

**INTERNATIONAL LEGAL AID GROUP CONFERENCE:  
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**CONFERENCE PAPER:  
LEGAL AID IN BRAZIL: WHAT LESSONS CAN BE LEARNT FROM  
JURISDICTIONS THAT HAVE “ADVANCED SCHEMES” OF STATE-  
FUNDED LEGAL AID AND ARE FACING FINANCIAL RESTRICTIONS?**

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1. Introduction:

Legal aid is widely recognized as a foundation for the enjoyment of other rights, not only the procedural/instrumental right to a fair trial but also many other “substantive” rights that are established by law and whose exercise is being denied or contested in given/concrete life situations. According to Professor Alan Paterson, “substantive legal rights are of little value to citizens if the latter lack the awareness, capacity, facilities or (the effective possibility) of enforcing these rights or of participating effectively in the justice system”<sup>1</sup>. As pointed out by a senior English lawyer, Lord Pannick: “legal aid is a vital element in securing access to justice and ... without access to justice, the rights and duties which we spend time creating in (this) Parliament by legislation are reduced in value and effect”<sup>2</sup>.

At the international level, the right to legal aid is directly linked with the right of access to justice (access to courts) required to ensure a fair trial. The expression “legal aid” includes legal advice, legal assistance, and legal representation as required, either before a court or tribunal, delivered free of charge, for people who do not have adequate financial means to pay for it. This kind of legal service can be provided free of charge on a charitable basis (pro bono), by private lawyers or may be partially or fully funded by the state, it being recognized since the middle of the 20<sup>th</sup> century that it is a duty of the State to ensure free legal aid services to citizens that cannot meet their costs. Furthermore “legal aid” is intended to include the notion of legal education, access to legal information and other services provided for citizens through alternative dispute resolution mechanisms.

However, this generous and ample vision of legal aid services provided by the state is being put in check. As the theme of this ILAG Conference indicates, the future of legal aid services is uncertain. As is already known, during the second half of the twentieth century there was an broad expansion and

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<sup>1</sup> PATERSON, Alan. *Lawyers and the Public Good – democracy in action?*. Cambridge, Cambridge University Press, 2012, p. 69.

<sup>2</sup> Debate in Committee in the UK House of Lords 20 December 2011.

development of legal aid mechanisms, especially in the main industrialized democracies of the western world<sup>3</sup>. Amongst all of these examples, one notes the legal aid scheme established in England & Wales, that attained its peak at the end of the 70's and the beginning of the 80's of the last century. However, beginning in the 90's and in the first two decades of the 21<sup>st</sup> century, in the majority of countries that had otherwise possessed legal aid systems thought to be “advanced”, the scenario has been one of regression and a cutting of the provision of services, with severe restrictions in terms of funding and support.

In contrast to these scenarios, some underdeveloped and developing nations, such as in the case of Brazil, are experiencing a continuous process of expansion<sup>4</sup> and consolidation of legal aid services subsidised by the State. Specifically in the Brazilian case, beyond the quantitative growth, one also sees a process of instituting a very particular model, in certain respects *sui generis*, of public service legal aid through a Public Defender System. It is a model that is also being consolidated in various other countries in Latin America, and which has awoken interest in the academic world<sup>5</sup>. However, despite the somewhat paradoxical mixture of cut backs and expansion, we consider that the scenario of strong growth experienced in Brazil throughout the last decades will not be long lasting. A public policy of budget cuts in diverse sectors is already starting to affect Justice services. Given this, it seems important to be aware of the scenario of crises and their repercussions seen in countries that possess legal aid systems considered to be more evolved, seeking to encounter lessons that would be useful for dealing with future possible scarcity.

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<sup>3</sup> See: JOHNSON Jr., Earl. *Equal Access to Justice: comparing access to justice in the United States and other industrial democracies*. In: Fordham International Law Journal. Vol. 24, 2000.

<sup>4</sup> To illustrate the reality of the effective expansion of investments needed to assure the consolidation of the Public Defender System in Brazil, we can mention statistical data in the Public Defender III Diagnosis in Brazil, published in 2009 by the Ministry of Justice. Among the data shown there, the evolution of financial support (effective budget execution) in 2006-2008 can be highlighted: the volume of funds invested nearly quadrupled: were R\$ 306,351,332.13 in 2006; R\$ 1,076,589,915.03 in 2007 and R\$ 1,415,562,383.56 in 2008 (information available at: <http://www.defensoria.sp.gov.br/dpesp/repositorio/0/III%20Diagn%C3%B3stico%20Defensoria%20P%C3%ABlica%20no%20Brasil.pdf>). According to (unofficial) data that I collected together with the ANADEP (The National Association of Public Defenders), in 2014 this value reached R\$ 2.985.789.956,00, and this, without taking into account the budget of the Federal Public Defender (that would have reached a value of R\$ 385.894.098,00). It represents an increase of almost ten times or 1000% (from 2006 to 2014).

<sup>5</sup> Regarding the innovative character of the Public Defender model in Brazil, see the paper: “Change and Innovation in Access to Justice: the Public Defender System in Sao Paulo”, written by Elida Lauris dos Santos, presented at the “Congrès Mondial ISA/RCSL. Sociologie du Droit et Action Politique. Organizers: ISA/RCSL, Sciences Po Toulouse e Réseau Européen Droit et Société, Toulouse, 03 a 06 de Setembro de 2103”, available at: [http://2013rcslcongress.sciencespo-toulouse.fr/IMG/pdf/Work\\_in\\_Progress\\_-\\_Justice\\_Access\\_to\\_Justice.pdf](http://2013rcslcongress.sciencespo-toulouse.fr/IMG/pdf/Work_in_Progress_-_Justice_Access_to_Justice.pdf). See also: MADEIRA, Ligia Mori. *Institutionalisation, Reform and Independence of the Public Defender's Office in Brazil*. In: Brazilian Political Science Review. (2014) 8 (2). Available at: <http://www.scielo.br/pdf/bpsr/v8n2/1981-3821-bpsr-8-2-0048.pdf>

In the initial section of this article we will present an overview of legal aid services in Brazil, detailing the evolution and consolidation still under way. Subsequently, we move on to consider possible lessons that can be learnt from the transformations which legal aid systems in European countries considered more developed have experienced, focusing especially on England & Wales, which we should take into account to prepare for future crises that countries such as Brazil may confront.

## 2. Overview of Legal Services and Legal Aid in Brazil

The structures for the state provision of legal aid that predominate in liberal democratic States, especially throughout the period of the so called welfare state, prioritize the model of individualized and personalized legal aid, which is usually described as “judicare”. This model, although sporadically adopted in some Brazilian states, did not become predominant in Brazil. However, according to the Federal Constitution of 1988, a public model of legal aid is guaranteed by the State, provided and managed by state entities dedicated to the identification of structural solutions for, and mechanisms that inhibit, threats or large scale violations of human rights, especially social and collective rights.

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. It should 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 the social inclusion of the majority of the population would not simply be viewed as vague notions but rather, as having the mechanisms to make them effectively achievable. 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's at the end of the last century. 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”, but it also expressly regulated the manner of implementation of these rights, 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).

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 either 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 and the enforcement of social/welfare rights such as public health, housing, and education.

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 cases as well as criminal cases for anyone unable to pay for an attorney. This was recognised from that time up 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 however, some Brazilian states and parts of the Federal Government did not fully comply with this obligation. As such 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 and fully 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. In such cases, if a public defender is not available it is mandatory that the court appoints a private lawyer<sup>6</sup> to represent the citizen because, as is typical in most civil law countries, normally the citizen has no right to “litigate-in-person” (appear personally in court, without counsel) and so must be represented by a lawyer.

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 considered by state) at an average of one public defender for every 16,000 inhabitants. In the national capital, Brasilia, this ratio is even better: one public defender for every 12,000 inhabitants. However, in states like Maranhão, the ratio

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<sup>6</sup> 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).

is one public defender for every 86,000 inhabitants. Even in the State of São Paulo, Brazil's most populous state, the number of public defenders is only 600, implying a ratio of only one for every 65,000 inhabitants<sup>7</sup>. 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 the "Public Defender Map of Brazil"<sup>8</sup>. The reality of the lack of public defenders, especially in the countryside, was evident. Although uninhabited areas, most notably 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 legislating that within eight years each "district" (in the Portuguese language we use the word: "comarcas") should have at least one office of the public defender 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 a given area. It also provides that, over the following eight years, the criteria for allocation of new public defenders should prioritise regions with higher levels of social exclusion.

This 2014 constitutional amendment determined the allocation of sufficient budgetary resources and, because it is a constitutional rule unalterable by any future Parliamentary majorities, is not dependent on the political makeup of the future governments at either federal or state levels. In the event of any failure of implementation, the matter may be brought to the Supreme Court to mandate that the government takes concrete measures (especially budgetary ones) to fulfill this constitutional provision<sup>9</sup>.

In a previous paper entitled "The new constitutional regime of public defenders in Brazil", presented at a conference in Barcelona on 10 October 2013, I argued that this constitutional amendment of June 2014 is the culmination of the continuous process of consolidation of the Brazilian legal aid model. This process

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<sup>7</sup> 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.

<sup>8</sup> See: <http://www.ipea.gov.br/sites/mapadefensoria/defensoresnosestados>.

<sup>9</sup> In February of 2014, by decree of the President of the Supreme Federal Tribunal, the efficacy of the law (complementary law 180/2014) of the state of Paraná that allowed the governor to reduce the budget of the state Public Defender, and thereby limit its constitutionally guaranteed functional and administrative autonomy, was suspended. In 2013, the same Tribunal declared the decision of the governor of the State of Paraíba which would have made cuts to the budget of the Public Defender of that State, unconstitutional, for violating its budgetary and financial autonomy.

over the past 25 years has also included, besides other previous constitutional amendments, numerous ordinary laws and emblematic decisions of the Supreme Court. Particularly noteworthy in this respect is the Complementary Law 132 of 2009 that brought about important innovations which can be interpreted as aiming to *expand even further the scope of protection of 'integral legal aid'*. The very definition – and the role – of the organization of the OPD has been amended in order to reflect such changes<sup>10</sup>.

Besides fixing a deadline for the creation of offices of the public defender in order to provide effective and full national coverage, the 2014 constitutional amendment also elevated to “constitutional status” some rules that had been laid down in the legislative reform of 2009, as has previously been mentioned. 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

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<sup>10</sup> As we have already had the opportunity to indicate in the “National Report” presented in the 2011 ILAG Conference, the Complementary Law 132/2009 expanded and improved the institutional functions of the Public Defender as can be seen in the following: a.) The duty to promote, as a matter of priority, the extra-judicial solution of conflicts, through mediation, conciliation, arbitration or any other technique (paragraph II). The main significant change - in this case - was the addition of the *requirement of priority* and the statement that the means for achieving non-judicial conflict resolution are open; b.) The duty to defend consumer’s rights and interests, be they individual or collective (paragraph VIII), the main addition being the direct reference to the possibility of filing collective lawsuits; c.) The obligation to promote the most ample defense possible of the fundamental rights of the needy, encompassing individual, collective, social, economic, cultural and environmental rights, with all types of lawsuits permitted (paragraph X). The innovation here is the emphasis on the fundamental rights of the needy and the guarantee that public defenders are free to use any kind of legal action to defend fundamental rights; d.) The duty to defend the rights and interests, individual and collective, of children and adolescents, of the elderly, of disabled individuals, of women victims of domestic violence and any other vulnerable social group in need of special protection from the State (paragraph XI). Prior to the reform, the only vulnerable group explicitly mentioned was children and adolescents and there was no reference to the collective interests of vulnerable people. The above mentioned lists indicate a greater concern with the poor’s fundamental rights, the defense of vulnerable groups, and with a legal system more able to deal with their specific concerns, either through extra-judicial mechanisms of conflict resolution or by emphasizing public interest and collective litigation. The innovations in the list examined below also maintain these concerns while further expanding the OPD’s functions. According to these, the OPD must: a.) promote the dissemination and the awareness of human rights, citizenship, and the legal order among the poor (paragraph III); b.) provide an interdisciplinary service for the disadvantaged, through its administrative organs (paragraph IV); c.) present petitions to international bodies for the protection of human rights (paragraph VI); d.) start any kind of collective lawsuit, when the expected result of litigation will benefit groups of individuals considered to be disadvantaged (paragraph VII); e.) file any lawsuit or remedy in defense of the OPD’s own functions and public defenders’ guarantees (paragraph IX); d.) work to preserve and seek reparation for the violation of the rights of persons victim of torture, sexual abuse, discrimination or any other form of violation or oppression, providing support and interdisciplinary service to the victims (paragraph XVIII); e.) participate in governmental meetings where the OPD’s functions are being discussed (paragraph XX) and receive funds owed to the OPD from judicial fees or any other public entity, with the obligation of establishing special funds to manage such income. This income may only be used for infrastructural improvements to the institution and the training of public defenders and personnel (paragraph XXI); f.) organize public consultations to discuss the OPD’s functions and powers (paragraph XXII).

treatment<sup>11</sup> to that enjoyed by judges and prosecutors. Moreover, the new amendment of June 2014 incorporated into the text of the Brazilian Constitution set out a new conception of and range of activities for the public defender, providing greater clarity and further reinforcement of 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 on cannot be abolished by any law or government decision, except by another Constitutional amendment. It is recognized 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 disadvantaged people.

The Public Defender's new role<sup>12</sup>, beyond confirming the traditional individualistic notion of ensuring representation for litigants in any type of judicial process, either as plaintiff or defendant, broadly supersedes its previous functions: the Public Defender is given the task of promoting human rights, in its ample acceptance, which cannot be restricted solely to the disadvantaged in an economic sense.

Diverse studies have been undertaken in an attempt to demonstrate the practical results of the performance of the Public Defender in the provision of integral legal aid and in the promotion of human rights. A survey made in 2013 by Prof. José Augusto Garcia de Souza analysed around fifty collective actions of the Public Defender, throughout Brazil<sup>13</sup>. The list of beneficiaries of these collective actions is impressive. Amongst many others, one finds beneficiaries of rights such as: clients of public nurseries; people with special needs (the physically disabled or mentally ill); institutionalized adolescents (juveniles in detention); people imprisoned in inhuman conditions, detained without alimentation or medical attendance; family members of prisoners; women submitted to invasive searches in prisons; street vendors; residents of communities in need; victims of climatic disasters; small farmers affected by environmental damage; the homeless; low income consumers; elderly people facing problems related to health insurance

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<sup>11</sup> In some Brazilian States, including with respect to income/remuneration.

<sup>12</sup> See: ALVES, Cleber Francisco & CAROTTI, Andrea S. *Legal Aid Delivery in Brazil: new roles for the office of the Public Defenders*. Paper presented at the IV National Access to Justice Conference, in Melbourne, in March, 2013. Available at: [https://wic041u.server-secure.com/vs155205\\_secure/CMS/files/cms/ALVES\\_Cleber\\_%20A2J%20in%20Brazil.pdf](https://wic041u.server-secure.com/vs155205_secure/CMS/files/cms/ALVES_Cleber_%20A2J%20in%20Brazil.pdf)

<sup>13</sup> See: SOUSA, José Augusto Garcia de (coord.). *I Relatório Nacional de Atuações Coletivas da Defensoria Pública: um estudo empírico sob a ótica dos “consumidores” do sistema de Justiça*. Brasília, Anadep, 2013. (First National Report of the Public Defender Collective Actions: An Empirical Study from the perspective of "consumers" of the justice system).

policies; transport terminal users; students of the public education network who use/need free collective transport; the chronically ill; people dependent on electrical health devices; women with breast cancer; sick children; asbestos victims; carriers of Hansen's disease; collectors of recyclable materials; unemployed workers; pregnant women who are undertaking public selection processes as penitentiary employees, and so forth.

To improve the effectiveness of its performance, the Public Defender has adopted a policy and politics of coordinated “strategic litigation”, especially through actions in the collective sphere. Beyond this, special attention has been given to actions of a preventative character and to alternative dispute resolution services. To this end, we underline some cases in the current year 2015. Earlier this year (2015) a serious bus accident occurred in one of the most populous cities of the metropolitan region of Rio de Janeiro: São Gonçalo: on February 18th a bus collided with a lamppost causing the fall of a transformer and consequent fire that completely destroyed the vehicle. Among the passengers that were inside the bus, nine people were seriously injured and nine died: their bodies were completely charred. The Consumer Defense Center of the Public Defender Rio de Janeiro immediately, even before being approached by any interested party has contacted the transport company and the public authorities responsible for urban transport service to propose a collective agreement to ensure the right of victims and their families to fair compensation, as provided by law, in order to avoid the need to propose individual lawsuits to exercise their rights. The agreement signed by the Public Defenders does not prevent any victim or relative of a deceased victim of the accident opt for filing an individual lawsuit with a private attorney. But as most people involved in the case are poor, the solution reached by public defenders will enable a rapid and effective response to protect their rights. Also in view of the bus company, the consensual solution was certainly more beneficial because it will save money that would be spent on paying lawyers and skills in a long judicial process. The agreement also provided for the creation of DNA tests to confirm the identity of casualties, so their families could receive promptly due compensation.

Another interesting case worthy of note occurred in the state of Maranhão: in the local penitentiary system, the visitation rights of the families of prisoners, especially children, were only guaranteed for those who had official recognition of paternity in their personal documents. However, in many cases children did not have access to their birth certificate, or did not have paternity recognized, which made visits and the maintenance of family relations difficult. A movement was subsequently realized by the public defenders, with attendance made directly in prisons, aiming at normalizing the familial status of the children and stepchildren of the prisoners, making viable the formalization of registries and the emission of the relevant documents and, when necessary, the arbitration of the recognition of

paternity. Equally relevant was the creation of a sector of international legal aid in the jurisdiction of the Public Defender of the Federal Government (Defensoria Pública da União), with the aim of providing orientation and legal assistance to Brazilian citizens living abroad. The attendance is made via internet in, for example, cases of poor Brazilians immigrants that are living overseas and divorced while out of the country, requiring as such the normalization of their records in Brazil, through ratifying foreign divorce proceedings and departmental registers.

Despite all the Constitutional guarantees and even considering that in the recent past Brazil has been undergoing significant improvements and progress in effective implementation of the legal aid system and the Public Defender's Office, the author believes that Brazil must be alert to the lessons presented by jurisdictions with "advanced schemes" of state-funded legal aid, such as England & Wales. Despite having achieved levels of excellence and being regarded as a global benchmark as having an "ideal" and paradigmatic legal aid service, their service was not immune to setbacks. According to some authors, certain areas of law have even returned to standards lower than those that existed in 1949 when the modern legal aid system was first established.

During a period of 8 months (between July 2014 and February 2015) I undertook research as a visiting fellow at the Institute of Advanced Legal Studies, at the University of London, the aim of which was to critically examine the implementation of the "first wave" of legal service reform in England, charting the historical trajectory of this model of legal aid service that had once reached internationally recognized standards of excellence. This research was undertaken with the purpose of understanding the framework that resulted in the crisis and retrocession currently experienced in this second decade of the 21<sup>st</sup> Century. We had in mind that the study of the trajectory of the English Legal Aid system, and the in depth analysis of the causes which prompted the difficulties that have been faced in recent years could be of great significance for reflecting on the challenges we might have to face in Brazil, so that the growth/expansion of our particular model of State-subsidised free legal aid to those in need may occur in a sustainable fashion. Additionally, we considered it extremely helpful to verify *in loco* how England was generally dealing with this situation of "scarcity" and restrictions, and how it is seeking creative solutions – which may also be implemented in Brazil – capable of maintaining broad access to justice for those in need. In this manner, we can make an effort to optimise "cost-benefit" considerations while at the same time guaranteeing the rights assured to all Brazilians by the 1988 Federal Constitution. In this paper we will seek to present some partial conclusions regarding the results of this research.

3. Recent transformations experienced by jurisdictions that once had “advanced schemes” of state-funded legal aid and are facing financial restrictions: the case of the English/Welsh Legal Aid System

The majority of countries that previously possessed legal aid systems considered amongst the most advanced in the world have been confronting severe difficulties in recent years, with deep changes and adjustments to find savings especially through “means testing” and reducing the “scope of legal aid”. The impact of the crisis of the welfare state on the capacity of official institutions to maintain large public legal aid systems shook confidence in the ideals of the model of universal access, putting into question the perceived efficacy of its public policy responses. The debate regarding access to justice began to orient itself according to the focusing and selectivity consequent on financial limitations, restrictions on the definition of possible beneficiaries and relevant juridical questions, and reduction of the reach of services, amongst others. In this manner, access to justice has gradually distanced itself from the cover of the social protection of the state, fragmenting itself in the administration of a market of juridical services and of alternative conflict resolution mechanisms. The most eloquent example of this situation is that of the English & Welsh legal aid system.

The English/Welsh legal aid system was created in 1949, through the Legal Aid Act, rolled out in the context of the implementation of the welfare state in the UK of the post-World War II period. Initially it was restricted to funding legal representation, especially related to family issues (divorce cases). Gradually the scope was enlarged to include other areas of law (especially criminal law), as well as guidance and extrajudicial legal advice. The management of the service was originally under the stewardship of the professional body representing lawyers (the Law Society), but in the late 80's it became the responsibility of a state public body created specifically for this purpose (the Legal Aid Board and then legal Services Commission). It is considered that between the 70's and 80's the English system reached its peak, in terms of breadth of coverage, whether considering the geographical extension of the service or as regards the demographic scope of the population eligible to use these services<sup>14</sup>. Studies show that England had the highest per capita expenditure, on legal aid services in the world.

In this “golden age”, the “universalization” of the English legal aid system had attained an extensive coverage that used to be touted as a model for many countries. Another aspect of great importance to be emphasized is the concern, especially during the 90's, with guaranteeing high quality standards in service

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<sup>14</sup> According to Steve Hynes, “prior to losing office, in 1979, the Labour government increased the percentage of the population entitled to claim legal aid to 79 percent – it had been 40 per cent in 1973 at the start of this period”. HYNES, Steve. *Austerity Justice!*. London, Legal Action Group, 2012, p. 26.

delivery, with the adoption of specific mechanisms (through peer review) for relevant control<sup>15</sup>.

However, in recent years, owing to the economic crisis present in most European countries, there have been successive budget cuts that resulted in the need for a complete reconfiguration (or a “reconceptualization”) of legal aid, as explained in detail by Prof. Roger Smith<sup>16</sup>. Already over the last decade, due to the rapid growth of budget expenditure on legal aid (a jump from 1 billion, 200 million pounds annually to more than 2 billion pounds per year in less than a decade, i.e., 1995 to 2004), numerous measures have been taken by the English government to improve cost/benefit indicators and seek alternative ways to deliver legal aid and facilitate broad access to Justice for disadvantaged citizens.

This new scenario implied a significant shift - in quantitative terms - in the distribution of cases for state subsidized legal services going mainly towards criminal cases. This is also explained by the impact of the implementation of strict guidelines issued by the European Convention on Human Rights for mandatory state assistance of defendants in criminal matters, going from the stage of police involvement up until the trial itself. In an effort to identify alternatives to deal with the new situation, England has even set up a pilot project to establish a Public Defence service. This however met with strong resistance from the corporate body of professionals of the private law firms, who have traditionally dominated the provision of services in the form of the model known as “judicare”.

The crisis of the English legal aid system was profoundly aggravated by the passing of the LASP Act, on 1<sup>st</sup> of May 2012, which generated a situation considered to be “the lowest ebb of the civil legal aid system in forty years”<sup>17</sup>. According to the last ILAG conference, “in summary, what is happening to poverty law services in England and Wales is that the government is no longer supporting them. As part of their deficit reduction program, the Government have decide to reduce all legal services to a minimal safety net to comply with supranational and international law, and no more.”<sup>18</sup>

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<sup>15</sup> See: SHERR, Avrom & PATERSON, Alan. *Professional Competence, Peer Review and Quality Assurance in England and Wales and in Scotland*, Alberta Law Review, Volume 45, No 5 (June 2008). See also: *Lawyers - The Quality Agenda*. Volume One: *Assessing and Developing Competence and Quality in Legal Aid - The Report of the Birmingham Franchising Pilot*, Sherr, A.H. with Paterson, A. and Moorhead, R. HMSO, London(1994). Volume Two: *Assessing and Developing Competence and Quality in Legal Aid - Transaction Criteria*. HMSO, London 1994., Sherr, A.H. with Paterson, A. and Moorhead, R. (1994)

<sup>16</sup> See: SMITH, Roger. After the Act: what future for legal aid? JUSTICE Tom Sargant memorial Annual Lecture 2012. Available at: <https://www.yumpu.com/en/document/view/24593009/after-the-act-what-future-for-legal-aid-justice>.

<sup>17</sup> See: “Country report: England and Wales” (Report presented at the ILAG Conference, 2013).

<sup>18</sup> Idem.

Given this background, we believe that mapping the trajectory of the English Legal Aid system, and further analysis of the causes that gave rise to the setbacks being faced, can be of great importance to reflect on the challenges that we may have to confront in Brazil, so that the expansion of our particular model of free legal assistance for the disadvantaged, by Public Defenders can continue in a sustainable manner. Moreover, “spot verification” appears useful for seeking creative solutions which could also be implemented in Brazil, capable of preventing a drop in the accessibility of justice for the poorest, given that English society at large is dealing with a situation of scarcity and restrictions. As such, one seeks to optimize the "cost-benefit" ratio without prejudicing the provision of rights guaranteed to all Brazilians in the Federal Constitution. Such an approach is justified especially in the light of the scenario currently unfolding in Brazil, with the spread of a culture of entitlement that has led to, and certainly further expanded, the demand for Legal Aid by low income populations.

#### 4. Possible lessons to be learnt by the Brazilian Legal Aid System from the current context of the English/Welsh legal aid scheme

With the intention of demonstrating the possibility of learning useful lessons for the improvement of the Brazilian legal aid system, we might firstly ask whether it makes sense to compare models of legal aid services adopted in countries as different 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 however, we believe that such a study does in fact make sense.

Despite the continuous and uninterrupted process of expansion and consolidation, of legal aid services in Brazil, through the Public Defender, we are still in a fairly precarious state regarding the effective universalization of access to justice, especially for the economically disadvantaged social classes. By contrast, England despite already having attained, some decades back, a state of effective universalization of legal aid services that benefits more than 70% of the population<sup>19</sup>, has been experiencing a continuous and uninterrupted process of reduction in the reach of the state legal aid services and the section of the population that benefits from them.

However, we have a clear perception that the financial and budgetary restrictions confronted by England, just as in other jurisdictions that rely on model systems of legal aid, will shortly also become a reality in Brazil. And, even though the scenario is not so drastic, to the point of implying cuts in public funding given

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<sup>19</sup> See footnote 14, supra.

to the service, the need to increase the territorial coverage of the functioning of the Public Defender and for the improvement of the services that the entity provides, show that it is necessary to find mechanisms capable of realizing these objectives in a context where the continuation of global budgetary growth is very unlikely, at least at the levels seen in the last decades.

One of the strategies that can be adopted to optimize the use of the limited resources available is to create mechanisms that diminish the quantity of people that depend on the assistance of the Public Defender for access to justice. In this manner, one aspect that, although it could be seen as a great virtue of the Brazilian model of legal aid, that is to say, the ample flexibility of the eligibility criteria (means testing) for using the service<sup>20</sup>, certainly will need to be rethought in a future scenario of scarcity of public resources available for the financing of the service. Despite the advantages of this flexibility, the current model makes possible abuses and waste of resources. Many members of the middle class<sup>21</sup>, attracted by the high quality of the services provided by the Public Defender, seek free legal aid. In these cases rejecting attendance becomes impossible owing to a lack of more objective parameters for the precise definition of which clients should have the right to the services offered by the Public Defenders. The introduction of more objective means testing criteria, preferably not of an excessive rigor, to define who should be eligible for public legal aid services,, could permit better management of scarce resources and the reduction of workloads, resulting in a better quality service. Along this same course of action, stimulating the participation of private lawyers paid via the system of “contingency fees” as adopted in England, could reduce the demand on cases at the Public Defender’s Office. This would allow defenders to prioritize more complex cases, in which there would be reduced interest for involvement on the part of private lawyers owing to the lack of possibility of significant economic benefit that would make the payment of fees for the services provided viable.

Beyond this, one has to rethink the actual Brazilian model, which is excessively restrictive on the legal capacity of the citizen to directly defend (in-

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<sup>20</sup> According to Brazilian law, anybody who is considered legally “disadvantaged” is considered eligible to make use of the right to legal aid and assistance by the Public Defender, that is to say, “every person whose economic situation does not permit them to pay the lawsuit’s costs and the lawyer’s fees without harm to their own maintenance or to that of their family.” The characterization of the prevailing condition of “needy”, or “hyposufficient,” is an established idea for over a century in the Brazilian legal system: the group of possible “beneficiaries” of the assistance which must be provided by the state with the purpose of facilitating equal access to justice is not defined by fixed tables based on the standard of a citizen’s earnings. Incorporated in the legal concept which defines the conditions of eligibility for the “benefit” of legal aid - both judicial and extra-judicial – is an ample margin of flexibility which allows the analysis of all of the person’s and their family’s economic circumstances.

<sup>21</sup> In Brazil, the alternative of purchasing judicial insurance is practically non-existent. We believe that the expansion of this market could facilitate access to justice, especially for citizens of the middle classes.

person) their rights/interests. This makes necessary the involvement of a lawyer/public defender in the majority of litigations (in both, civil and criminal areas) being considered,(actually mandatory/indispensable!). In Brazilian law, there are very few situations<sup>22</sup> in which the citizen can assert their rights in a law court without being represented by a lawyer (or by a public defender, in cases where they are unable to meet the costs of private professional services). The significant improvement during the last decades, in the standards of school education for the Brazilian population (even for the more disadvantaged classes) , allows, as far as we can tell, for many cases that currently depend on the formal technical aid of a professional (lawyer), but which do not have a great deal of legal complexity (such as in cases of consensual divorce, or even the amicable division of goods of an inheritance between heirs of legal age and possessed of full civil rights) to be resolved directly by the involved parties. We think that these cases should not necessarily require the professional involvement of a private lawyer (or of the public defender), as is already the case in England and in the majority of countries that possess “advanced schemes” of state funded legal aid.

Equally, in certain cases of patrimonial questions/disputes (such as for example, the collection of debts or evictions) even for values higher than the current level of 20 minimum wages (given that in Brazil one admits self-representation exclusively in small claim courts, whose financial limit for the value of cases is 20 minimum wages), one could make the involvement of the lawyer/public defender optional (and not mandatory as it is today!). A new value could be, maybe, in the order of 60 minimum wages, establishing that in those cases the involvement of a lawyer/public defender would only be necessary (as part of the right to a “fair trial”) in cases of situations of vulnerability on the part of the litigant, so as to ensure “equality of arms”. This would certainly diminish a good part of the work-load of the Public Defender, permitting defenders to occupy themselves with other institutional functions, on more serious or complicated cases in which their involvement would be important and at times even indispensable. Naturally, making the possibilities for self- representation more flexible needs to be undertaken in a coordinated manner, creating services for orientation and aid, to be provided by the justice courts themselves, to stimulate and facilitate citizens who are acting on their own behalf (self-represented), so as not to result in perverse effects in the passage of legal processes (excessive waiting periods, unjust decisions owing to a lack of parity of arms, etc.).

Conjointly, it seems to us that the regulation of the activities of paralegals, with the fixing of roles and attribution of tasks of a lesser complexity that can be undertaken by such professionals, would be opportune. The necessity of formal

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<sup>22</sup> Only in cases whose value is equal to or below 20 minimum salaries, is the citizen permitted to litigate “in person” in the “small claims court. In the criminal field, “self-representation” is only permissible in exceptional cases, in habeas corpus actions.

and express intervention in each act realized, either by a lawyer or public defender<sup>23</sup>, would not always be necessary, it being enough that one establish that the functions of paralegals always occur under supervision and with technical orientation.

Beyond this, it is necessary to amplify the use of available resources through new technologies, be it via the formatting of bureaucratic routines and procedures, in such a way as to improve the management of services and streamlining of the internal organization of the Public Defender, or via the use of channels of communication and digital platforms to facilitate access by citizens to information about rights, and even to simplify means of conflict resolution.

Another lesson to be considered is the importance of enlarging and improving a method which becomes even more viable in public models of state funded legal aid (staff lawyers) that is, the method of preventive advocacy using planned action for legal education in partnership with civil society organizations. For this, it is necessary to identify with greater precision the real legal needs which remain unmet by the current model, and that are of greatest relevance for the citizen. This will only be possible by encouraging the production of empirical research to better formulate or evaluate public policy and practice in day-to-day legal aid service delivery. . . .

Studying the trajectory of the English model of legal aid also permitted us to conclude that, though the model there adopted was that of “judicare”, based on the provision of services by particular lawyers who do not possess employment ties with state organizations, across time the transformations which the system underwent brought it increasingly closer, in many respects, to the model of staff lawyers adopted in countries such as Brazil. This is because such public policy has led to the concentration of the provision of services in a reduced number of law firms. This tendency reduced the range of options and the choice by the client of the lawyer that would provide them with aid, which was always considered a virtue of the ‘judicare’ model. At the same time this change allows the streamlining of the organizational management of the provision of services on a large scale, increasing the efficiency and improving the cost-benefit index (which is an advantage typically associated with the “staff model”). There is still another advantage. In the “judicare” system, in which the service is provided by large law firms, a certain “prolateralization” of lawyers contracted as employees by these firms, can occur, given that the private model tends to preserve greater profit margins for the partners of the firm. This does not occur with the Public Defender

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<sup>23</sup>In practice, this already happens in many law firms, while in the operation of the Public Defender the contribution made by interns (students from law school) is indispensable. However, for the validity of the majority of acts of representation of the part, one still requires the formal intervention of a lawyer or defender.

model in which a more equal system of remuneration of all legal professionals (judges, prosecutors, and public defenders) takes place.

Finally, we believe that the trajectory of transformations undergone in the English & Welsh systems of free legal aid also provides important lessons that can serve as inspiration for the Brazilian model regarding the adoption of control mechanisms for service provision and refining accountability mechanisms.

## 5. Final Remarks:

From studying the current and recent past framework in England and in other jurisdictions that have “advanced schemes” of state-funded legal aid, I highlight some lessons that could be translated into challenges to be considered in the Brazilian scenario:

- simplify judicial procedures to allow (and even encourage), in some cases, the citizen himself to act before courts through self-representation, providing, as appropriate, due support and guidance. The big taboo here would be making the current restriction on self-representation before Courts more flexible. This could be done by reducing the number of activities that are the exclusive prerogative of lawyers, (activities which, in the case of the disadvantaged, would therefore 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 provide the assistance of a paralegal, or even permit the citizen to represent themselves before a Court of Law...
- deploy / expand the use of new technologies to go beyond the traditional model of legal service provision (especially in the educational / preventive activity and legal advice / triage of cases...);
- encourage the production of empirical research for better formulation and evaluation of public policy and practice in day-to-day legal aid service delivery;
- improve organisational management, thereby overcoming another taboo that this could interfere with the autonomy and functional independence of the PD. In this way, one strengthens the virtues inherent in the “staff model” in order to optimize the provision of large-scale services, and saves time on routine, repetitive tasks, consequently achieving by this, greater “productivity”;
- improve mechanisms to ensure quality control of the service provided, and improve accountability mechanisms ...