

**INTERNATIONAL LEGAL AID GROUP CONFERENCE:
6 TO 8 JUNE 2007 – ANTWERP, BELGIUM**

NATIONAL REPORT: BRAZIL

Introduction

Under Brazil's current Constitution, approved on October 5, 1988, the Government must provide legal aid to anyone unable to pay for an attorney¹. This guarantee covers advice and representation by counsel in any criminal or civil case, whatever the scope of jurisdiction. While easily stated in the Constitution, implementing a guarantee such as this in practice in a society as large as Brazil's, where inequality is substantial, is more difficult.

Legal aid in Brazil includes exemption from taxes and court costs (in Anglo-American Law this would equate to "*in forma pauperis*" status) and legal representation in civil cases as well as criminal cases (*assistência judiciária*), at no cost, in litigation for persons unable to undertake such expense, in addition to exemption from taxes and court costs. More recently, since 1988, legal aid in Brazil has taken on a broader meaning ("*integral legal aid*" being the expression used in the Brazilian Constitution of 1988). The new Constitution added an important new feature. It guaranteed not only the right to legal aid, *i.e.* to representation and defense during trials, but also the broader notion of full legal aid covering guidance and counseling on legal matters, expressly emphasizing that such services would be provided free of charge.

In order to appreciate the essentiality of the legal aid in Brazil, it should be borne in mind that, except in rare cases², a litigant may only appear before the court represented by counsel. In other words, a poor person who lacks the economic resources to pay a lawyer may, if he cannot obtain a professional representative to represent him before the Judiciary, be effectively prevented from litigating, *i.e.* he will be denied his right of access to justice. But, in this case, this would conflict with the model established in the Constitution of 1988, according to which the State expressly assumes the responsibility of providing for representation of the poor person in litigation.

Thus the text of the 1988 Constitution provided:

"Article 5, Section LXXIV – The State will provide integral and free legal aid to those who can prove³ having insufficiency of resources."

No longer is it permissible to impose the burden of representation upon individual lawyers as a matter of charity (*pro bono* service), as used to occur in the past. In

¹ In fact, since 1934, the national Constitution included a provision guaranteeing a right to counsel in civil as well as criminal cases.

² In Brazilian Legal System, except in rare cases (*habeas corpus* or small claim courts, for example) a litigant may only appear before the Court represented by counsel.

³ Although the current Constitution states that "The State will provide integral and free legal aid to those who can prove having insufficiency of resources." (Art. 5, LXXIV), the decisions of the Courts prevailed in the sense that no formal proof be required further than the acceptance of the individual's word of honor, as it was stated in the previous infraco¹nstitutional law.

fact, according to Law No. 8906/94 (Article 22, Paragraph 1), the Statute of the Legal Profession in Brazil, any time a private lawyer is named by a Judge to represent a poor party, if that nomination becomes necessary by reason of the failure of Government to provide an adequate Public Defender service, the lawyer named by the Judge now has the right to charge fees against the Government entity (State or Union) responsible for rendering legal aid.

SOME STATISTICS ON BRAZILIAN JUSTICE SYSTEM

	Population X “potential clients” for Legal Aid	GDP	Total Expenditures Judiciary Branch	Total Expenditure Public Defenders Offices	Expenditure per capita Judiciary Branch	Expenditure per capita Public Defenders Offices	Number of Judges	Number of Public Defenders (civil and criminal)
BRASIL (all the 27 States plus Federal Judiciary)	184.184.264 X 119.486.992	2.147.000 milhões de Reais (1.070.000 million Dollars)	28.000 milhões de Reais (14.000 million Dollars)	445 milhões de Reais (220 million Dollars)	R\$ 152,02 (US \$ 75,00)	R\$ 2,76 (US \$ 1,20)	13.660	3.624
RIO DE JANEIRO STATE (only the State Judicial System)	15.383.407 X 9.358.967	265.000 milhões de Reais (130.000 million Dollars)	1.300 milhões de Reais (650 million Dollars)	115 milhões de Reais (55 million Dollars)	R\$ 84,50 (US \$ 42,00)	R\$ 7,47 (US \$ 3,50)	880	698

Reference Year: 2005

We considered “potential clients” for Legal Aid people earning less than US \$6.000 a year.

R\$ 1,00 - US\$ 0,50 - (average rate in May 2007)

The Organization of the Legal Aid: The Public Defenders System

Another innovation of the 1988 Constitution was the officialization on a national scale of the status of public entities charged with implementing the guarantee of Article 5, Section LXXIV. Brazil’s Constitution establishes the **professional staff model** as the main form for legal aid services delivered by the Government. Thus both the Federal Government and the States must organize and maintain a specific institution, the Public Defender’s Office (“Defensoria Pública”), which has a status and structure similar to that of the Public Ministry (the Prosecutor’s Office). In the chapter referring to the structure of the Judicial Power, the Constitution enumerated a series of institutions described as “essential functions of justice.” For the first time in the constitutional history of Brazil, according to Article 134, the Public Defender system was deemed “an institution essential to the jurisdictional function of the State, being assigned the responsibility of providing legal orientation and defense, at all levels, to needy persons, as provided in Article 5, LXXIV.” Article 134 establishes that Public Defenders must be organized as established by infraconstitutional law.

From the constitutional standpoint, the Public Defender System, like the Brazilian Judiciary, has its own structure and may function in both the Federal and State spheres. The Brazilian Constitution does not place the Public Defender System within any of the three traditional branches of government, although in practice, owing to the historical evolution of Brazilian judicial institutions, Public Defenders have traditionally been associated with the Executive (and not with the Judicial Branch as is the case in the majority of countries of Latin America). The Public Defender System's administrative and financial autonomy makes it self-governing. It possesses total independence to accomplish its constitutional mission and is not subject to the directives or specific projects or programs of a particular Government or occupant of the Office of Chief Executive. Its only obligation is to fulfill its mission as established in the Federal Constitution and in Brazil's ordinary laws.

The standards and directives of the Constitution of 1988 were eventually implemented through an Organic Law of the Public Defender System promulgated on January 12, 1994. That law established the general standards to be observed by the States when organizing public services charged with providing equal access to justice for Brazilian citizens. The Organic Law (Complementary Law 80 of January 12, 1994) provided that the institution must be maintained at both the federal and state levels. It also provide(d) that the offices of Public Defender will be filled by public competition⁴, in the same way that the positions of judge and prosecutor are, and that once a probationary period has been successfully completed, Public Defenders will acquire tenure of office. This means that Public Defenders cannot be dismissed at the pleasure of the powers that be. The Organic Law of the Public Defender assures that Public Defenders can not be removed from office unless they commit some illegal act. The law also requires that Defenders work as such on a full-time basis, so Public Defenders can not take on private practice of law.

SALARIES - There is a broad variation on Public Defenders salaries among the different States in Brazil. Rio de Janeiro has, since 2006, the highest (average of US\$ 100.000 a year)⁵. But some other States – as Paraíba, in the Northeast – have very low salaries for PD (average of US \$ 15.000 per year).

With regard to the technical/legal aspect of his work, as with any private attorney, each Public Defender has total autonomy – in consultation with his client – to determine the course of action and the technical-legal strategy that he will pursue in a given case. Interference by other Public Defenders in the case is not allowed, not even by those with supervisory authority over the individual Defender. Each Defender acts as an autonomous attorney with an obligation exclusively to the client. The State public defender or the public defender in charge of a given regional office cannot tell a public defender what to do with his/her case. For that reason it is possible that, at times, in the same proceeding two parties with conflicting interests will be assisted by different Public Defenders. Even though the Defenders might belong to the same institution, given their functional autonomy, no impediment is seen in their representation of distinct interests.

Even so, the gap between theory and practice remains. Few States of the Federation can genuinely affirm that their Public Defense Systems have been established according to the constitutional model and even in those States in which the Systems are functioning, difficulties of a functional and operational order remain. This may be a result of an insufficient number of Public Defenders, or it may be because of a lack of material

⁴ In the 2006 competition, 40 positions were open and more than 4000 applicants took the exam.

⁵ In Rio de Janeiro, the average salaries of the Judges and Prosecutors is US \$120.000.

resources, that is, physical space and minimally necessary equipment for rendering appropriate service.

The process of consolidating Public Defender Systems and their strengthening institutionally has advanced considerably in recent years. In December 2004, Constitutional Amendment No. 45/2004 established that State Public Defenders must be given functional administrative and financial autonomy, which signifies that they must have their own budgets, distinct and separate from the budgets of the three traditional branches of Government. In practical terms, it is as if another branch of Government had been created in addition to the Executive, Legislative, and Judicial Powers (the Public Ministry was given similar autonomy by the Constitution of 1988). No longer must Public Defenders depend administratively or financially on the Executive Power as used to be the case. **In some States, such as Rio de Janeiro, laws and amendments to the State Constitutions conferring financial and administrative autonomy upon Public Defenders have already been approved. For example, part of the judicial fees are sent to Special Funds which are administrated by the State Public Defenders Office, without any interference of the Government. The aim of these Funds is to provide ordinary expenses and investments, so as to be able to give more independence to the Public Defenders. Only the salaries of the PD are paid by the State treasury.** These guarantees are important for the accomplishment of the institutional mission of Public Defenders and reinforce their independence.

Bearing in mind the heavy workload carried by Defenders, and in order to better safeguard the rights of those who need to avail themselves of legal aid, the law confers upon Public Defenders a few prerogatives not recognized for other lawyers. One of the most important of these grants Defenders twice as much time to meet procedural deadlines, especially the deadline to present a defense in the case. The law also assures that the Public Defender will receive personal notice of each and every procedural act, whereas normally lawyers are only notified of procedural acts by means of publication in the official Daily Record.

In order to facilitate the activity of Defenders, as distinguished from the rest of the Bar, they need not present a power of attorney to appear in litigation. The simple affirmation of the client declaring that he is poor and lacks resources to cover costs and procedural expenses will suffice.

Types of Legal Aid

As has been seen, by virtue of an express constitutional provision, the Brazilian Government has undertaken to provide full and free legal aid to any citizen who, by reason of insufficient financial resources, is unable to pay the expenses of an attorney. That aid extends not only to representation before the several courts of the criminal, civil and administrative areas, but also to assistance in terms of counseling and legal orientation. By reason of an express constitutional provision, this service must be provided through the Public Defender System.

The institutional functions of the Public Defenders, as established by law, are broad. They are authorized to promote conciliation of the parties by resorting to techniques of alternative resolution of disputes; to ₄provide representation in judicial

proceedings, whether the needy person is suing or being sued (PD represents plaintiffs as well as defendants in civil proceedings) or being criminally prosecuted; and to act before police and prison authorities to the end of assuring that an individual's rights and guarantees are protected. Moreover, Defenders must provide for the defense of children and adolescents and assist in looking after their interests, as well as the rights of injured consumers. In Brazil's Special Small Claims Courts, although representation of parties by lawyers is not required, the Government is legally obliged to provide free legal aid and must therefore maintain a Public Defender at the disposition of poor litigants who may be incapable of representing their own interests.

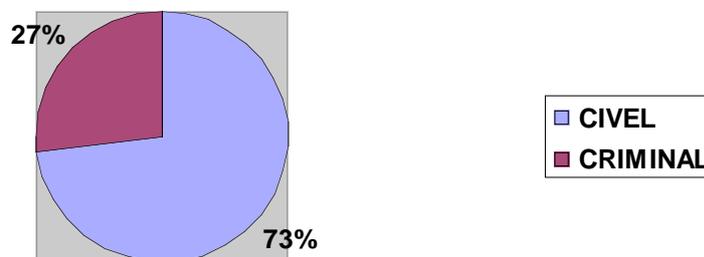
In addition to these functions, apart from an individual's ability to pay, the Public Defender is tasked with representing parties who, for any reason, may not have a lawyer, whenever indispensable rights, such as liberty in the criminal process, are at stake. Such representation is justified in order that the constitutional principles of full defense and due process of law may be respected. Even in civil cases, if the defendant's whereabouts are unknown and it is not possible to ascertain whether he has knowledge that he is a party in a judicial proceeding, it falls to the Public Defender to represent his interests.

CLASS ACTIONS - In 2006, National Congress enacted a statute including expressly the Public Defenders Office between the entities who have specific "standing" to initiate **class actions** on behalf of group interests, when at least a part of the members of the group are poor people.

INCOMING CASES IN THE BRAZILLIAN PUBLIC DEFENDER SYSTEM IN 2005

CIVIL CASES – 744.760 (73%) – includes Family and Inheritance Law, Contract and Tort Law, Landlord/Tenants issues, Public Benefits, etc.

CRIMINAL CASES – 275.422 (27%)



Eligibility criteria

The standards that regulate free justice and legal aid in Brazil are established by Law 1060, dated February 5, 1950. Over time this law has undergone various changes to permit it to keep up-to-date and to adapt to new realities, including the new constitutional order that became effective at the beginning of 1988.

Article 2 provides that the benefits of the law apply not only to Brazilian citizens, but also to foreigners resident in Brazil, and no distinction is made between persons who have entered the country legally or illegally. The same provision indicates, moreover, that legal aid extends to criminal, civil, military and labor justice.

The law does not establish any strict test to verify the economic ability of a citizen to be eligible for the benefit of legal aid (“means test”). Article 2 says only that, for legal purposes, “a needy person is anyone whose economic situation does not allow him to pay the costs of the proceedings and the attorneys’ fees, without prejudicing his own support or that of his family”. There is no concrete monetary limit.

Nor does the law require any documentary proof to demonstrate the economic need described in Article 2; it is sufficient if the individual merely signs a declaration to that effect, *i.e.*, the PD will provide services to anyone who signs an affidavit they can’t afford a lawyer without requiring a detailed income and asset statement. There is a presumption of veracity in favor of anyone who makes such a declaration. Nonetheless, an adverse party is entitled to challenge such a declaration. In that event, a parallel proceeding is undertaken in which the interested parties must prove to the judge their allegations. Ultimately, if it is proven that the declaration of one seeking legal aid was false and that he was not eligible to receive it, the judge may assess a fine corresponding to 10 times the value of the judicial costs that should have been paid. At the same time, if the judge determines that the applicant is not in fact needy, he may, *ex officio*, deny or revoke the award of legal aid. In any case, however, the party that is aggrieved by the judicial decision may take an appeal to competent tribunal.

The law also establishes that, should there be a change of circumstances of the recipient so that he is no longer needy (within five years), then he will be obliged to pay the expenses of the proceeding (Article 12). Additionally legal aid may be granted in part but not in whole, in accordance with the economic resources of the requesting party (Article 13).

Notably, there is no requirement in Law 1060/50 that the Court inquires into the merits or the reasonableness of the claim (“merits test”), or even that it determine the likely success of the claim. It remains for the Public Defender alone (or the appointed lawyer, depending on the case) to evaluate the legal aspects of the question put forth by the applicant and decide if it is appropriate to assist in the cause.

The Public Defenders System of the State of Rio de Janeiro

Among the States of the Brazilian Federation, the Public Defender System in the State of Rio de Janeiro is probably the best organized. It has some 674 Public Defenders serving a population of 15383.407 inhabitants. If one considers only the poorest population, who receive priority service from the ⁶Public Defenders (about 9.300.000

“potential clients”) the result is an average of one defender for every 13.886 persons.

LAW STUDENTS - Due to the very heavy workload they have to deal with, Public Defenders normally need to count on the help of law students performing mostly as unpaid paralegals. In Rio de Janeiro, there are about 2000 law students as interns/trainees in the State Public Defender System. Only 391 of them are paid for this job.

Each trial court or court of first instance in the State of Rio de Janeiro (called a “vara” in Portuguese) has one assigned Public Defender. If the volume of proceedings requires it, two defenders may be designated to act in the same “vara”. In contrast, in those “varas” where the number of cases of poor individuals is less (as in the case of business “varas”, for example), one Public Defender may be designated to act in multiple “varas”.

Legal advice and orientation in general, as opposed to court representation, is normally provided in the intake offices, called “Centers of First Resort” (Núcleo de Primeiro Atendimento) which function in a decentralized manner in neighborhoods and administrative regions closest to the target population. In these Centers, the Defenders begin by attempting conciliation between the parties. If that fails, however, the Defender will prepare the pleadings in cases to be litigated, *i.e.* the initial petition, to be sent to the competent judicial body, *i.e.* to the competent “vara”, where the case will be taken up and handled by the Defender designated to work in that “vara”.

Numerous service centers exist in specialized areas such as: the Center for the Defense of the Consumer; the Center for the Defense of Children and Adolescents; the Center for the Defense of Elderly Persons; the Center for Land and Popular Housing; etc. There exists as well a number of Public Defenders who appear exclusively before the Tribunal of Justice of the States (*i.e.* the State Supreme Courts), who handle the appeals filed by Public Defenders of first instance.

There is also a Special Center in Brasilia where Defenders handle appeals taken to the Supreme Federal Courts.

Prof. Dr. Cleber Francisco Alves⁶

⁶ Public Defender at the State of Rio de Janeiro’s Public Defenders Office – Professor at the Law School of the Universidade Católica Petrópolis, in Brazil.