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NATIONAL REPORT: BRAZIL

Cleber Francisco Alves¹ Diogo Esteves²

1. Introductory notes:

Brazil is facing a dramatic political crisis, especially as a result of very serious corruption scandals involving both the federal government and the governments of some of the most important states of the federation. These corruption schemes are being firmly dismantled by the Federal Police and the Federal Public Prosecutor's Office, and punished by Justice, despite many criticisms about certain excesses and non-compliance with constitutional guarantees of due process. This crisis has produced dramatic repercussions in the field of the economy, which are causing a huge setback in terms of the social achievements that had been achieved in the last decade.

Since the year 2014 the country has suffered a continuous economic recession, with a rise in the unemployment rate. In 2016 the picture reached its apex, with the decree of the impeachment of the, then, President Dilma Roussef. Among the States of the Federation, Rio de Janeiro may be the one in which the situation is most serious: former governor Sérgio Cabral (who governed the state for 8 continuous years!) is currently under arrest, accused of diverting billions of "Reais" from the public purse, and receiving millions of dollars in bribes from companies that have been hired for public works, especially in preparation for the World Cup and the Olympic Games. Due to this situation, public services essential to the population (such as health, education and public safety) are suffering from discontinuity and precariousness. Salaries of civil servants are being paid months in arrears.

¹ PhD, Professor at the Universidade Federal Fluminense (Law and Sociology Doctoral and Master's Degree Program) and Universidade Católica de Petrópolis (Law School), in Brazil. Public Defender at the State of Rio de Janeiro's Public Defenders Office.

² Professor at the Superior School of the Public Defender's Office (FESUPEPERJ) in the State of Rio de Janeiro, Brazil. He is currently reading for a PhD at Universidade Federal Fluminense (Law and Sociology Doctoral Program), under the supervision of Professor Cleber Alves. Public Defender at the State of Rio de Janeiro's Public Defenders Office.

The new federal government that has taken power does not have the support of the majority of the population: in an attempt to reverse the economic and financial crisis, it is trying to implement a series of fiscal austerity measures, which are markedly conservative and neoliberal, in order to reduce public spending. In parallel, the country also faces a serious crisis in the field of public security, with very violent rebellions in several prisons across the country, with police strikes demanding better working conditions and a significant increase in crime rates.

In this scenario, it becomes even more important and necessary to guarantee legal aid services to the poor and vulnerable people, which in Brazil, is provided - both in criminal cases as well as in civil matters, family litigation, etc. - by the Public Defender's Office: people lose their jobs, become indebted, disaggregate families, suffer eviction and therefore need free legal assistance. In the criminal area, the increase in urban violence, crimes related to drug trafficking, also significantly increase the demand for the Public Defender's Office.

As has been reported in previous ILAG conferences since the mid-2000s, the legal aid system in Brazil has been undergoing a significant process of expansion and growth. In less than 10 years (from 2006 to 2014) investments in the expansion of the Public Defender's Office increased by more than 1000%: the annual budget in 2006 was R\$ 306,351,332.13, reaching a total of more than 3 billion Reais in 2014. The number of public defenders working effectively in the country increased from 3,154 (in 2004) to more than 5,000 (in 2013), and is 5,855 currently (in 2017). In 2014 a Constitutional Amendment was approved, determining that, within 8 (eight) years, the Public Defender's Office should be established in all the "Comarcas" (judicial districts) of the country.

However, after three years since 2014, given the severe crisis - political and economic - mentioned above that has hit the country, it is not possible to be optimistic about the effective compliance with the determinations established by the aforementioned Constitutional Amendment. Nevertheless, fortunately, it is also not correct to say that the Brazilian legal aid system in general, and the Public Defender's Office in particular, are facing the same setbacks which are being experienced in other sectors of public services.

However, the pace of growth and expansion that was foreseen in the Constitutional Amendment is not taking place.

In the specific case of the State of Rio de Janeiro, paradoxically, despite the fact that we are facing an even more acute crisis than other states of the federation, considering that in this state already operated one of the most complete and effective legal aid services in the country (as it was already reported in previous reports presented at ILAG Conferences), thanks to the effort and competence of the current Chief State Public Defender and his team, it is possible to affirm that some progress and achievements have been reached. The most important of these was the effective implementation of budgetary and financial autonomy (which had been determined by a Federal Constitutional Amendment of the year 2005, but was not yet fully realized!), guaranteeing greater independence before the Executive Branch of the State Government. Thus, especially considering the financial crisis that has caused serious problems in the State of Rio de Janeiro, the recognition of the institutional autonomy to manage its own resources, which has to be transferred monthly by the State Governor to the Bank account of the Public Defender's Office, has been an important element in strengthening the role of the Public defenders in defending the rights and interests of the target population of its services. For example, the Public Defender's Office promoted, in 2016, class actions against acts practised by the State Governor, charging the Government the payment of salaries due, which had not been paid, to state public employees and, above all, to state retired employees. Also in the protection of the right to housing, numerous measures were taken to guarantee the payment of "rent aid" to families who lost their homes in natural accidents (landslides), lobbying the State Parliament for approval of a resolution that annulled a Governor who intended to extinguish this benefit.

In the case of Rio de Janeiro, a small increase in the value of the annual budget was obtained, from the State Parliament, for both 2016 and 2017 fiscal years. This allowed the appointment of new public defenders (to replace positions that were vacant) and the hiring of needed human resources. In fact, since 2015 the personal support staff has grown by more than 50%, reaching a total of nearly 700 support staff (as civil servants), who

work as "paralegals" assisting the public defenders (not counting more than 3,000 law students who also help with simpler tasks, interviewing clients, and drafting pleadings and other legal documents to be reviewed by the public defenders). The improvement of the service and optimization of available resources was achieved through renegotiation of contracts with service providers and reduction of rental values of buildings occupied by the Public Defender's Office.

2. Population:

According to official projections of the Brazilian Institute of Geography and Statistics (*Instituto Brasileiro de Geografia e Estatística – IBGE*), the population of Brazil is currently about 207.443.700 people.

3. GDP

In 2016, the Brazilian GDP was of R\$ 6.266.000.000.000 (equivalent to US\$ 1.989.206.000.000 or € 1.864.880.000.000³). In terms of real values, there has been a significant drop due to the economic crisis mentioned above. For comparison purposes, as reported in the Brazilian National Report presented in ILAG Conference, in 2011, the value of Brazilian GDP in 2010 was, at that time, approximately US\$ 2.100.000.000.000⁴.

The 2016 annual per capita income (per capita GDP|) is approximately US\$ 9.589.

4. The budget of the Brazilian Public Defender's Office

Annually, the Public Defender's Office (both at the Federal or State level) must prepare its budget proposal, obeying the rules and limits imposed

³ The rate of exchange used US\$ 1,00 = R\$ 3,15: € 1,00 = R\$ 3,36 (rate on April 21, 2017).

⁴ At that time (April, 2011), the rate of exchange was US\$ 1,00 = R\$ 1,58

by national legislation. Next, the proposal must be sent to the Chief Executive, who consolidates all annual budget proposals and directs the Legislative Branch to vote.

It is important to note that the Chief of Executive Power cannot modify the budget proposal formulated by the Public Defender's Office, and it is only up to him to forward the proposal to the Legislative Branch.

According to a decision issued by the Supreme Court of Brazil (Supremo Tribunal Federal - STF), "the head of the Executive Branch is not allowed to reduce the budget proposal of the Public Defender's Office when this is compatible with national legislation. All measures that result in the subordination of the Public Defender's Office to the Executive Power must be considered unconstitutional, as they imply in violation of its functional, administrative and financial autonomy" ⁵.

In this way, any cuts in the budget proposal can only be made during the annual budget vote at the parliamentary level, in the exercise of activities that are exclusively for the Legislative Branch.

After forwarding the budget proposal to the Legislative Branch, parliamentarians conduct the analysis and voting of all proposals, editing the Annual Budget Law - which contains the government's annual collection estimate and how resources shall be distributed.

Following the guidelines of the Annual Budget Law, every month the Executive Branch (in its function of collecting taxes) must pass on to the Legislative Branch, the Judiciary, the Public Prosecutor's Office, and the Public Defender's Office, the equivalent of 1/12 of the yearly budget (called "duodecimo", i.e. the twefht).

In 2016, due to the economic crisis affecting Brazil, the Executive Branch of the State of Rio de Janeiro failed to carry out the regular transfer of the amounts necessary for the monthly execution of the March budget by the Public Defender's Office. Due to this fact, the Public defender filed a lawsuit (before the State Supreme Court) to force the Executive Branch to pass on the money, obtaining a favorable decision that immediately blocked, in government bank accounts, the exact amounts of the "twelfth" that should be

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 $^{^{\}rm 5}$ STF - Full Court – ADPF n° 307 MC/DF – Justice Dias Toffoli, decision: 19-December-2013.

delivered to the Public Defender's Office in accordance with the Annual Budget Law⁶.

Through this system of budget elaboration and execution, the Brazilian Constitution gave the Public Defender's Office the security and autonomy it needs to exercise freely its legal assistance activity, which often runs counter to the interests of those who dominate the economic power, that is, the large private companies and the Government/Public Power itself.

In addition to the resources coming from the public purse, the Public Defender's Office also has two other sources of revenue:

- (i) *succumbential fees*: according to Article 85 of the Brazilian New Code of Civil Procedure of 2015, the unsuccessful party in civil proceedings must pay fees to the lawyer of the winning party, which are set by the judge at least 10% and a maximum of 20% on the cause value. When the winning party is represented by a public defender, the amounts paid by the unsuccessful party are destined to specific funds managed by the Public Defender's Office and should be used exclusively in the structuring of Public Defender's Office and in the professional training of its members (Article 4, XXI of the Complementary Law No. 80/1994).
- (ii) fixed percentage of the collection of judicial fees, charged by the Courts: according to Article 82 of the Brazilian New Code of Civil Procedure of 2015, whenever the party intends to file a lawsuit or wishes to perform some act in the proceeding, it must pay the correspondent court fees in advance. This amount is destined to a specific fund to be used for the costing and administration of the jurisdictional activity, a portion of this amount being separated and remitted to other specific fund, managed by the Public Defender's Office. Generally, the amount allocated to the Public Defender's Office corresponds to 5% of the collection of fees received by the courts⁷.

In objective terms, the Public Defender's Office budget has seen sharp growth in recent years. In 2014, the annual budget of the Public Defender's

⁷ The Supreme Court of Brazil (Supremo Tribunal Federal - STF) considered it fully constitutional to allocate a portion/percentage of the Court fees to the Public Defender's Office, as a way to strengthen its economic structure. (STF – Full Court - ADI No. 4163/SP – Justice Carlos Britto, decision: 8-Nov-2006)

⁶ TJ/RJ – Mandado de Segurança nº 0016267-86.2016.8.19.0000 - Des. Caetano E. da Fonseca Costa, decision: 30-March-2016.

Office in Brazil, together with the proceeds from the public purse and its own sources of revenue, totaled R\$ 3.534.018.183,42 (equivalent to U\$1.121.910.534,42 or €1.051.791.126,02⁸). In comparison to the annual budget in 2004 was R\$ 282.259.000,00⁹(equivalent to U\$ 109.402.710,00): a raise of more than 1.000% is seen.

However, due to the economic crisis that affects Brazil, the continuity of the budget growth of the Public Defender's Office shall suffer a significant slowdown.

5. Numbers of public defenders in activity in Brazil:

The number of public defenders in activity is also growing at a regular pace: in 2003 there were 3250 public defenders in Brazil. In 2017, this figure leaped to 5855 (corresponding to an increase of over 180%).

These numbers reveal an important movement of strengthening and diffusion of the salaried staff model in Brazil. There is a clear effort to expand the territorial range of the services to the entire country. Although it is predictable that the current economic crisis will certainly affect this growth rate.

Even son, it is important to mention that three selection processes are underway for the hiring of new public defenders in the states of Bahia, Espírito Santo and Paraná. Therefore, by the end of this year, about 50 public defenders will probably be selected and hired by state governments.

6. Areas of activity and activities carried out by the Public Defender's Office in Brazil

According to Article 134 of the Brazilian Constitution of 1988, the Public Defender's Office is in charge of providing "legal guidance, promotion of

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 $^{^{8}}$ The rate of exchange considered is US\$ 1,00 = R\$ 3,15: € 1,00 = R\$ 3,36 (rate on April 21, 2017).

⁹ At that time (April, 2005), the rate of exchange was US\$ 1,00 = R\$ 2,58.

human rights and judicial and extrajudicial defense of individual and collective rights, in a comprehensive and free manner, to those in need".

In the traditional individual scope of cases of civil nature, the Public Defender's Office can act by providing legal guidance, assisting in the drafting of contracts, intervening to enable the conclusion of extrajudicial agreements, joining any kind of lawsuits and carrying out the defense of defendants in any kind of judicial proceedings. This individual action in causes of civil nature occurs eminently for the benefit of economically needy persons.

In the individual scope of criminal cases, the Public Defender's Office acts by promoting the defense of defendants in judicial proceedings, whenever the accused does not perform the hiring of a private attorney. It is important to note that in Brazilian law, those accused in criminal proceedings are not allowed to carry out their defense alone before the Court, being mandatory the performance of a private attorney or a public defender in all criminal cases. Thus, in criminal cases, the performance of the public defender does not depend on any assessment of the economic condition of the accused. Whether the defendant is rich or poor, and not being hired as a lawyer to promote judicial defense, the assistance/representation by a public defender shall be mandatory.

During the phase of police investigations, which precedes the beginning of the criminal judicial process, the accused also has the right to be assisted by a member of the Public Defender's Office. However, due to the lack of structure and the small number of public defenders, this defensive performance during the police investigation phase does not occur in the daily reality of Brazil. In fact, the role of the public defender in the individual scope of criminal cases occurs only during the judicial phase.

It is also a routine activity of the Public Defender's Office to carry out the monitoring of prisoners during all the period of deprivation of liberty, with periodic visits to prisons. With this, the Public Defender's Office carries out constant monitoring of the prison conditions and the uninterrupted monitoring of the execution of the sentence, guaranteeing to the prisoners the correct application of the various benefits provided for in criminal law (for example, progression of sentences, temporary visit to the home, grant of conditional release).

Also in the criminal sphere, the Public Defender's Office acts in the preservation and reparation of the rights of victims of torture, sexual abuse, discrimination or any other form of oppression or violence, providing the assistance and care of victims.

In addition to the traditional role in individual cases (civil and criminal), the Public Defender's Office can also claim and defend collective rights of the population. Public defenders have, legally, *standing* right for collective actions to protect the interests of their clients, being able to carry out the filing "class actions" (denominated by the Brazilian legislation as "Ação Civil Pública"). As an example of this kind of collective actions, we can mention the role of the public defender in protecting the rights of consumers, people with special needs, people incarcerated in inhuman conditions, victims of climate catastrophes, elderly people with health insurance problems, students of public schools who need free public transportation, among others.

In addition, the Public Defender's Office has the constitutional function of promoting the defense of human rights in a broad sense, and this action is not restricted to the poor. Whenever the occurrence of a serious violation of human rights (provided for in the Brazilian Constitution or in International Treaties) is identified, the Public Defender's Office may act independently of the economic condition of the one who shall be directly benefited by the action. The Public Defender's Office is legally entitled to act along with the international systems of protection of human rights, postulating sanctioning measures against the Brazilian Federal State itself.

Lastly, the Public Defender's Office can act by carrying out the so-called human rights education, promoting the population's awareness of the rights they have and how they should proceed if their rights are violated.

In objective terms, the number of appointments made by the Brazilian Public Defender's Office has been growing intensely in recent years. To a large extent, this increase is related to the expansion of the free legal aid service in the country and the greater awareness of the population about their

rights. In 2014, the Brazilian Public Defender's Office carried out 12.042.424 cases of assistance throughout the country¹⁰.

According to a survey carried out by the Association of Official Public Defenders of Mercosur (*Bloque de Defensores Públicos Oficiales del Mercosur*), about 50% of the cases in which the Brazilian public defenders carry out their functions are related to Family Law. Within the scope of civil law (i.e., non-criminal cases) matters in general, it represents around 30% of all the cases they are in charge of, with emphasis on the defense of consumer rights and a great number of suits against public departments/government (especially in matters related to public health, such as obtaining medicines and medical treatment free of charge). Finally, the criminal activity totals about 20% of the cases in which the Brazilian Public Defender's Office operates¹¹.

7. Territorial distribution of the Brazilian Public Defender's Office:

Although the Brazilian Public Defender's Office has a very extensive and somewhat advanced normative basis, everyday reality shows that its practical implementation is still far from satisfactory. Currently, Brazil has 5.855 public defenders spread throughout the national territory¹².

However, there is still a large number of jurisdictional units without the presence of Public Defender's Office regularly installed.

In these places, the right to free legal assistance continues to be improvised, in a precarious way, through lawyers appointed by the judge to take part in the case, almost always on a *pro bono* basis.

In 2013, the National Association of Public defenders (Associação Nacional dos Defensores Públicos - ANADEP) and the Institute of Applied

¹¹ "En Brasil cerca del 50% de los casos son relativos a materias de Derecho de Familia, 30% de los casos son relativos a materia civil en general y 20% relativos a materia Penal. Dentro de la materia civil en general, merecen ser destacadas las materias de Defensa del Consumidor y Hacienda Pública (acciones contra el Poder Público)." (BURGER, Adriana Fagundes. ROCHA, Amélia Soares da. *Cartografía del acceso a la justicia en el Mercosur*, Porto Alegre: ADPERGS, 2012, p.163)

¹² Data provided by Associação Nacional dos Defensores Públicos ("Associação Nacional dos Defensores Públicos – ANADEP"), in may 2017.

¹⁰ GONÇALVES, Gabriella Vieira Oliveira. BRITO, Lany Cristina Silva. FIGUEIRA, Yasmin von Glehn Santos. *IV Diagnóstico da Defensoria Pública no Brasil*, Brasília: Ministério da Justiça, 2015, p. 68-112.

Economic Research (*Instituto de Pesquisa Econômica Aplicada* – IPEA) conducted a survey to determine the actual geographic coverage of the Public Defender's Office in Brazil, in a project called Map of the Public Defender's Office in Brazil (*Mapa da Defensoria Pública no Brasil*). The research clearly demonstrates the huge disparity in the geographical distribution of public defenders in Brazil, as well as the lack of coverage in a great part of the Brazilian territory. According to data collected in the survey, the Public Defender's Office is present in only 28% of the Brazilian districts (in Portuguese, "*comarcas*") ¹³.



Brazilian Legislative Branch approved, in June 2014, a Constitutional Amendment determining that within eight years each district ("comarcas") shall have at least one office of the Public Defender's Office regularly installed. This Constitutional Amendment also stipulated that the number of public defenders should be proportional to the effective demand for the service and the population potentially receiving free legal assistance in a given area. Finally, this Constitutional Amendment determined that, over the next eight years, the criterion for the allocation of the new Offices of the Public defender must prioritize the locations with the highest levels of social exclusion.

¹³ CASTRO, André Luis Machado. MOURA, Tatiana Whately de. CUSTÓDIO, Rosier Batista. SILVA, Fábio de Sá e. *Mapa da Defensoria Pública no Brasil*, Brasília: ANADEP, 2013, p. 50.

Although this is a Constitutional Amendment, the current dramatic scenario of financial and economic crisis indicates that this established goal (full territorial coverage) will hardly be fulfilled until 2022.

8. Structure of the offices of the Brazilian Public Defender's Office and evaluation of the workload attributed to public defenders:

Even where Public Defender's Office is regularly established, the number of public defenders is still insufficient to satisfactorily meet the huge number of people seeking free legal aid.

Likewise, the physical structure of the Public Defender's Offices is still precarious in some localities, especially in the smaller cities and rural areas.

Given this situation, the percentage of public defenders who consider the demand for work under their responsibility as excessive is very high. According to a survey conducted by the National Association of Public defenders (*Associação Nacional dos Defensores Públicos - ANADEP*), 84% of public defenders consider that the volume of tasks accumulated by them is greater than adequate for the good performance of their activities¹⁴.

9. Prerogatives

Faced with the enormous workload and enormous structural deficiency of the Brazilian Public Defender's Office, Complementary Law No. 80/1994 (National Public Defender's Law) confers on public defenders several prerogatives, in order to optimize their performance regime.

In accordance with Articles 44, 89 and 128 of Complementary Law No. 80/1994, public defenders have the prerogative of double counting of all procedural deadlines. Thus, for example, while the private lawyer has 15 days to file appeals (Article 1003, §5 of the New Code of Civil Procedure of 2015), the public defender has a 30-day term.

¹⁴ GONÇALVES, Gabriella Vieira Oliveira. BRITO, Lany Cristina Silva. FIGUEIRA, Yasmin von Glehn Santos. Op. cit., p. 50-103

In addition, the public defender has the prerogative of requesting from any public authority documents, certificates, surveys, diligences, processes, information, clarifications and measures necessary for the performance of their duties. Thus, if the public defender needs some document that is in the power of a governmental body, for example, it can issue a request that this document be made available for consultation by the Public Defender's Office. Likewise, in the event that the Public Defender's Office needs to perform any diligence to ascertain a specific fact, it may request the support of the Police to accompany the public defender to the place and assist him in what is necessary.

10. Warranties

Due to the very nature of the functions of the Public Defender's Office, which is constantly in conflict with the Public Power/Government and with powerful private companies, the Brazilian legislation provides a series of guarantees that seek to safeguard the freedom of action of public defenders.

These legal guarantees are considered a true shield, which protects the performance of the public defenders against any nature of external pressure.

Complementary Law No. 80/1994 (National Public defender's Law) lists four guarantees of Brazilian public defenders:

- (i) functional independence: it assures the public defender's freedom of action in the performance of his activities, shielding him against any nature of external interference. Regardless of the hypothesis or cause of litigation, the activity of the public defender shall always be immunized against possible influences coming from public authorities or large private companies.
- (ii) *irremovability*: it consists of the prohibition of the involuntary removal of the public defender of the place where he/she carries out his/her activities. This guarantee seeks to ensure the permanence of the public defender in the office in which he is appointed, remaining protected from possible political interference that could maliciously intends his compulsory removal

as a form of retaliation or to hamper the work developed in defense of those less favored.

- (iii) *irreducibility of wages*: prevents the Public Power from adopting measures that affect the reduction of salaries due to public defenders. This special protection of a financial nature seeks to preserve the full freedom of the public defender to claim and defend the interests of the needy, preventing the occurrence of economic coercion and pecuniary retaliation, due to the natural confrontation with the interests of the holders of the political positions and of the holders of the economic power (especially large entrepreneurs).
- (iv) *stability*: after being approved in a public competition and entering the career of the Public Defender's Office, public defenders may only be dismissed by a judicial decision or by a decision rendered in an administrative proceeding conducted by the Public Defender's Office own correctional agency (*Corregedoria-Geral da Defensoria Pública*).

11. Selection and entry into the career of Public defender in Brazil

The selection of the members of the Public Defender's Office in Brazil takes place through a rigorous public competition, in which the candidate is submitted to various tests of theoretical and practical knowledge. In addition, the academic and professional titles of the candidate are considered, in order to guarantee the selection of the best professionals.

Due to the high degree of difficulty of the competitions to enter the career, many candidates cannot obtain the minimum pass grade and not all positions are effectively filled. In the last competition for entry into the Public Defender's Office of the State of Rio de Janeiro, for example, about 5.000 candidates registered to compete for 40 career positions. At the end of the competition, however, only 37 candidates were considered sufficiently qualified to carry out the difficult and relevant position of public defender.

Due to the high remuneration of the position (generally in the same range as the paid to prosecutors and judges), in comparison with the market salaries of other professions in the market, the competitions for admission to the Public Defender's Office are usually extremely crowded, attracting the attention of a huge range of law professionals.

In 2014, the National Association of Public defenders (*Associação Nacional dos Defensores Públicos - ANADEP*) carried out research in order to understand the reasons that led to the choice of the public defender's career. According to the research, there are three main factors for career choice: the interest in social work, the inherent stability of the public service and the remuneration of the position¹⁵.

12. Remuneration of public defender in Brazil

By Brazilian market standards, the monthly salaries paid to public defenders can be considered, in general, high. In many Brazilian states, a total parity between the monthly remuneration received by a Judge, a Public Prosecutor and a public defender has been reached, indicating the acknowledgment of the importance of equal treatment/parity among prosecution (defense of society's interests) and the defense of the citizens' interests in need of a lawyer to adequately represent them in a lawsuit.

According to research conducted by the National Association of public defenders (*Associação Nacional dos Defensores Públicos - ANADEP*), there is considerable variation in the remuneration received in each Brazilian State. The final gross remuneration ranges from R\$ 10.500,00 in the State of Santa Catarina to R\$ 31.861,00 in the State of Rondônia¹⁶.

¹⁶According to the current rate of exchange (April, 2017) this is equivalent, more or less, to US\$ 3.330,00 in the State of Santa Catarina, and to US\$ 10.114.000,00 in the State of Rondônia.

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¹⁵ GONÇALVES, Gabriella Vieira Oliveira. BRITO, Lany Cristina Silva. FIGUEIRA, Yasmin von Glehn Santos. Op. cit., p. 22-86.