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The selection of cases by the Public Prosecutor's Office in Chile

La selección de causas por parte del Ministerio Público en Chile

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Abstract

This paper aims to study the effectiveness of the legality principle in the Chilean system. To this end, it recreates the different models used by the four Regional Prosecutor's Offices in the Metropolitan Region to select and filter cases. In this regard, the paper analyzes how the Public Prosecutor's Office works at three different levels or categories when selecting cases that are likely to be investigated: arrest for *in flagrante delicto*, type of crime, and pre-classification. The paper shows how the criteria of efficiency and prosecutorial effectiveness by the Public Prosecutor's Office is applied and, in the end, influences the future of a case.

Keywords: *Public Prosecutor's Office; Opportunity principle; Selection of cases; Pre-classification.*

Resumen

El trabajo busca estudiar la operatividad del principio de legalidad en el sistema chileno. Para ello, se reconstruyen los distintos modelos de selección y filtro de causas por parte de las cuatro Fiscalías Regionales que existen en la Región Metropolitana. En este sentido, el trabajo analiza cómo el Ministerio Público opera en tres niveles o categorías distintas en el trabajo de selección de causas susceptibles de ser investigadas: detención por flagrancia, clase de delito y preclasificación. El trabajo constata como la aplicación de criterios de eficiencia y operatividad persecutoria por parte de la fiscalía termina incidiendo en el futuro de una causa.

Palabras claves: *Ministerio Público; Principio de oportunidad; Selección de causas; Preclasificación.*

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I. INTRODUCTION

How does the Public Prosecutor's Office select the cases it pursues in the Chilean criminal justice system? The question underlying this article may seem inappropriate. Criminal prosecution in Chile is defined as per the prevailing tradition in continental Europe, based on the legality principle ["*principio de legalidad*"][1] (article 166 par. 2º Code of Criminal Procedure (CPP by its acronym in Spanish)).[2] Criminal prosecution is (in theory) mandatory and only in exceptional cases (those provided for by law) the prosecution may be renounced ("early termination").

The limitations of strictly applying the legality principle are well known. The volume of cases, problems in achieving results, the lack of information on the vast majority of crimes, and the scarcity of resources for prosecuting and punishing crimes make this principle—statistically speaking—a myth. Of the approximately 1.5 million inflow cases recorded annually by the Public Prosecutor's Office nationwide, 150,000 convictions are reported each year. Even this statistic is likely to be exaggerated by the Public Prosecutor's Office's recording system. In any case, at best, the conviction rate stands at around 10% of inflow cases.[3] The opposite is reflected in the one million cases that are simply shelved each year.

All this is well known: legality is largely a myth, and the Public Prosecutor's Office must make decisions to satisfy the demands for prosecution to an acceptable extent. The purpose of this paper is not to argue about the existence of this myth by trying to prove what is obvious. The question that drives it is somewhat more ambitious: to understand how the Public Prosecutor's Office selects cases. How is the work of the various Public Prosecutor's offices organized to distinguish between what will *actually* be prosecuted and what will not? On what criteria and guidelines does this institution select and filter its cases?

The paper addresses this issue in abstract terms and through an analysis of empirical sources relating to the Regional Prosecutor's Office in the Metropolitan region. In abstract terms, sections 2 and 3 outline the Public Prosecutor's Office's historical understanding of the legality principle and how this institution has developed different internal case selection systems with predefined structures and objectives. In this context, the second part (sections 4 to 6) reports on the results of an investigation into how the Metropolitan Regional Prosecutor's Offices—most affected by the need to select cases due to the large number of crimes committed in Santiago and the concentration of the most complex cases—organizes and carries out the selection process.

II. THE DEBATE ON CASE SELECTION IN THE CHILEAN EXPERIENCE

As outlined above, the debate on how the Chilean criminal justice system selects cases that are ultimately prosecuted is based (at least in theory) on the "the legality principle". Traditionally, this principle implies a duty to prosecute and the inability to renounce it once initiated.[4] The

[1] On its origins, see DUCE & RIEGO (2021), pp. 179 *et seq.* In a comparative context, for discussions of the recent evolution of the legality principle in continental Europe, see BOYNE (2017), 138-174; BOYNE (2014); ANTONUCCI (2021); SEPULVEDA & WILENMANN (2022).

[2] The legality principle is closely linked to the officiality principle, which expresses the idea of public prosecution of crimes (see Article 53(2) of the CCP). See: LÓPEZ (2002), pp. 36f.

[3] The number is much lower if only "effective" convictions are considered.

[4] MATURANA & MONTERO (2017), p. 139.

material basis for this principle is found[5] in equality before the law: the prosecution of criminal conduct should not be left to the mere discretion of a state body, such as the Public Prosecutor's Office,[6] nor to the will of its officials. Consequently, state agents responsible for criminal prosecution would be *a priori* prevented from selecting which crimes will be prosecuted and which ones will not.[7]

However, reality shows exactly the opposite: all criminal prosecution systems—regardless of their structure and design—operate under mechanisms of case selection and filtering. No justice system is capable of investigating all cases to their very end. In other words, no matter what criminal procedure system is analyzed and what resources it may have, its ability to investigate and punish crimes will always be limited.[8] It is therefore unavoidable for the Public Prosecutor's Office to make decision that will impact its ability to bring criminal proceedings in a particular case and in the universe of cases to be investigated. The lack of filtering decisions has even greater impacts: the pursuit of "bad" cases increases the system's caseload and can lead to the wasteful allocation of valuable resources.[9]

Since the prosecution and punishment output in different criminal justice systems is much lower than the overall input of reported crimes, these systems are naturally required to select their cases.[10] The outcomes of the system also depend on how much work is involved in each case, which in turn requires techniques for classifying or segmenting cases.[11] If all cases were handled in the same way and spending the same energy, the system would either become irremediably mechanical or would generate endless backlogs of pending cases. So, how the system works depends a lot on the practices of cases selection.

The problem of case selection is well known in Chilean literature and institutional practice. In fact, the volume of cases was a core issue in the Criminal Procedure Reform, and its handling through selection mechanisms was directly discussed at the beginning of the reform.[12] Institutionally, from the outset of the reform's implementation across regions, the local Public Prosecutors' offices quickly sought to develop working models aimed, above all, at implementing case management models[13] based on optimizing the time and resources available.

Indeed, one of the main issues perceived as problematic in the first assessment of the reform, in 2001, was the Public Prosecutor's Office's low ability to quickly close cases that merited it. This stemmed, amongst other factors, from a lack of sophistication in case flow management, organizing work on a strictly individual basis.[14] Thus, in the initial stage, the work of prosecutors was organized mainly by allocating cases equally among them. There was no

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[5] LÓPEZ (2002), p. 47.
[6] MATURANA & MONTERO (2017), p. 139.
[7] LÓPEZ (2002), p. 47.
[8] CHAHUAN (2019), p. 80.
[9] FANDIÑO *et al.* (2017), p. 59.
[10] This is the traditional way of thematizing the point in contemporary European literature. See JEHLE (2006), pp. 3-25; JEHLE *et al.* (2008), pp. 161-79.
[11] By "segmentation", we mean the operation of grouping the set of *inputs* received (or retained) into several categories and treating them differently. Although referring to the form of processing (negotiation vs. trial), the same explanation has tended to dominate the literature on the progressive consolidation of the *plea bargain*: BALDWIN & MCCONVILLE (1979), p. 287; LANGBEIN (1979b), p. 266.
[12] See, for example, DUCE (2002).
[13] On case management in the Chilean criminal justice system in general, see: FUENTES MAUREIRA (2021), pp. 105 *et seq.*
[14] BAYTELMAN & DUCE (2003), p. 91.

significant differentiation of tasks between prosecutors, and each prosecutor was expected to handle "his" case from start to finish. This lack of a specialized organizational structure naturally led to inefficiency in case management.[15]

In this regard, case selection mechanisms were gradually implemented: initially, in some local Public Prosecutors' offices, the chief prosecutor personally took on the task of selecting cases at an early stage. In others, this task was distributed through a rotation system among the various officials. Finally, in some local Public Prosecutors' offices, specialized units dedicated exclusively to these tasks could be found. This allowed for the efficient use of economies of scale and, at the same time, enabled the creation of specialized units for pursuing certain types of crimes.[16] Gradually, the Public Prosecutor's Office began to experiment with management models that broke with the paradigm of equal distribution of cases in order to improve its ability to select cases through sophisticated structures.[17]

The two most important changes when generating models to be disseminated among prosecutors, with a view to creating more efficient management mechanisms, were the creation of mass case processing units (commonly known as TCMC (by its acronym in Spanish): Less-Complex Case Processing) and the creation of prosecutors' offices for *flagrante delicto* at a regional level. As we shall see, both types of units have allowed the classification, filtering, and referral of cases to other units to be done more quickly and efficiently. Ultimately, this model sought to identify and use resources for the proper processing of cases according to the complexity of the investigation.[18]

Implementing these work structures allowed the Public Prosecutors' Office to optimize case completion rates in a very short time.[19] Thus, it's been said that one of the great achievements of the reformed Chilean criminal justice system is its ability to handle the volume of inputs entering the system, unlike other Latin American countries.[20]

Although several Chilean studies have highlighted the importance of organizational structures linked to decision-making on selection and termination of cases as a management mechanism, there are still significant gaps in the literature. First, there are no recent studies on the subject: the selection and early termination of cases was a core idea in the early discussion of the reform, but it lost relevance over time. Second, much of the initial work focused almost exclusively on promoting efficient organizational forms for early decision-making about termination in less complex cases. The literature did not address sufficiently—neither empirically nor as a design issue—the variables affecting the decision to select other types of cases. Outside the realm of mass crimes, we know little about how selection decisions are made.

[15] Critically, CASTILLO VAL *et al.* (2011), p. 264.
[16] BAYTELMAN & DUCE (2003), pp. 92 and 97; CASTILLO VAL *et al.* (2011), p. 264.
[17] DUCE (2010), pp. 196 *et seq.*; BAYTELMAN & DUCE (2003), p. 91.
[18] CASTILLO VAL *et al.* (2011), pp. 59 *et seq.*
[19] The implementation of structures dedicated to the early termination of cases allowed annual case completion rates to rise from 46% in 2001 to 87% in 2002, reaching 95% by the end of 2003. See BAYTELMAN & DUCE (2003), p. 94.
[20] FANDIÑO *et al.* (2017), p. 48.

III. FORMAL SELECTION MECHANISMS IN CHILEAN LAW AND THEIR INTERNAL REGULATION

In this article, we are interested in studying how the case selection process is structured in Chile. Our object of analysis is a legal process. In a broad sense, selection is a concept that defines that certain cases are dismissed, that others receive a degree of attention incompatible with their actual prosecution, and that others ultimately receive a level of attention appropriate to their resolution. To account for the general selection process, we conceptually divide the general topic of "selection of cases" into four operations that influence the treatment given to a case: segmentation, classification, filtering, and *stricto sensu* selection.

We understand segmentation as the formal or informal definition of types of cases that have different expected forms of treatment. The generation of abstract labels such as "less-complex cases", "cases with an investigative line", and others that we review below, is the expression of the existence of general segmentation operations. Segmentation in legal settings depends on intra-organizational adaptations to expectations about case treatment that are not purely internal to the organization, but rather defined by the working groups associated with the criminal justice system.[21] The mere organization of the Public Prosecutor's Office does not completely control the parameters that allow cases to be segmented and thus does not arbitrarily define its segments, but it does influence those definitions.

Classification, on the other hand, is the application of labels corresponding to each segment to a particular case. In a system that segments its cases, an operator must review the information to give it the corresponding treatment. Classification is the micro-level implementation of the macro-organizational operation of case segmentation.

By filtering, we mean the decision not to pursue a case. When filtering, the organization terminates and removes the filtered causes from its inventory, without seeking to apply sanctions regarding them. Filtering is generally expressed by a termination that does not imply sanctions. Under the idea of mandatory prosecution, the administrative application of filters is the only way to remove a cause from the system without the intervention of judicial decision-making procedures.

Finally, by *stricto sensu* selection, we mean the decision to seek the application of a sanction. In systems that do not have mandatory prosecution expectations, selection tends to be expressed in a more or less formal manner: the case is referred, for example, to a specific unit. In systems with mandatory prosecution, selection is generally expressed through the use of classification labels that involve greater investment of resources in processing. Selection operations—the decision to actually investigate and litigate a case—thus have virtually no formal definition in a mandatory prosecution system. This makes their investigation particularly difficult.[22]

The central thesis of the article is that, because of the formal expression of filtering and not of *stricto sensu* selection, the general process of case selection has been studied almost exclusively from the perspective of the first type of operation. The literature has made the study of the application of early terminations (filters) and the management of case selection virtually

[21] See the classic works of NARDULLI *et al.* (1985); EISENSTEIN & JACOB (1977); EISENSTEIN *et al.* (1988).
[22] On this point, SEPÚLVEDA & WILENMANN (2022), pp. 6f.

synonymous.[23] The other three operations have received comparatively much less attention. This creates blind spots.

Indeed, as we have seen, national literature has associated the Public Prosecutor's Office's use of the forms of termination included in the Criminal Procedure Reform with the general topic of case selection. These include, fundamentally, the provisional discontinuance ["*archivo provisional*"], the power not to initiate an investigation, and the opportunity principle (in its narrow sense).

The most significant part of this effort has been associated with provisional discontinuance, the power not to initiate an investigation, and the decision not to persevere in the prosecution of a case ["*decisión de no perseverar*"].[24] In general, the label in question implies that the case is lacking merit or sufficient chance of success for prosecution. As these are mostly administrative terms and widely applicable, the organization depends to a significant extent on the use of these techniques to terminate cases early. Table 1 reflects the predominance of these mechanisms.

Table 1: Inflow cases and filtering mechanisms in Metropolitan Prosecutor's Offices 2023

Metropolitan Prosecutor's Office	Total entries	Total filtered entries	% faculty not to initiate an investigation	% provisional discontinuance	% opportunity principle art. 170
North Centra	263,558	181,518	4.7	92	3.3
East	146,386	98,258	8.3	90.4	1.2
West	184,862	130,935	8.7	75.5	15.8
South	148,243	101,886	9.9	88.4	1.7

Source: Annual Bulletin – January–December 2023, Chilean Public Prosecutor's Office. Available at: http://www.fiscaliadechile.cl/Fiscalia/estadisticas/index.do.

Table 1 shows—comparing only prosecutors' offices located in the same urban unit—the sensitivity of case selection practices to organizational differences in the use of each instrument. Given the prevalence of provisional discontinuance, it is no coincidence that this has been the most studied type of termination when reporting on selection practices and that it has been the subject of internal regulatory decisions from early on.[25]

On the contrary, the opportunity principle of Article 170 CPP may not be based *a priori* on considerations regarding the likelihood of success. In minor crimes, prosecutors may simply decide not to prosecute certain crimes that meet certain conditions. In practice, the central difference lies in the (at least theoretical) ability to carry out simple mass filtering through the *stricto sensu* opportunity principle, a feature that is not part of technical-discretion

[23] This is common in continental studies on the subject. The influential work by Jehle, JEHLE (2006); JEHLE *et al.* (2008a); JEHLE *et al.* (2008b), for example, deals almost exclusively with filtering decisions when examining the structuring of case selection in European systems.

[24] See: RODRÍGUEZ & PINO (2015).

[25] Starting in 2002, the National Prosecutor's Office considerably relaxed the application of provisional discontinuance, stipulating that in crimes that do not carry a mandatory sentence, the prosecutor could provisionally dismiss a case after simply reading the complaint. In subsequent years, the regulation (*Oficio* FN No. 542/2003 and 790/2008) moved toward a differentiated application of provisional filing, being more or less restrictive depending on the type of crime investigated. See CASTILLO VAL *et al.* (2011), pp. 33ff.

tools, which always refer to the specific case. As Table 1 shows, there is considerable heterogeneity in the use of this tool: the West Prosecutor's Office makes much more intensive use of the *stricto sensu* opportunity principle, which in turn suggests heterogeneity in its case segmentation strategies. In any case, its use is comparatively lower than that of other instruments.

The focus of the national literature on mechanisms of early dismissal of case, however, has costs in terms of understanding case selection practices; filtering does not work as an independent operation. Its use depends on segmentation, classification, and *stricto sensu* selection strategies, which usually are not studied in the same way. Consider the provisional discontinuance. Treating a case as susceptible to "provisional discontinuance" assumes that there is no probability of success based on the information available. But in turn, the weight of the initial lack of information will differ depending on the type of case—so in a case segmentation may be a factor that influences the application of filtering operations. At the extreme, a theft with no "line of investigation" will most likely be quickly dismissed; on the other hand, a homicide cannot be immediately classified as having no "line of investigation" and dismissed without further ado. As will be seen, the use of the forms of termination of a case in the CPP certainly varies depending on the type of crime in question.[26]

The case selection process thus depends on organizational definitions that go far beyond the regulation of early filters. Officials within the Public Prosecutor's Office constantly make more or less automatic decisions in which they assign classification labels to cases and, based on this, substantially influence their future. Classification decisions determine which cases will receive a great deal of investigative and litigation energy and which cases, even if they are not filtered out early, will receive little attention and end up being dismissed. Who are the individuals that make these decisions, what instructions they receive, and how their work is integrated into the workflows of other officials are crucial organizational decisions in the actual practice of case selection in the Public Prosecutor's Office in Chile. These practices structure the way in which the work of selecting and allocating resources to prosecution is carried out.

IV. CASE AND METHODS

Given that the purpose of this article is to examine a legal process rather than a formal legal structure, in order to produce information about it, we observed the behavior of the four Metropolitan Regional Prosecutor's Offices, *i.e.* the units most affected by the need for selection due to the sheer volume of cases. Focusing on the Metropolitan Prosecutor's Offices also has the advantage that the units observed have less variation in non-organizational aspects: their legal communities are likely to have similarities, the population density is relatively similar, etc. The cost, of course, is that this means our results cannot be generalized beyond the Santiago metropolitan area. Behavior in other regions may be radically different.

The object of observation is the selection process. As this involves understanding an organizational process, we decided to study it through descriptive analysis of official statistical information reported by the Public Prosecutor's Office. This information was obtained from official documents of the institution and, mainly, through semi-structured interviews with 31 actors in the Chilean criminal justice system.

[26] Without these conceptual differences, but based on the existence of informal selection mechanisms, MATURANA & MONTERO (2017), p. 140.

The sample of interviews comes from two different rounds of information gathering. In a first round carried out during 2019, one of the authors interviewed 23 actors in the criminal justice system to understand the decision-making processes in minor cases. To complement the results obtained in that study, we conducted 11 additional interviews during 2023 to compare the practices identified in that context with those of other local Prosecutor's Offices. The guidelines used for the interviews in the two rounds of this research are similar, although there are some differences. In the 2019 interviews, we focused specifically on understanding the processes associated with mass and minor cases and the perceptions of prosecutors (and, to a lesser extent, other actors in the criminal justice system) regarding these forms of organization and decision-making. In the 2023 interviews, we used very similar guidelines, but without limiting ourselves to the sphere of minor crimes. The qualitative sample was constructed to include chief prosecutors from pre-classification units at both the regional and local levels. Prosecutors were selected to ensure equal representation of the four Metropolitan Regional Prosecutor's Offices, which allowed us to reflect different approaches among the interviewees. In all cases, our research object is associated with local Prosecutor's Offices and other centers where classification and termination decisions are made.

We describe the results associated with the structure of this process in two parts.

The first part deals with the formal internal organizational structures used by the Metropolitan Regional Prosecutors' Offices to organize their work in the case selection process. In our interviews, we discovered widespread language referring to "models" of organization in the decision-making process studied. Contrary to what one might think, the need for selection is felt so strongly in the Metropolitan Regional Prosecutors' Offices that there is not really an "elephant in the room" regarding this issue. Section 5 addresses this point.

The second part deals with the content of the criteria used in the segmentation, classification, filtering, and *stricto sensu* selection operations on which the overall selection process depends.

V. THE FORMAL ORGANIZATION OF SELECTION PROCESSES IN THE METROPOLITAN PUBLIC PROSECUTOR'S OFFICES

Part of the work of structuring the selection of cases depends on the application of formal organizational techniques. By formal organizational techniques, we mean the creation of units, departments, and other structures that concentrate a particular type of work with a specific purpose, in this case, making the work of selecting cases more efficient. The Metropolitan Regional Prosecutors' Offices have different organizational models in this regard, but in general these models operate on variations at three levels: using the input of arrests for *in flagrante delicto* as a basic form of selection, the preselection of minor cases, and the more heterogeneous decision-making when faced with other types of factors. We will analyze the variations in the organizational models associated with these variables below.

5.1 The organization for initial selection: the flagrante delicto model

All Metropolitan Regional Prosecutors' Offices structure their processes around a basic distinction: crimes that begin with the arrest of a person caught in *flagrante delicto* and crimes that do not.[27] Organizational arrangements to ensure the rapid and effective handling of cases according to whether there is or not *flagrante delicto* are the first key organizational structure for selecting cases in the work of prosecutors' offices.

The *flagrante delicto* label has been used by the Chilean system to prioritize the effective handling of cases that begin with the arrest of a person engaged in one of the situations provided for in Article 130 of the CPP. In this regard, the *flagrante delicto* has the status of a core natural variable in case selection: cases initiated in this way—unless any legal problems with the arrest—are likely to be associated with labels and handling methods that imply predisposition to pursue the case.

Using *flagrante delicto* as the basis for the Public Prosecutor's Office's work structure can be seen in the concentration of satisfactory outcomes in cases initiated in this way.

Table 2: Average judicial conclusion of cases in the Metropolitan Region for known defendants with and without an arrest hearing (ACD by its acronym in Spanish) in 2023

Type of defendant: identified	Total outcomes	Total judicial outcomes	Average % convictions	Average % acquittals	Average % other judicial outcomes
With ACD	96,670	81,398	29.75	3.36	66.89
Without ACD	209,462	69,456	8.82	0.84	90.34

Source: Annual Bulletin – January–December 2023, Chilean Public Prosecutor's Office. Available at: http://www.fiscaliadechile.cl/Fiscalia/estadisticas/index.do.

Table 2 shows only the tip of the iceberg of the differences that arise in cases of *flagrante delicto* and cases in which there is no such arrest. The differences in behavior are striking, even in the small universe represented by cases without *flagrante delicto* but with a known defendant. In cases without a known defendant, the behavior is (almost) exclusively concentrated in non-judicial forms of outcome.[28]

The differences in treatment between cases of *flagrante delicto* and cases in which there is no arrest for a brazing offence are not the result of spontaneous behavior but are linked to normative criteria and core organizational structures in the work of the Public Prosecutor's Office. The difference that a case of *flagrante delicto* makes can be expressed in four

[27] The reference to the *flagrante delicto* model and the label "*flagrante delicto*" analyzed in this section is limited exclusively to cases initiated as a result of the arrest of a person who falls under one of the circumstances described in Article 130 of the CPP. In this regard, it should be noted that the presence of a circumstance of flagrancy does not authorize the arrest of a person in all cases. Thus, anyone caught in flagrante delicto regarding the commission of offenses or crimes that the law does not punish with custodial or restrictive penalties shall only be summoned to appear before the prosecutor, in accordance with Article 134 in conjunction with Article 124 of the CCP.

[28] The average number of non-judicial closures for cases without a known defendant was around 90% between 2020 and 2023.

dimensions: an organizational dimension, a classification dimension, a work expectation dimension, and a workflow dimension.

Organizationally, *flagrante delicto* have been linked to teams organized specifically to deal with them. *Flagrante delicto* is handled uniformly at the regional level:[29] each Regional Prosecutor's Office (nowadays) has a "*Flagrante Delicto* Unit" (for example, in the North Central Region: the Local Prosecutor's Office for First Proceedings and Arrest Hearing) which is responsible for all matters related to the initial handling of the case. Essentially, this involves appearing before the arrest hearing. However, given that the central problems of the system lie in legal errors or securing evidence at the time of arrest, they are also gradually taking on the role of providing guidance to the police. This has led to a basic division of labor: some lawyers working in *flagrante delicto* cases do office work related to this advice, while others work in the courtroom.

In terms of classification, *flagrante delicto* cases involve fairly simple labeling. Unless specific problems arise (primarily, declarations of illegal arrest), *flagrante delicto* is synonymous with a case likely to succeed and is therefore labeled as a crime that must be prosecuted.[30]

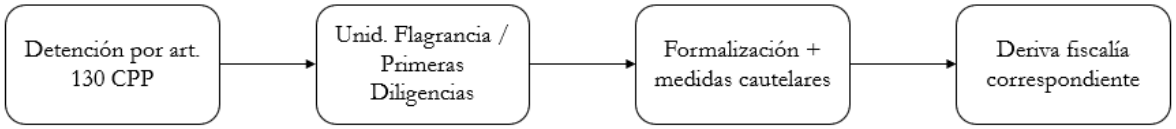
In terms of work expectations, a case initiated as a result of an arrest in *flagrante delicto* sets more or less clear expectations for all actors in the system, which encourages its effective selection. First, the work will begin with the arrest hearing, where the central expectation will be linked—from the point of view of the Public Prosecutor's Office—to avoid a declaration of illegal arrest, charging, and urging the application of a precautionary measure. Serious cases generally conclude with the schedule of successive hearings, while in minor cases, the prosecutor may offer an alternative solution ["*salida alternativa*"] or even conduct a plea-bargaining arrangement at the same hearing.

Finally, *flagrante delicto* is also associated with defined and fairly homogeneous follow-up procedures. The Public Prosecutor's Office has internal mechanisms for assigning such cases to the appropriate processing units. As these tend to be standardized cases with much of the relevant information associated with the arrest itself (the so-called arrest report ["*parte denuncia*"]), the follow-up work will generally consist of checking that the relevant information is available.

[29] In accordance with Resolution FN/MP No. 2327 of November 28, 2023, issued by the National Prosecutor, the implementation of the "Web Log System" is mandatory throughout the country as the only national entry system for the operation of flagrant procedures, with or without detainees. This system involves centralized planning of proceedings initiated for flagrant offenses, setting up an interregional schedule at the "macrozone" level.

[30] The number of cases that were brought before a judge and, consequently, received a judicial term is significantly higher when it comes to cases of flagrante delicto: 91% of cases corresponding to 2006 in which there was flagrante delicto had a judicial outcome, in contrast to 29.74% of all cases filed (i) the possibility of being brought to trial is very high (9 out of 10), probably because the prosecutor believes that he or she has better conditions to obtain a conviction. PÁSARA (2009), p. 12. See FANDIÑO et al. (2017), p. 54.

The flow of a *flagrante delicto* case (not a minor offense) is thus more or less standardized in the Regional Prosecutor's Offices of the Metropolitan Region and could be depicted as follows:



[***Note of the translator:*** *The text reads from left to right: Arrest under Art. 130 CPP; Flagrante delicto Unit / First Procedures; Arraignment + precautionary measures; Referred to the corresponding prosecutor's office*]

5.2 Structuring cases not related to flagrante delicto: pre-classification

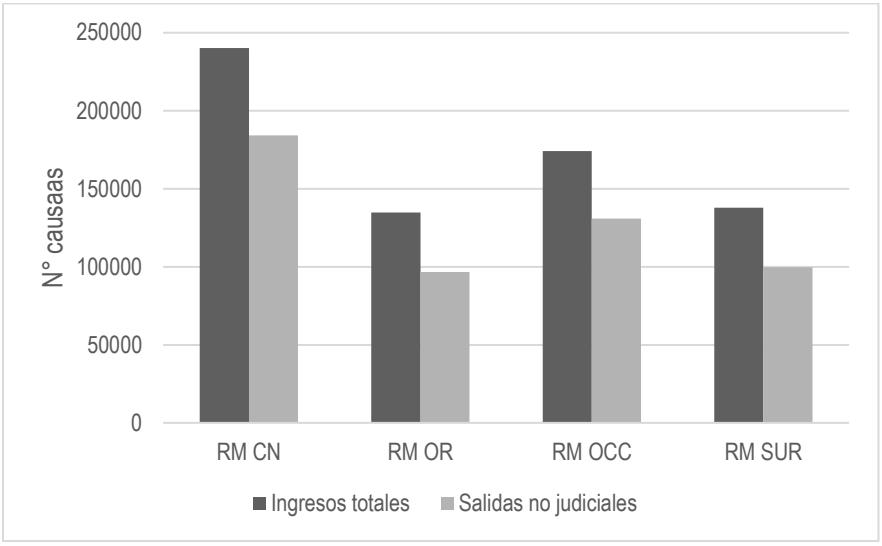
The opposite of crimes that can be naturally selected because they were reported as *flagrante delicto* are cases involving minor crimes without arrest *in flagrante delicto*. Unlike the organizational homogeneity that can be seen in all Metropolitan Prosecutor's Offices regarding *flagrante delicto*, heterogeneity prevails in the area of mass cases entering the system.

The classification, filtering, and selection of non-*flagrante delicto* minor offenses tends to be carried out by various units clearly defined by the repetitive classification of cases: it is common for the departments or officials responsible for accepting these cases to be called "pre-classifiers" or "readers (of reports)". The function of the pre-classifier is in fact to carry out a merit analysis of the case, assess its viability for investigation, and decide on some type of action, all within a few seconds or minutes.

Once the pre-classifier has completed their work, the case is ready to be assigned to an investigative unit, generally after the police report with known defendant has been filed. On the other hand, cases without a known defendant will generally not leave the pre-classification unit (but will instead be dismissed). The only exception, as we will see, is cases involving crimes that fall under the competence of specialized units. Once a case has been referred from the first procedure unit to the unit that will continue the investigation, the chances of early dismissal are sharply reduced.

The organizational structure associated with this function changes in the different Metropolitan Prosecutor's Offices. The Central North and South Metropolitan Regional Prosecutor's Offices are structured under a selection model that we will call centralized, meaning that both have a unit responsible for receiving, at the regional level, all cases that do not arise from an arrest in *flagrante delicto*. These cases are classified by type of crime and other relevant labels associated with the case, filtering out those that do not meet the conditions for prosecution. Particularly noteworthy in this design is the *Fiscalía Local Centro de Justicia*, which belongs to the Central North Metropolitan Regional Prosecutor's Office and plays a crucial role: it is the main "pre-classifier" at the Regional Prosecutor's Office level and, given the volume involved, probably at the national level as well.

Figure 2: Comparison of total inflows and non-judicial outflows in the Regional Prosecutor's Offices of the Metropolitan Region 2023



Source: Annual Bulletin – January-December 2023, Chilean Prosecutor's Office. Available at: http://www.fiscaliadechile.cl/Fiscalia/estadisticas/index.do.

[***Note of the translator***: *The x-axis says "total inflow"; "non-judicial outflow." The y-axis says "Number of cases."*]

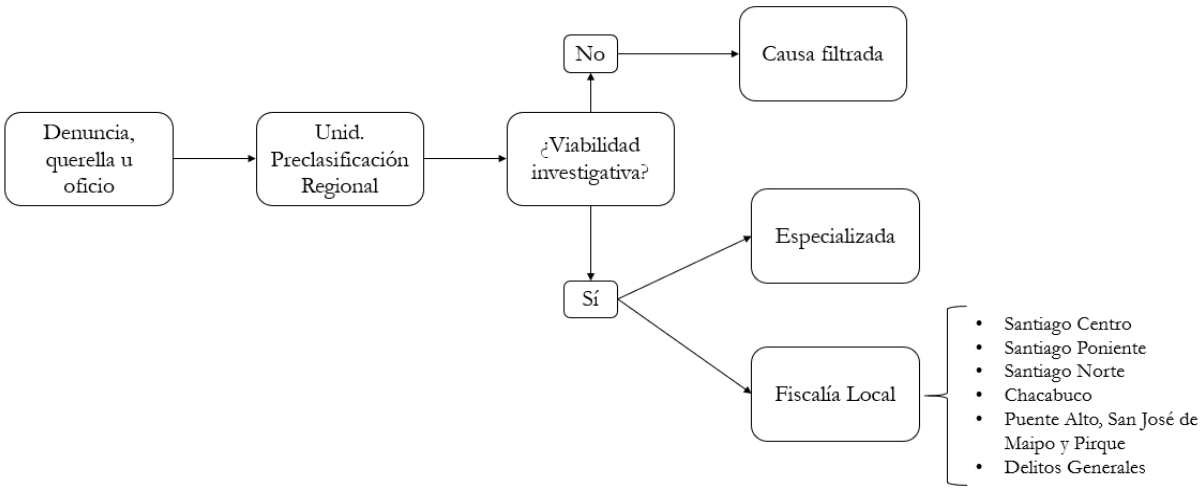
As can be seen in Figure 2, the Central North Prosecutor's Office is the Metropolitan Regional Prosecutor's Office that receives the most cases and filters the most cases in the region. Similarly, the vast majority of complaints that enter this large regional pre-screening unit are dismissed early on, generally through provisional discontinuance.[31] These cases will obviously never reach the local territorial prosecutor's offices. Cases that pass the threshold are then referred to the local territorial prosecutor's offices belonging to this regional prosecutor's office (Santiago Centro, Santiago Poniente, Santiago Norte, and Chacabuco) for subsequent investigation.

The Southern Metropolitan Regional Prosecutor's Office also uses a centralized case classification model. The Prosecutor's Office for Case Filing and Preliminary Proceedings, structured at the regional level, centralizes the pre-classification work. Unlike the Central North Prosecutor's Office, the processing units to which cases are referred are not organized by territory but by specialty according to the type of crime.[32]

[31] One of our interviewees estimated that filters are applied in 75% of cases. As another prosecutor interviewed graphically stated, *"the pre-classification unit, it's ugly to say, is basically a dismissal unit."*

[32] The exception is the Local Prosecutor's Office in Puente Alto, because its cases are not processed at the Santiago Justice Center.

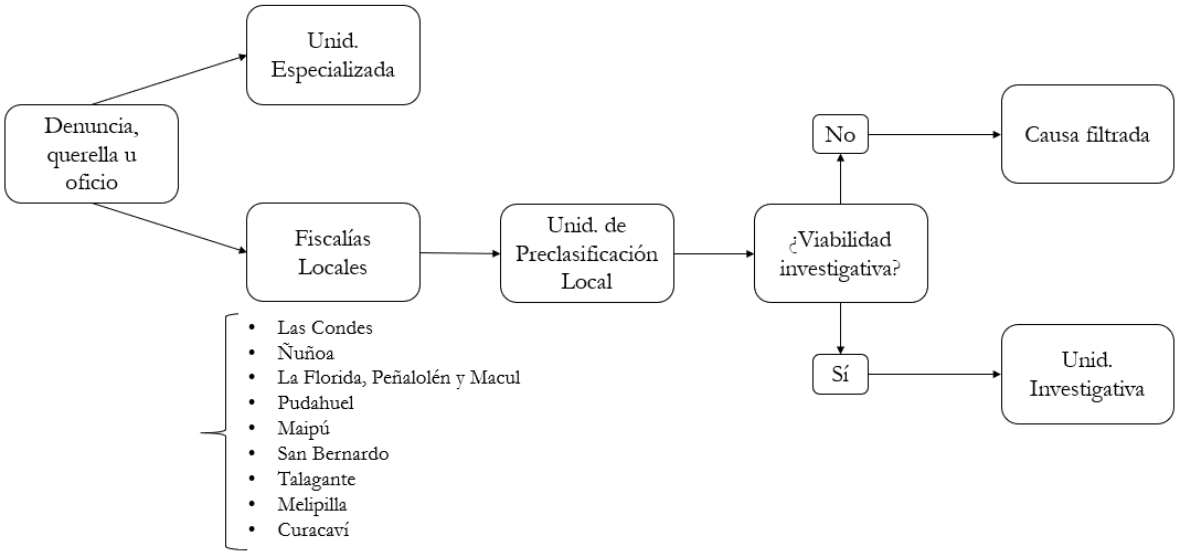
In summary, the centralized case selection model described above can be represented as follows:



[***Note of the translator:*** *The text reads from left to right: Complaint, Criminal Complaint or oficio; Regional Pre-Classification Unit, Investigative viability? No: case dismissed; Yes: Specialized, Local Prosecutor's Office: Santiago Centro, Santiago Poniente, Santiago Norte, Chacabuco, Puente Alto, San José de Maipo and Pirque, General Crimes.*]

Unlike the aforementioned prosecutor's offices, in the East and West Regional Prosecutor's Offices, pre-classification is structured in a decentralized manner. In these cases, there is no single unit at the regional level responsible for pre-classifying cases; rather, this task is assigned to the various Local Prosecutor's Offices with territorial jurisdiction that are part of each regional prosecutor's office. Most of the cases that enter these regional prosecutor's offices are directly distributed to the Local Prosecutor's Office with jurisdiction over the territory. However, the Local Prosecutor's Offices tend to set up a team of prosecutors or lawyers who perform the pre-classification function. The main difference thus concerns who makes the decision to dismiss a case at an early stage. In the decentralized model, decisions associated with this operation take place entirely internally: it is the same local prosecutor's office that selects the cases it will continue to hear or dismiss, and there is no model with two separate units (pre-classification and territorial) as was the case in centralized systems.

The decentralized models adopted by the East and West Regional Prosecutor's Offices can be summarized as follows:



[***Note of the translator:*** *the text reads from left to right: Complaint, criminal complaint, or oficio, Specialized Unit. Local Prosecutor's Offices (Las Condes, Ñuñoa, La Florida, Peñalolén and Macul, Pudahuel, Maipú, San Bernardo, Talagante, Melipilla, Curacaví). Local Pre-classification Unit, Investigative feasibility? No: case dismissed. Yes: Investigative Unit.*]

5.3 The organization of the investigation of other cases

The structuring of the selection process around the use of *flagrante delicto* offences and the creation of specialized units for the early classification of non-*flagrante delicto* offences does not, of course, exhaust the organizational decisions made by the Regional Metropolitan Prosecutor's Offices when selecting cases. *Flagrante delicto* offences and the pre-classification of minor cases only have a decisive effect on the selection of two types of cases: positive, regarding *flagrante delicto* filings; and negative, regarding a large proportion of non-*flagrante delicto* filings relating to minor crimes with characteristics considered to be case deficits—we explore the content of this in section 6.

However, outside this group, prosecutors must make selection decisions (whether or not to actually pursue a crime) on cases that do not have this characteristic. This large residual universe is composed of cases without arrest *in flagrante delicto* but which are associated with either more serious crimes or crimes which lack the deficits sought by the pre-classifiers. The seriousness of the crime and the quality of the initial information are the two main things that usually affect this selection process: mass crimes (theft, robbery, sometimes violent robbery) with "no line of investigation" will be quickly dismissed, while homicides, rapes, kidnappings, economic crimes, or corruption most likely depend on other factors and take longer to decide before real selection decisions are made. All these cases are thus associated with an ambiguous initial condition that does not exist in *flagrante delicto* offences or in minor crimes with little information. How do the Metropolitan Prosecutor's Offices organize their work on these cases?

As a general rule, complaints that enter the system without *flagrante delicto* will be transferred to the case inflow and preliminary proceedings unit. However, there are certain crimes that, due to their importance, are not subject to a filtering and selection process by the intake prosecutor's office, but rather are referred directly to one of the specialized units of the

prosecutor's office (e.g. High Complexity and Organized Crime Prosecutor's Office, Specialized Prosecutor's Office for Crimes against Property, Specialized Prosecutor's Office for Gender, Domestic Violence, and Sexual Crimes, or Specialized Prosecutor's Office for Violent Crimes), which must directly make a decision regarding the future of the case. As one of our interviewees stated:

> There are three major areas that we do not filter by order of the regional prosecutor (instruction No. 185), which are: all deaths, and by death we mean homicide in general. The second major exception, which does not pass, as it is not filtered (...) are crimes under Law 20,000, specifically micro-trafficking and trafficking (...) which go directly to the territorial drug prosecutor's office. And finally, the third major exception (...) is sexual crimes. All sexual crimes go directly to the specialized prosecutors (...) of the territory; we do not pre-classify them.

Lack of pre-classification and early dismissal does not mean that, in cases with ambiguous status (greater significance but lack of information; lesser significance but greater level of information), there is no selection process involving classification, filtering, and *stricto sensu* selection. This is the universe of cases that, in practice, requires more intensive work in this area: without criteria and material constraints, prosecutors could widely dismiss cases of these types or, conversely, attempt to investigate and litigate a larger proportion of them. In general, the National Prosecutor's Office guidelines have attempted to moderate the tendency toward early dismissals by imposing early processing obligations through "first proceeding" guidelines.[33] However, it is in this universe of cases where the greatest heterogeneity and discretion in selection practices survives by far.

VI. CASE SELECTION CRITERIA IN THE PRE-CLASSIFICATION UNIT

Formal organizational practices do not exhaust the set of factors that structure case selection by the Public Prosecutor's Office. In abstract terms, an organization does not only need to decide who should make the classification, filtering, and selection decisions and at what point. A central component of selection practices is to define the criteria used to classify a case as viable or not, which then serves as the basis for a filtering or *stricto sensu* selection. Given that we have distinguished three broad types of cases (*flagrante delicto*, minor and non- *flagrante delicto* offences, and ambiguous cases) and that one of them automatically associates a classification label that implies selection (*flagrante delicto*), exploring the generation of criteria requires studying it in one of the other two organizational contexts. In this section, based on the findings of our interviews, we describe criteria generally used by prosecutors in the area of pre-classification.

In general, our research found that case classification operations at the pre-classification level depend on two variables: the pre-classifier's attribution to the case of having an "investigative line", "investigative feasibility", or "probable indictment", on the one hand, and the entity of the case, on the other.

[33] For example: *Oficio* FN No. 277/2022, which provides guidelines for action in cases of sexual violence; or Official Letter FN No. 230/2020, on guidelines for action in cases of economic crimes.

Investigative viability is an open criterion, which is ultimately left to the discretion of the attorney in charge of pre-classification. Investigative viability is a concept whose origins can be traced back to the first guidelines issued by the National Prosecutor's Office on the use of provisional discontinuance.[34] In this regard, Instruction No. 75 of 2002 of the National Prosecutor's Office (FN by its acronym in Spanish) already incorporated the "viability of obtaining a successful outcome in clarifying the facts" as a criterion for determining whether a case is susceptible to being closed.

Line of investigation is the concept that has been institutionalized to refer to easily recognizable proceedings that could, in all likelihood, identify possible participants and generate evidence to effectively prosecute them. Determining this depends, of course, on the joint socialization of prosecutors: "*I would say that it is more a matter of custom or practice. But in general terms, there are no parameters, let's say, even if it sounds a bit harsh, objectives in relation to which cases yes and which cases no. It sounds like intuition, but it's more like, you know what? This case is not viable and it won't matter if I issue an order to investigate*".

The only criterion that is uniformly established in determining the viability of an investigation and that has even been institutionalized in the institution's statistics is whether there is a known defendant: "*The main criterion for a pre-classifier is whether the defendant is known or unknown*". At the mass level, especially in the case of property crimes, determining whether a defendant is known or unknown is based on a few minimum standardized criteria: information about the perpetrator(s), information that allows them to be identified or contacted, and the presence or absence of essential evidence associated with a type of case.

Although the elements that allow a case to be viable vary greatly between types of crimes, for the purposes of mass decision-making—generally associated with mass crimes when they do not result from an arrest *in flagrante delicto*—the most precise elements do not matter.

Of course, assigning investigative viability is sensitive not only to the characteristics of the case information (names and possible witnesses in the complaint, obvious documentary procedures to be carried out, etc.) but also interacts with the second variable, namely, the assessment of the importance of the case.[35] The most common combination of formal criteria for pre-classification decisions is as follows: if the case is minor, there is no associated complaint, and there is no line of investigation, it is classified as unfeasible and, therefore, must be dismissed. If the case is of greater importance, there is an associated criminal complaint and/or there is a line of investigation, it must be sent (or retained, if it is being processed directly by the pre-classification unit) to the unit that corresponds to it. That unit must then decide whether to maintain its ambiguous status, downgrade and dismiss it, or consider it truly viable and pursue it with sufficient energy.

The problem of heterogeneous criteria when assigning a label to a case arises primarily regarding cases that are received by local Prosecutors' Offices after pre-classification. Regional prosecutors tend to consider themselves sovereign in promoting different criteria for handling cases among themselves. Thus, it is likely that in local Prosecutors' Offices, the treatment of a

[34] CASTILLO VAL *et al.* (2011), p. 38. "In cases of crimes for which no severe penalty is assigned by law, prosecutors may order the provisional discontinuance of the case if, after a complaint has been brought to their attention, no evidence emerges that could lead to a successful investigation. (...) In cases of crimes that carry a severe penalty, the prosecutor shall carefully assess the need to conduct preliminary proceedings, taking into account the likelihood of obtaining any successful results in clarifying the facts, before ordering the provisional closure of the case."

[35] Similarly: PÁSARA (2009), p. 10.

case depends not only on the idiosyncratic considerations of the assistant prosecutors, but also on luck.

Despite the heterogeneity, prosecutors have recurring patterns of behavior. As a general rule, cases that do not have a clear predefined course (as is usually the case in *flagrante delicto* cases) will follow a more or less standardized line of investigation already suggested by the referral from the pre-classification unit. In general, this will lead to the issuance of a standard investigation order associated with the suggested line of investigation. As an assistant prosecutor in charge of pre-classification in her office stated, "*if the case is viable for investigation, we pass it on to the legal unit to issue a specific instruction or an order to investigate to give the victim and the case a chance*".

In general, in our experience, that "opportunity" will likely end in a later dismissal. The order will typically have long response times. The response report will likely maintain ambiguity. The ambiguous status of the case will tend to decline as the proceedings fail to yield clear results, move away from the standard that allows them to be considered truly viable (incriminating strength), and as time passes (statute of limitations and loss of available evidence). Selection—the granting of the viable label—is thus associated either with exceptional factors (selection by entity) or with luck.

Classification decisions, especially when they lead to the application of filters, are theoretically subject to forms of control by hierarchical superiors. In this regard, the chief prosecutors interviewed agree that they have little opportunity to actively monitor a significant proportion of the work of the pre-classifiers. To maintain some level of control, chief and regional prosecutors have three complementary strategies at their disposal. A first possibility is to randomly review pre-classified files in order to detect certain inconsistencies. One prosecutor noted: "Sometimes what I do is take a smaller number of cases and review them (...) I pick a specific day and say, today I'm going to review the four economic cases". The advantage of this approach is that it allows not only for the correction of specific problems in a case, but also for setting criteria. However, it is more time-consuming.

A second possibility is simply to wait for reactions (usually from the victims) that reveal an error. Another prosecutor interviewed pointed out: "*How do you control it? Also post, but not randomly post, as we say, but because of screw-ups* (sic)". However, the reaction to obvious errors tends to serve only to resolve the particular problem.

A third way of controlling the decisions made by pre-classifiers is to examine the validity of each official's cases in their accounts. "*That is, if you have a pre-classifier who has 100 cases in his pre-classification account, that means he is dismissing many of the NN cases that come in. He is filing them away. Versus a pre-classifying prosecutor who has, for example, 2,000 cases in his account*". Thus, the existence of asymmetries in the number of cases opened by each official is often indicative of unequal criteria and should require some coordination between them.

Although the review work is important from an organizational standpoint, it is unlikely that it can substantially change the institutionalized behavior of the pre-classifiers themselves. The dominant modality of sample auditing can serve to correct errors in the filters, but it is unlikely to actually change the practice that ultimately counts, namely *stricto sensu* selection. To do so, the review should not be limited to the legal basis of forms of filtering but should monitor the follow-up of classification criteria aimed at selecting certain types of cases that prosecutors want to prioritize. Our interviews show that, except for cases driven by external pressures (from the media, for example), there are no real factors or definitions that influence this operation. This means that *stricto sensu* selection is rather blind.

VII. CONCLUSIONS

The general process of case selection depends on the interaction of macro-organizational definitions of case segmentation as with the definition of criteria for carrying out classification, filtering, and *stricto sensu* selection operations.

The regional Metropolitan Prosecutor's Offices leverage much of the operational work in formal organizational decisions. The basic division of labor in the intake process, distinguishing between *flagrante delicto* cases, minor cases, and other cases with a more ambiguous status, is expressed in the creation of units that specialize in the mass processing of cases.

With varying degrees of specialization in the type of cases handled, the units in question associate three types of classification labels that tend to define the outcome, and in that sense the selection, of a case: viable/to be pursued, dismissible/to be dismissed, and ambiguous/dependent on further processing. The forms of case selection by the Public Prosecutor's Office, at least in the regional Metropolitan Prosecutor's Offices, have three distinctive characteristics.

First, *stricto sensu* selection (the assignment of the viable label) remains, in practice, strongly associated with *flagrante delicto* offences: *flagrante delicto* was and is the major factor in case selection. If the principle of mandatory prosecution has any vitality in any area, it is in cases following an arrest hearing. *Flagrante delicto* almost automatically associate the condition of a viable case and organizational priority. In this sense, the system—both normatively and organizationally—seems to have settled into the processing of *flagrante delicto* offence cases.

A second characteristic of the Public Prosecutor's Office's behavior in case selection is its focus on filtering operations. To put it bluntly, the Public Prosecutor's Office is an institution that is extremely aware that it has to "dismiss" cases and that it has to generate organizational practices that allow it to do so effectively, but it is not an institution that seems to have any plan regarding what types of cases it really wants to pursue and to achieve what objectives. The central concern of which the pre-classifiers are aware, and which transcends the way in which this task is structured, is that it is crucial to dismiss (many) cases. The entire institution is aware of the importance of these forms of behavior. But beyond the simple definition that bad cases should be dismissed, there do not seem to be any further criteria for allocating resources: which cases should be given priority? In the processing line, once a case that has not been dismissed is received (and is therefore pragmatically labeled as "ambiguous"), the behavior of decision-makers is completely heterogeneous. A significant number of them probably receive the case that has not yet been dismissed as a case to which—by protocol—a standardized form of processing must be assigned; a kind of ritual that must be followed. In the words of one of our interviewees: "*our mission, it sounds awful, in those cases is simply to process the case in an orderly manner*".

The third characteristic is the contrast between the homogeneity of practices associated with the selection of *flagrante delicto* cases and the heterogeneity of practices in other types of crimes. All regional Metropolitan Prosecutor's Offices have the same way of organizing their work in relation to *flagrante delicto*; all of them have different practices in relation to the selection of other cases. This heterogeneity does not seem to be directly associated with a divergence in prosecution policies; that one prosecutor's office has different priority selection objectives outside the scope of *flagrante delicto* than another. In general, they are more expressive of organizational idiosyncrasies.

Our work does not investigate the existence of other forms of case generation and processing. Outside the usual sphere of pre-classification—territorial or specialized prosecutors' offices—the Public Prosecutor's Office has invested in building prosecution capacity not associated with *flagrante delicto* in the so-called SACFI Units. The assignment of some cases to the High Complexity Prosecutors' Offices also probably exhibits different behaviors. However, it seems to point to a three-speed Public Prosecutor's Office, consisting of the automatic and relatively successful world of *flagrante delicto*, the small world of exceptional cases generated by SACFI or High Complexity, and an absolutely majority world whose functioning is not really associated with political-criminal objectives.

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