

ACCESS TO JUSTICE AND LEGAL AID IN BRAZIL AND ENGLAND/WALES: CONTEMPORARY CHALLENGES AND COMPARATIVE PERSPECTIVES¹

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“To no one we will deny or delay right or justice”

(*Magna Charta*, 1215)

In this year 2015 when we celebrate the 800th anniversary of the Constitution,, - we must remember that despite the intrinsic strength and objectivity of this simple clause– it originally had a very restricted interpretation in practical terms. – It expressed a fundamental idea: that the modern democratic state is based on the rule of law; a social and political model of organization recognized as a paradigm in contemporary international society. The fundamental idea of equality for all in terms of access to rights and justice!

It turns out that for this to be effective equality, and not just an abstraction, one must consider the complexity of the legal systems in which citizens' rights are enshrined and the correlated state mechanisms (and the non state ones) intended to enforce those rights. Very often justice is denied (or delayed) because of the material inequalities that mark our societies, particularly inequalities in the economic sphere.

The right to equal and effective access to justice, enshrined in such a clause of the *Magna Charta*, depends largely on effective action by governments to ensure not only passively but especially proactively, that all citizens have the real possibility of claiming and asserting their rights regardless of any limitations of an economic, cultural or intellectual nature. For this reason, I have been stating that the right to legal assistance provided by the state / government, both in criminal and civil cases, is a “fundamental human right”, whose nature is that of a “political and civilian right” inherent in the very possession of “citizenship” and not - as has been understood by many - a “social welfare” right. To further these investigations, I decided to conduct post-doctoral research, as a visiting fellow at IALS, to study and try to better understand the crisis which the English/Welsh system of legal aid underwent (formerly recognized internationally as a paradigmatic, and true reference for Western industrialized democracies) and to try to extract possible lessons to be applied in the Brazilian context, which is still in the process of expanding and consolidating its state funded legal aid model.

My goal, by studying the historical trajectory of the English/Welsh model of "legal aid", was to understand the causes that led to the crisis experienced at the time and to identify how society/government/professionals dealt with this situation of scarcity and reduction of services, previously available free of charge. I intended to identify possible alternatives that were – and still are - emerging, to deal with the new scenario so as to still ensure a minimum level of access to justice for the most disadvantaged.

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In contrast to the English setting, over recent years and especially in the last decade, Brazil has experienced a period 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 this boom period 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.

I think it would be useful and interesting for the public attending this debate for me to make a general presentation regarding the Public Defense services 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. This new Constitution can be seen as part of a movement of affirmation of the rule of law and democracy in several Latin American countries after periods of military dictatorship. There was great concern at the time that the democratic regime and its objective of social inclusion for the majority of the population would not simply be seen as a vague idea but as having the mechanisms to make it effectively achievable. In this sense, the issue of access to justice, especially for the poorest, 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 especially tasked with providing this service should be created: the Office of Public Defenders (OPD).

In other words, the 1988 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 those 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 Office of Public Defenders (OPD).

I think it is important to emphasize that, in addition to its being written (a feature which itself provides a certain stability) in some matters this constitution can be classified as “super –rigid” or even as “immutable/unchangeable”. In this way, in order to prevent potential abolition of the constitutional guarantees of citizen's rights in the future, especially those rights recognized as “fundamental”, there is a constitutional clause prohibiting any change/amendments in the constitutional text that could imply reversal or suppression of such rights. The right to legal aid is recognized as one of those guarantees!

According to Brazil’s 1988 Constitution, “integral legal aid” (delivered by OPD) covers: LEGAL ADVICE (preventive advocacy, assistance in writing contracts and legal documents and defense in “extra-judicial” tribunals/administrative bodies) 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 redress of any failure by the government to adequately provide public services guaranteed by law (especially welfare benefits, like housing, health, and education) to the citizen, 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 fact, 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 as well as criminal cases for anyone unable to pay for an attorney. Despite constitutional, and statutory provisions, however, most Brazilian States and parts of the Federal government did

not fully comply with these obligations. At that time, Legal aid was mostly delivered by lawyers acting pro bono.

After the 1988 Constitution this scenario began to undergo more substantive changes, 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 piecemeal fashion, with the number of professionals falling far below the demand to be met.

It is true that the number of public defenders has grown significantly over the years. In 2004 there were 3,154 public defenders in Brazil, and by 2013 this number rose to 5,054 – an increase of over 60 per cent in almost ten years. Similarly, the public defender budget has been increasing faster than the general growth of spending on the justice system. However, even with this being the case in many States the Public Defender System is not effectively implemented to ensure full territorial coverage.



The first map shows, in green, the districts where, in 2013, there were OPDs regularly delivering legal aid services.



The second map shows the actual geographic coverage of the PD service across the country (each green point corresponds to a public defender in activity).

The State of Rio de Janeiro is recognized as having the best structured public defender system in the country. It has 750 public defenders in total (the highest absolute number by 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, (a state that has proportionally one of the poorest population in the country), the ratio is one public defender for every 86,000 inhabitants. Even in Brazil's most populous state, São Paulo, 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.

The Brazilian Parliament, seeking to end this disparity,, passed a new constitutional amendment in June 2014, providing that, within eight years, there will be at least one office of the Public Defender in each district of the country. This amendment also stipulates 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 the area. It also mandates that, over these next eight years, the criteria for allocation of the new public defenders should prioritize regions with higher levels of social disadvantage.

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 rules that had been laid down in a legislative reform of 2009. This law extended the objectives of the organization (and the functions to be carried out by its members!) and defined a new legal framework that ensured the autonomy and functional independence of the public defenders, especially to prevent conflicts of interests with the government of the day. It ensured them equal treatment (, including with respect to remuneration in some States) to that enjoyed by judges and prosecutors.

Moreover, the new amendment of June 2014 incorporated into the text of the Brazilian Constitution, an explanation of a new conception and range of activities for the Public Defender, providing greater clarity and further reinforcement 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 this time forth, cannot be abolished by any law or government decision, except by another Constitutional Amendment. It is recognized as essential to the judicial functioning 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.

Despite these constitutional guarantees and even taking into account the significant improvements and progress towards effective implementation of the legal aid system and of the Public Defender's Office in Brazil in the recent past,, I believe that Brazil still needs to be conscious of the lessons to be learnt from jurisdictions like England & Wales. At one time these jurisdictions had reached high standards of excellence, and were regarded as a global benchmark as an “ideal”, paradigmatic legal aid service Even given this high standard of service, they were not immune to setbacks that - according to some authors, returned certain areas of law to standards even lower than what existed in 1949 when modern legal aid system was first established.

Finally, to summarize the ideas I have presented in this debate, I would like to emphasize three aspects, in relation to the Brazilian legal aid system, for comparison purposes with the reality of England and Wales:

- the continuous process of expansion and consolidation of state services of legal aid experienced recently, in contrast to the cuts being faced here in England and Wales... There is a question: how long will this expansion last in Brazil?
- the existence of a legal and constitutional framework, endowed with a certain stability, that despite political, ideological and, above all, economic pressures, represents a counterbalance (ratchet effect) to any roll-backs, and configures an instrument that drives the continuity of public policy expansion, and consolidation of the service. ..
- the challenge of consolidating a model that goes beyond the traditional view (based on the legal representation of individual cases in the area of family and criminal law mainly) for a more proactive vision, to promote human rights in a collective framework, with emphasis on preventive policies and on human rights education.

From studying both the present the recent past in England, , I highlight some lessons that could be translated into challenges to be confronted in the Brazilian scenario:

- it is necessary to improve mechanisms to ensure quality control of the service provided, and improve accountability mechanisms ...
- improve organisational management, overcoming the taboo that this could interfere with the autonomy and functional independence of the PD. This would strengthen the virtues inherent in the “staff model” so as to optimize the provision of large-scale services, saving time on routine, repetitive tasks, and achieving greater "productivity";
- deploy / expand the use of new technologies to go beyond the traditional model of provision of legal services, especially in the educational / preventive field and legal advice / triage of cases...;
- encouraging the production of empirical research for better formulation and evaluation of public policy and practice in day-to-day legal aid service delivery;
- simplify judicial procedures to allow (and even encourage in some cases),, the citizen to represent themselves before Courts, by providing, as appropriate due support, and guidance. ...Overcoming this big taboo would perhaps make the current restriction on self-representation before Courts more flexible; this could be done by reducing activities that are the exclusive prerogative of lawyers, and therefore, in the case of the poor, require the direct involvement of a public defender, sometimes unnecessarily, owing to the relative simplicity of the issue to be resolved. It is enough, in some cases, to count on the assistance of a paralegal, or even for the citizen to be allowed to represent themselves before a Law Court...