functions within the courts. Therefore, it is important to develop an approach that includes the subjective level of the professions while also making visible their collective scope, since it is this collective scope that "will *represent* normal behavior, beyond the particularities of individual behaviors". (Thévenot, 2015: 73)

> You must know and always keep in mind that you are going to have to "defend the indefensible". Generally, most of the serious crimes are not represented by private attorneys, such as rape followed by death or crimes against minors. This commitment must be every day a pillar for a public defender, to be able to work effectively. If you are not willing to do so, you must step down. The work is not easy, that's why there is so much turnover. Very few last more than five years in the same place, because they mentally collapse or wear out (Interview 6).
>
> The challenge is not to get trapped in bureaucratic logic, in daily working routines. You sometimes read a case and you already know how it's going to end, and then, why do I start writing an appeal and take the case to the chamber if everything is lost? You must do it because sometimes you get surprises, and you have dismissals in cases that you would never have thought we were going to win. Even if it happens exceptionally, even if out of 100 cases 99 are rejected, we must not fall asleep and we must be aware that our duty is not to collaborate with the administration of justice, that is not what we are here for (Interview 1).

These testimonies bring us closer to the limit of the rational choice model to analyze the performance of the PD, including the relationship of this model with what is known as cultural criminology. In its most frequent meaning, rational choice theory maintains that individuals seek to achieve the greatest possible benefit within their reach (Palmer, 1982), with optimization occupying a central place as the logic that guides their action. Therefore, to consider a rational person, one must consider "whether he[/she] adequately sought information relevant to his[/her] choices, whether the beliefs he[/her] formed with respect to the different dimensions that

make up his[/her] decision are solid" (Ermakoff, 2019: 199). Even though there are many works that discuss the theory of rational choice, we are interested in recovering it because, at least in its most utilitarian aspect, said theory seems to enter into tension with some testimonies of those who work in PD. So, in the patrimony of habits of the public defenders, it is necessary to include elements that go beyond cost and benefit, not because one or the other does not exist in that judicial space, but because they are not always sufficient to interpret their conduct. Hence, adrenaline and pleasure may also be factors that are part of everyday experiences in PD, just as cultural criminology suggests with respect to committing a crime (Ferrell, 1999). In short, the somewhat simplistic image of judicial actors -in our case, of those who are part of the PD- rooted in exclusively opportunistic criteria that only seek to maximize their personal profits should be reviewed considering that, along with the calculation, they can also there may be shreds of audacity and risk.

The tension between discourses and concrete practices

The subjective folds of public defenders involve not only internalized and manifested values and ideas, but also their daily practices. As Martin-Criado (2014) argues, the discrepancy between practices and beliefs, and even between different beliefs, is normal. Following Lahire (2005), public defenders are plural subjects, who suffer continuous discrepancies between practices and declared beliefs, as well as continuous strategic adaptations of their beliefs to legitimize their practices (Martin-Criado, 2014). These dissonances are evident when consulting the public defenders for their ideas about what they consider the professional duty of the public defender, on the one hand, and their justification for the use of the plea bargaining, a common mechanism to dispose of cases without going to trial.

When asked to describe their daily work, a group of defenders, those most ideologically distant from the prosecutors, emulated the reformist discourse (Gilardone & Narvaja, 2015) and criticized "formal or reactive strategies of defense." (Interview 2). These formal defenses are based on the technical interpretation of the law (Bourdieu, 1987). The expectation of these defenders is to embrace a more active role, to offer what reformers define as an effective criminal defense (Binder et al., 2015). The effectiveness of criminal defense in this sense is not satisfied with mere legal representation but requires the full participation of the accused during the process, that is, that he/she can properly understand what is said, that his/her voice is heard, and that she/he can make informed decisions regarding his/her case (Binder et al., 2015). But in addition to this, it requires the defender to conduct a parallel investigation to the official one gathering evidence that supports the defendant's case. Defenders who strongly identify with this vision of defense interpret the absence of these active strategies as "lack of commitment to work (…) lack of resources and the absence of conditions to ensure equality of arms." (Interview 2). Even these critical defenders recognize that defense strategies are dependent on the strength of the case. Because most cases that reach courts are those defined as flagrancy, i.e., those in which the accused has been detained while committing the offense or immediately after committing it, as one defender explained "by definition

there is strong evidence" (Interview 1). Furthermore, even those defenders who are most critical of the police and prosecutors admit that it is not common to find cases of "innocent defendants convicted" (Interview 1) because very few cases will move forward if they actually require an investigation (Interview 2). In other words, the problem in the criminal courts is not of miscarriage of justice because of unjust convictions, but of impunity due to the ineffectiveness or inefficiency of police, prosecutors and in some cases judges.

Faced with the strength of the cases that reach the courts, alternative dispute resolution mechanisms are presented by public defenders as necessary to avoid a debate with a predictable ending. There was consensus among those interviewed on the advantages of those mechanisms that dispose of cases without imposing a punishment, such as mediation or diversion. There was unanimous praise for mediation, which was described as a "tool" (Interview 1), which "decompresses the administration of justice" (Interview 1), and "allows the use of restorative justice mechanisms." (Interview 10). In the same laudatory tone, the defenders point to a repertoire of legal instruments that seek the 'composition' of the parties, and thus to reduce or avoid state punishment. Within these mechanisms are mentioned the "conciliation; integral compensation; deferred prosecution agreement; diversion" (Interview 2).

Regarding the use of the *juicio abreviado*, the local adaptation of the American plea bargaining (Langer, 2004), a mechanism that arguable contradicts some elements of an "effective defense," there is also a strong consensus among the public defenders interviewed of its need, with only some critical voices raising objections. Criticism directed to the American plea bargaining such as its blackmailing character, the prioritization of organizational needs over the pursuit of justice, and its general lack of transparency (Langbein, 1978; Mather, 1979; Mulcahy, 1994; Feeley, 1997; McCoy, 2005) are largely applicable to the *juicio abreviado*. Acknowledging some of the weaknesses of plea bargaining, the *juicio abreviado*, regardless of the agreement reached by the parties, requires the judge to control the evidence presented in the case sentencing the defendant, and she/he has the power to even acquit the defendant.

It was noticeable in thire responses the use by public defenders of commercial metaphors when describing their strategic use of plea bargaining. Thus, an interviewee referred to cases involving serious crimes and with strong evidence as cases that "are worth a lot", to a relatively harsh sentence as "they charge you more than they should," to the offer of a light prison sentence in relation to the crime committed as a "giveaway" and the use of plea bargaining is justified because "you get good results" (Interview 1). This way of thinking about cases coincides with criticisms raised on shift towards managerialism in detriment of due process (Ganon, 2008).

Public defenders are aware of the problematic nature of the *juicio abreviado*, describing it as "a tool to extort the defense" (Interview 2) which is "overuse" (Interview 10) and that "is part of a punitive trend" (Interview 10). They explain how this extortion works: "[prosecutors] offer deals that involve a prison sentence but so that [with the time the defendant has already spent in pre-trial detention] the defendant recovers his freedom, and so defendants in order to be release sign what is put in front of them" (Interview 5). Inspired by the reformist discourse, one defender argued that if "the trials were carried out on time", the extortive character of plea

bargaining would disappear, since the accused would not face the decision to wait in detention for the trial or to quickly receive a short sentence through plea bargaining. This justification both of plea bargaining and of its problems by blaming court delay has also been to justify simplified procedures in cases of flagrancy (Ciocchini, 2014). However, this idea, that the extortive character of the plea bargaining is result of court delay, is questioned by another public defender interviewed who argues that even in the simplified procedures, the extortion is present, as the prosecutors offer the release of the detainee only if he/she also accepts a *juicio abreviado* with a suspended sentence (Interview 6). In conclusion, there is no swiftness that can neutralize its extortive nature.

However, not all public defenders agree with these critical descriptions of the *juicio abreviado*. Some argue that since prosecutors are interested in avoiding the trial and their objective is to secure a conviction, they tend to offer significantly lighter sentences than they would request in a regular trial and therefore the *juicio abreviado* benefits the accused (Interview 1). In any case, and despite the difference of opinions, there is consensus on its need. The defenders understand it as an "indispensable" mechanism, and even that "it would not be desirable" for all criminal cases to go to trial. The latter, not only for reasons of economy of resources, but also because sometimes the accused has no interest in denying the accusation (Interview 1). Thus, there are multiple justifications aiming at reducing the dissonance between the discourse of effective defense and the daily use of plea bargaining.

These contradictions allow us to observe how the subjective folds of the defenders are constituted by the tensions between a plurality of discourses on what a defender should be and the practical needs imposed by the specific situations. Hence, the defenders are continuously internalizing narratives ever since the beginning of their professional legal education that shape their perspectives and work-related practices, but because there are multiple narratives and their internalization is contingent on the individual and the institution history, the result is a condensation of sense which is constantly produced and reproduce that we have defined in this article as the subjective folds of the judicial world.

Conclusion

The criminal process in the PBA has been affected by radical reforms in the last decades. Beginning with the complete replacement of the CPC in 1998 to the introduction of pre-trial hearings and simplified procedures for cases declared in flagrante delicto in 2004 the reforms have impacted more than legal procedures; they have changed the way judicial actors perceive themselves and their relations with the institution. This article offers an exploratory analysis on how public defenders' perceptions have been impacted by those reforms and to what extent those internal changes have affected the internal dynamics of the PD. We are hoping this article is followed by others that examine the dynamics of criminal courts in Argentina from the judicial actors' point of view.

Our analysis has shown that there is a crucial tension in the expected role public defenders should play between the interests of the defendants they are representing and those of the society. Public defenders deal with that contradiction by presenting their duty as ensuring the protection of the defendants' human rights, so the individual interests of their clients become a common good. However, the expansion of managerialism has complicated this narrative since the PD has shifted its priority from due process to the number and the results of the cases handled. This shift has taken place while the PD is institutionally located within the same roof as public prosecutors, the latest political move to finally grant the PD institutional autonomy might affect this managerial trend.

Drawing from the sociology of Bernard Lahire and Laurent Thenevot we were able to identify in the public defenders' responses how these changes affected their personal commitments. Mapping those commitments allow us to describe the *subjective folds* of the PD through which it is possible to better understand the decisions of public defenders by considering the internalization they make of the judicial world and its relationship with the institutional context. Then we have also highlighted how in their description of their trajectory, public defenders constructed an identity around the rejection of some traditional attributes of the courts such as formalism, bureaucracy, or cryptic language. Together with this consensus among public defenders on the rejection of the traditional attributes of courts, we found a strong agreement on the three key aspects of the PD in the new CCP: its institutional strength, its more active role in the process, and the relevance of professional specialization. It is around these shared ideas and values than public defenders have constructed in the interviews an image of a more cohesive and even better prepared PD. This was illustrated in their critical description on how criminal courts are taking and overly punitive stance when handling gender violence cases. The way they refer to public prosecutors and their relationship with them also illuminates how they constructed themselves. Though on this point we found public defenders to split between different levels of support of the public prosecutors, two key findings were the role police play in this narrative as the burden public prosecutors must carry and the classification of public prosecutors among those who shared their legal ideology, *garantistas*, and those who doesn't, *mano dura*.

Finally, we found that the cohesiveness of this individual and institutional identity, condensed in the subjective folds, is further cemented by the social dimension of the defendants they represent. The social vulnerability of the defendant manifests with all its strength during the criminal process, often in the defendant's family basic needs. Facing this social problem, public defenders' commitment to their clients mobilizes their cognitive and emotional elements to go beyond the merely legal assistance into a redefinition of their labor conventions that integrates social assistance as part of their duty. This expansion of their own professional role goes against their own strictly personal benefits, since it is not institutionally rewarded, and redefining their work with individual defendants as guided towards the common good. This also shows the limit of the rational choice model, and its focus on cost and benefit, to interpret public defenders' practices. This is not to deny the existence of this logic of cost and benefit, but that it co-exists with other logics based such as that of commitments, which have a significant emotional element, and that are condensed

in the subjective folds of the judiciary. To conclude, the analysis shows that whilst adversarial reforms were aimed at developing public defenders' independence, the lack of formal autonomy of the PD together with the managerial pressures recently introduced, are attempting against such independence, questioning public defenders' priorities and commitments.

Data availability The data that support the findings of this study are available from the corresponding author upon request.

Declarations

Competing interests The authors have no competing interests to declare that are relevant to the content of this article.

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