

Contemporary challenges to legal aid in Brazil and England: comparative perspectives on access to justice

by Cleber Francisco Alves

It is important to explain that in Brazil public defenders operate not only in criminal defence but also provide legal assistance in civil matters in general, including family law cases, consumers rights, judicial review, social rights, class actions, etc. The author is a public defender acting before a civil court.

Given my dual status as a professor and a legal professional who works as a public defender, I have been dedicating myself to academic research in the field of legal aid for over 10 years. Between 2001 and 2005 I studied for my PhD in law and the research done at the time resulted in a doctoral thesis comparing legal aid models from Brazil, the United States and France. For a better understanding of those models, I spent six months researching in the United States as a visiting fellow at the University of Baltimore, and also spent six months in France researching at the University of Montpellier. Since then, I have been invited to join the International Legal Aid Group (ILAG), and have had the opportunity to stay in touch with the most eminent world-renowned researchers in this field. From there came my interest in knowing more about English/Welsh model of legal aid.

My interest initially was to study the pilot project of the public defender being run here during the first decade of this century. In 2013 I had an opportunity to apply for a visiting fellowship at the IALS, but I realised that the picture had changed and because of that I decided to alter the subject of my research. I noticed that the approval of a new statute by the British Parliament, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) was causing great debate and huge controversy. For this reason I decided to study the history of the English/Welsh model of legal aid and analyse the contemporary context of the crisis faced by this jurisdiction in

order to undertake a comparative analysis with Brazilian reality and perspectives.

We might ask whether it makes sense to compare models of legal aid services adopted in countries as diverse as Brazil and England/Wales – countries that have such different legal traditions and diverse historical, cultural, social, political and economic backgrounds. Even taking these issues into account, I believe that such a study makes sense.

The author's goal is from the study of the historical trajectory of the English/Welsh model of legal aid to understand the causes that led to the crisis experienced at the time and identify how society/government/professionals are dealing with the situation of scarcity and suppression of services previously available free of charge. I intend to identify possible alternatives that are springing up to meet this new scenario and still assure a minimum level of access to justice to the poorest people.

In contrast to the English setting over recent years, especially in the last decade, Brazil is experiencing a time of expansion and consolidation of its system of legal aid. This is surprising to many people, due to the global economic crisis that has also affected our country. In Brazil we know that these times of “bonanza” will not last forever, and we must therefore be prepared to deal with the challenges that we will surely have to face in the future.

THE PUBLIC DEFENDER IN BRAZIL

The promulgation of a new Constitution in Brazil in 1988 represented a real milestone for the implementation of the democratic rule of law in the country. That Constitution

should be seen as part of a context of affirmation of the rule of law and democracy in several Latin American countries after periods of military dictatorship. There was great concern in the sense that the democratic regime and that the objective of social inclusion of the majority of the population would not be seen just as vague ideas but as having the mechanisms to make them effective achievements. In this sense, the issue of access to justice, especially for the poorest people, was a priority for those who were given the mission to write a new Constitution in 1988.

In order to ensure such access to justice, not only was the right to full (integral) legal assistance constitutionally established, but there was a determination that an institution specially tasked with providing this service should be created – the Office of Public Defenders (OPD). This provision is also present in the constitutions of other Latin American countries that have shared experiences similar to Brazil at the end of the last century. Highlights of constitutional changes during this period include the right to free legal assistance being recognised in Argentina, to be provided through the public defender system in the same way as Brazil.

The 1998 Brazilian Constitution not only determined that “the State will provide [comprehensive/integral/full] and free legal aid to those who can prove insufficiency of resources.” It also expressly regulated the manner of implementation of the rights by giving an explicit order for the government to organise and maintain a specific agency mandated with the obligation to deliver legal aid services (the OPD).

It is important to emphasise that, in addition to being written (a feature which itself provides a certain rigidity) in some matters the Constitution can be classified as “super-rigid” or even “immutable/unchangeable”. In order to prevent constitutional guarantees of citizens’ rights being abolished in the future, with regard to those that are recognised as “fundamental rights” there is a constitutional clause prohibiting any change/amendment in the constitutional text that could imply a reversal or suppression of such rights. The right to legal aid is recognised as one of those guarantees.

According to the 1988 Constitution, “integral legal aid” (delivered by the OPD) covers *legal advice* (preventive advocacy, assistance in writing contracts and legal documents and defence in “extra-judicial” jurisdictions) and *legal representation* by a public defender, as plaintiff or defendant, in any kind of civil or criminal case. This covers any kind of lawsuit against government decisions, or failure by the government to provide adequate public services guaranteed by law, including judicial review.

It is clear that the mere formal inclusion of such guarantees in the text of the constitution is not enough to ensure their implementation in practice. In Brazil there is a well-known

expression that laws are sometimes “*para inglês ver*”, which means “for the English people to see that the law formally exists” (this expression can be traced back to the nineteenth century, when several laws were enacted to meet the pressures from the UK for the abolition of slavery in Brazil, but such laws were not effectively enforced by the government).

Since 1934, the national Constitution has included a provision guaranteeing the right to proceed *in forma pauperis*, and the right to free counsel in civil cases as well as criminal cases for anyone unable to pay for an attorney. It has been recognised since then until the current Constitution of 1988. In 1950, a national statute (Law number 1060/50) was enacted to regulate this right.

Despite constitutional and statutory provisions, some Brazilian states and parts of the Federal Government did not fully comply with this obligation. Legal aid was mostly delivered by lawyers acting *pro bono*. This scenario began to change after 1988, but even so it cannot be said that legal and constitutional provisions are being effectively met today. In some states the public defender system works in a very precarious way, with the number of professionals falling far below the demand to be met.

In such cases, if a public defender is not available it is mandatory that the court appoints a private lawyer to represent the client because, as is typical in most civil law countries, normally the citizen has no right to appear personally in court and so must be represented by a lawyer. In this case, there is a statutory right for financial compensation to be paid to the lawyer by the government (but lawyers usually work *pro bono* in such situations).

The number of public defenders has grown significantly over the years. In 2004 there were 3,154 public defenders in Brazil, and by 2013 the number had risen to 5,054 – an increase of over 60 per cent in almost 10 years. Similarly, the public defender budget has been increasing faster than the general growth of spending on the justice system, yet in most States the public defender system is not effectively implemented to ensure full territorial coverage.

The State of Rio de Janeiro is recognised as having the best-structured public defender organisation in the country. It has 750 public defenders in total (the highest absolute number per state) at an average of one public defender for every 16,000 inhabitants. In the national capital, Brasília, this ratio is even better: one public defender for every 12,000 inhabitants.

However, in states like Maranhão, the ratio is one public defender for every 86,000 inhabitants. Even in the State of São Paulo, the most populous, the number of public defenders is only 600, implying a ratio of only one for every 65,000 inhabitants (although in the State of São Paulo, to address the lack of public defenders a system that relies on private lawyers

paid on a case-by-case basis still exists as a kind of *judicare* model).

In addition to this disparity, even more serious is the concentration of defenders in the more densely populated areas, whereas the vast majority of cities in the countryside do not have the assistance of a public defender.

In 2013, a survey was conducted to determine the geographical coverage of public defenders' offices across the country, a project called "Map of the Public Defender in Brazil" (see website: <http://www.ipea.gov.br/sites/mapadefensoria/defensoresnosestados>).

The reality of the lack of public defenders, especially in the countryside, was evident. Although uninhabited areas, especially in the area of the Amazon rainforest, form a large part of the Brazilian territory, the map clearly shows the large territorial disparities in the provision of public defender services.

Seeking to end this disparity, in June 2014 the Brazilian Parliament passed a new constitutional amendment providing that within eight years there will be at least one office of the public defender in all districts of the country. This amendment also provides that the number of defenders should be proportional to the effective demand for services and to the population that is eligible for legal aid in a given area. It also provides that, over these next eight years, the criteria for allocation of new public defenders should prioritise regions with higher levels of social exclusion.

The amendment will impose the allocation of sufficient budgetary resources and, because it is a constitutional rule unchangeable by any future Parliamentary majorities, is not dependent on the political makeup of the next governments at both federal and state levels. In the event of any failure to implement, the matter may be brought to the Supreme Court to determine that the government takes concrete measures (especially the budgetary ones) to fulfill this constitutional provision.

In my paper entitled "The new constitutional regime of public defenders in Brazil", which I presented at a conference in Barcelona on 10 October 2014, I argued that this constitutional amendment of June 2014 is the culmination of the continuous consolidation process of the legal aid model in Brazil. That process over the past 25 years has also included, besides other previous constitutional amendments, numerous ordinary laws and emblematic decisions of the Supreme Court.

Besides fixing a deadline for the creation of offices of the public defender to provide full national coverage, the 2014 amendment also elevated to constitutional status some rules that had been laid down in a legislative reform of 2009. That law extended the territorial range and defined the

legal framework that ensured the autonomy and functional independence of public defenders, especially to prevent conflicts of interests with the government of the day. It assured them equal treatment (in some states including with respect to remuneration) to that enjoyed by judges and prosecutors.

Moreover, the new amendment of June 2014 incorporated to the text of the Brazilian Constitution an explanation of a new concept and range of activities for the public defender, providing greater firmness and further strength to what had already been established by infra-constitutional law in 2009. According to this new constitutional concept, the office of public defender is a "permanent agency" and from now it cannot be abolished by any law or government decision, except by another Constitutional amendment. It is recognised as essential to the judicial function of the state (the idea of "equality of arms" is behind this expression), mandated as an expression and instrument of the democratic regime with the task of providing legal advice, promoting human rights, and defending at all levels, judicially and extra-judicially, the individual and collective rights of all needy people.

FINANCIAL ELIGIBILITY AND SCOPE FOR LEGAL AID

For a better understanding of the Brazilian model of legal aid some knowledge of financial eligibility is required. There is no pre-established financial limit for a person to be eligible for legal aid; the law says it is enough to sign an affidavit declaring that the person cannot pay the judicial and lawyers' expenses. Normally public defenders take cases from people whose monthly income is up to US\$1,100 (ie three times the national minimum salary – the minimum salary is R\$724,00, which corresponds to US \$ 360 per month). If there is any controversy about the real financial situation of a litigant – this question is usually raised by a disputing opponent – the judge will decide the issue after production of evidence.

It is also important to understand the scope of free legal assistance. Law number 1060/50 establishes that legal aid includes the right to counsel and free litigation in all jurisdictions, including every stage of the law suit until the litigation is finally decided. As stated earlier, in Brazil unlike in most countries the service delivered by the public defender is not limited to criminal lawsuits (about 70% of all cases under the responsibility of the system are family and civil cases).

In criminal cases, the public defender will represent anyone who does not appoint a private lawyer. If that person is not poor, and is considered guilty, the government can charge the lawyers' expenses at the end of the lawsuit. There is no explicit legal requirement regarding a "merits test" or the "viability" of the case. It lies within the ethical responsibility of the public defender to refuse to represent a client if a civil case is considered legally impossible or inconsistent.

A client needing legal aid must go to a public defence intake office and undergo a “triage” process with the help of paralegals under direct supervision of the public defender (those paralegals are mostly law students who work pro bono or, sometimes receive an allowance from the office). Usually, the public defender in charge will first try to negotiate with the opposing party before preparing the pleadings and send it to the PDO that is competent to act before the court to where the case was assigned. The rest of the case (judicial representation) will be handled by a public defender stationed in the court; each is assigned to one (or more!) judicial courts.

The Brazilian public defender system seeks to follow a Resolution, originally approved in 2011 and reiterated in subsequent years, of the General Assembly of the Organization of American States (OAS) that expressly supports the work being done by “official public defenders”. It recommends that they shall operate as an independent body of government and have an adequate budget to fulfill their mission.

Despite these constitutional guarantees and even considering that in the recent past Brazil has been undergoing significant improvements and progress towards effective implementation of the legal aid system and the PDO, the author believes that Brazil must be alert to the lessons from countries like England, which once reached stages of excellence and was regarded as a global benchmark of what was considered an “ideal” and paradigmatic service of legal aid. But even then the service was not immune to setbacks that, according to some authors, returned certain areas of law to standards even lower than what existed in 1949 when the modern legal aid system was first established.

To achieve the objectives of my research I am reviewing literature on the historical trajectory of legal aid in England/Wales and seeking dialogue with researchers, legal professionals

and government officials to understand the causes of the current crisis, and try to identify diagnoses and proposals for possible solutions to the problems faced. I am in the middle phase of my research, and have had the opportunity to meet with important stakeholders to better understand the current situation experienced by the English/Welsh legal aid system.

In order to obtain a more empirical view of the system, I will visit courts based in London (civil and criminal) to observe, in practice, the performance of lawyers who provide legal assistance, and law firms that work with legal aid clients. At the end of the research I intend to write a report based on the findings which may become a new chapter for a possible new edition of the book that I published based on my doctoral thesis.

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