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LEGAL AID IN BRAZIL

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1. Introduction

Under Brazil's current Constitution, approved on October 5, 1988, the Government must provide legal aid to anyone unable to pay for an attorney[3]. 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.

When referring to the institutions through which the law guarantees effective access to justice for the poor, Brazilian jurists are careful to define their terms. As pointed out by Professor Pontes de Miranda, author of a leading treatise on civil law in Brazil, there is a distinction between "free justice" (justiça gratuita), which consists of exemption from taxes and court costs (in Anglo-American Law this would equate to "*in forma pauperis*" status) and "legal aid" (assistência judiciária), which refers to services maintained by public authorities to provide, at no cost, legal representation in litigation for persons unable to undertake such expense, in addition to exemption from taxes and court costs. More recently, "legal aid" in Brazil has taken on a broader meaning ("integral legal aid" being the expression used in the Brazilian Constitution of 1988), and now includes the provision of legal services beyond mere representation of a party in litigation or before a court.

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). Since Brazil is a federal system, a Public Defender's Office must exist at the Federal and State levels.

2. Historical Evolution of Access to Justice by the Poor in Brazil

2.1 Before 1900

Providing the poor with access to justice, while the subject of widespread attention in recent times, was not totally

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

unknown in classical antiquity, in the medieval world or in the period prior to the great bourgeois revolutions of the 18th century. In the case of Brazil, from the very beginning of the Portuguese colonization, defense of the poor before the courts was considered an act of charity having a strong religious basis[4], a concept also prevalent throughout Europe in the Middle Age. Certainly this idea lay at the heart of the Ordinances of the Kingdom of Portugal that were in effect in Brazil after Brazil's independence was proclaimed[5]. For example, provisions of the Ordinances that assured the appointment of guardians for minors and the insane were transported to Portuguese America. These two vulnerable classes of persons, often unable to defend their own interests especially when faced with the complexity of practice and procedure before the courts, were in many respects comparable to individuals who were poor and who lacked economic resources to contract a lawyer. Another importation from Portugal was the established practice according to which lawyers were expected to provide assistance to poor litigants in both criminal and civil cases, in the latter even when the poor person wished to proceed as a plaintiff[6]. In practice, while representation in civil cases was rarely provided, lawyers did tend to provide representation in criminal cases, recognizing the service as a moral obligation of the profession.

After 1840, the first distinctively Brazilian laws began to appear which, while not providing extensive benefits to the poor, at least began to move in that direction. Thus, in 1841 a law was approved which exempted the poor litigant from paying costs in criminal cases, and, in 1842, another law was enacted which exempted the poor defendant from certain costs in civil cases[7]. These laws, however, still did not suffice to guarantee access of the poor to the courts, a fact which caused considerable concern to jurists of the age. One of these was Joaquim Nabuco de Araújo, who was very much aware of developments in Belgium, France, Holland and Italy, where the matter of legal aid was being vigorously debated, and who for the first time in Brazil drew attention to the plight of the poor in the legal process. At his insistence, the *"Instituto dos Advogados Brasileiros"* (IAB) created an office of special counsel in the City of Rio de Janeiro to offer "legal aid to the poor in civil and criminal causes, providing consultations and charging one of the members of the Council or the Institute with the defense of their rights.[8]"

Nabuco de Araújo understood the relevance and importance of the service that was being established, that it was not enough that aid be rendered on the basis of charity, but that a legal guarantee of access by the poor to the court was needed. As he put it in his memoirs:

> "The proposed measure is not complete, . . . (I)n order to be so it depends on the legislative power. Without a doubt, legal aid consists not only of assistance of the lawyer; it is, principally, the exemption from costs and taxes."[9]

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[4] See, for example, Book III, Title 84, § 10, of the Ordenações Filipinas (The Ordinances of the Kingdom of Portugal), which established the formalities to be observed for a poor person to obtain dispensation from payment of procedural costs in court proceedings: "The appellant being so poor that he swears that he has no property real or personal, nor any means to pay the costs, and saying at the trial one Our Father for the soul of King Dom Diniz, it will be as if he has paid the 900 réis (note: currency, at that time), so that he will not within that time have to pay the cost of the appeal."

[5] Brazil became independent of Portugal in 1822 when a constitutional monarchy was established in the country. That form of government was in effect for 67 years until the proclamation of the Republic in 1889. In order to avoid a legal vacuum, the first Emperor of Brazil, Dom Pedro I, determined that the laws in effect in Portugal as of the date of independence would continue in effect in Brazil, except as might be expressly provided to the contrary.

[6] See RAMALHO, João, "Praxe Brasileira". Rio de Janeiro, 1869.

[7] See Law No. 261 of December 3, 1841 (art. 99) and Law No. 150 of April 9, 1842 (art. 10).

[8] SILVEIRA, Alfredo Balthazar da. "O Instituto da Ordem dos Advogados Brasileiros: Memória Histórica da sua Fundação e da sua Vida 1843-1943". Rio de Janeiro, 1944.

[9] NABUCO, Joaquim. "Um Estadista do Império: Nabuco de Araújo". Rio de Janeiro, 1883. 111/463, note 1.

From the beginning, Nabuco de Araújo's vision had the support of the abolitionists who saw in his program a guarantee for justice for the slaves who were about to be liberated. In that regard, the most distinguished collaborator without question was Perdigão Malheiros, Nabuco's predecessor in the Presidency of the IAB, and himself the author of a massive treatise on slavery in Brazil[10].

When the Brazilian Republic was proclaimed in 1889, the Provisional Government signed Decree No. 1030, regulating justice in the Federal District (then Rio de Janeiro), the first time an act of the Brazilian government made reference to free legal assistance to the poor in litigation. Through the Ministry of Justice, the new Constitution created a Commission dedicated to that objective. Subsequently, in 1897, an official legal aid service was established for Rio de Janeiro, fully financed from public sources. Decree No. 2457, of February 8, 1897, set the standard for all the State laws on legal aid that followed. Certain provisions of that decree were especially advanced; indeed their influence continues in Brazil to this day. These included a definition of a "poor" person for purposes of determining eligibility for service in both civil and criminal cases[11]; the total exemption of the poor from the costs and expenses of the proceedings; the revocability of legal aid benefits for just cause during any phase of the process; and the right of a party to "challenge with proof" his opponent's allegation of poverty and receipt of those benefits.

2.2. From 1900 until 1946-1950

In the 30 years following the establishment of the first legal aid service in Rio de Janeiro, the idea spread to other Brazilian States. While the practice of private lawyers offering free legal aid to the poor continued to be recognized as a moral obligation of the profession, the experience of the service in the Federal District demonstrated that that form of legal aid was considerably more efficient and appropriate. By 1910, for example, the number of cases handled by the service in Rio had increased substantially and assistance was even being furnished in the federal courts[12]. As Professor Oscar da Cunha has written, "in the States of the Federation, following the example of what was happening in the Federal District, state laws were enacted which defined and regulated legal aid.[13]" The first of these addressed the problem of cost. Rio Grande do Sul, which from 1895 had had a fairly broad law, gave it greater publicity at the beginning of the century[14]. São Paulo began with a slightly less expansive provision, only exempting the persons of the payment of certain costs, and even then, only provisionally[15]. Other states, such as Minas Gerais, did nothing in particular in the first

[10] PERDIGÃO MALHEIROS, A. A. "A Escravidão no Brasil". Rio de Janeiro, 1866, 3 volumes. The first volume was dedicated exclusively to legal aspects of slavery. There, Malheiros cited the long-established practice of the courts to provide a lawyer to the slave when his liberty was at issue.

[11] Since then, the definition of a "poor" person eligible to receive the benefit of legal aid in Brazil – which differs from what one finds in the majority of other countries – has not been based on pre-determined income. The definition was: "Any person who, having rights to vindicate in judgment, who may be unable to pay or advance costs and expenses of the process without depriving himself of pecuniary resources indispensable for the ordinary necessities for his own maintenance or that of his family." As will be seen infra, this differs little from the concept established in Art. 2 of Law N. 1060/50, presently in effect in Brazil.

[12] Instituto da Ordem dos Advogados Brasileiros, "Assistência Judiciária". In: Conferências e Principaes Trabalhos do Anno de 1910. Rio de Janeiro, 1912, pp 191-192.

[13] CUNHA, Oscar da. "Gratuidade e Rapidez da Justiça", In: Trabalhos do XXII Congresso da Union Internationale des Avocats. Rio de Janeiro, 1951, pp. 42-48.

[14] CHAVES, Marinho. "Assistência Judiciária". In: Revista Jurídica, Porto Alegre, vol. 6, p. 133 (1901).

[15] See Regimento de Custas do Estado de São Paulo, art. 172 (1919).

decades of the 20th century[16].

With the promulgation of Brazil's Civil Code in 1916, various States implemented reforms in their individual codes of civil procedure, which at the time were within the exclusive province of the States and not of the Union itself as is presently the case. These reforms expressly addressed the provision of legal aid for the poor. Notable in this regard were the States of Bahia, Minas Gerais, and especially São Paulo, which established one of the most advanced legal aid programs at the age[17]. Legislation also addressed exemption from procedural costs.

Problems, however, persisted. Exemption from costs did not mean exemption from all costs and taxes and, whereas lawyers may have had a continuing moral obligation to provide free assistance for the poor in litigation, most did not in fact fulfill that obligation adequately, especially those who had substantial private clients to attend to[18].

The creation in 1930 of the *Ordem dos Advogados do Brasil* (OAB) – i.e. the Brazilian Bar Association - and its regulation by official decree brought a new perspective. The obligation of the lawyers to assume free representation of poor persons ceased having an exclusively moral basis and took on a legal one as well, as a result of which an attorney's failure to provide assistance could occasion penalties ranging from fines to the possible loss of the lawyer's license. The organization of lawyers as an entity with official character, invested as it was with power to exercise discipline and control its membership, had important consequences for human rights, including the right of the poor to have access to the courts. Nevertheless, lawyers who undertook to provide legal aid continued to do so on an uncompensated basis.

The apex of the legal aid movement in Brazil occurred in 1934 when a new Constitution was promulgated which, pioneering for the Western World, recognized the obligation of both the Union and the States to provide legal assistance to needy persons, and which contemplated the creation of public institutions specifically charged with providing that service[19]. The elevation of the concept of legal aid to a constitutional level expressed the idea that it was part "of the regime of guarantees and rights essential to political and social life of the community.[20]" In response to this constitutional affirmation, the State of São Paulo, in 1935, created a legal aid service comprised of lawyers remunerated by the government. According to the model established by the Constitution of 1934, responsibility for the provision of legal aid services was only the responsibility of the various States; local governmental entities, *i.e.* the municipalities, were not so obliged.

The Constitution of 1934 had a short life span and in 1937, after a ***coup d'etat***, it was supplanted by a new one authorized by President Getúlio Vargas, whose regime was dictatorial in nature. Vargas' Constitution of 1937 made no mention of the rights of needy citizens to receive legal aid. On the other hand, according to Breno Cruz Mascarenhas Filho, "that circumstance, … did not affect the fact that [1] the Code of Civil Procedure of 1939 (Decree Law No. 1608/39) required that a lawyer had to be provided to needy litigants by the state organ responsible for providing that service or, in the absence of such service, had to be named by the Judge, or [2] that the

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[16] See DEODADO, Alberto. "O Problema da Assistência Judiciária em Belo Horizonte". In: Cadernos de Pesquisa do Instituto de Direito Processual. Vol. 1, pp. 67 e 73 (1961).

[17] CUNHA, Oscar da. "Gratuidade e Rapidez da Justiça". In: Trabalhos do XXII Congresso da Union Internationale des Avocats. Rio de Janeiro, 1951, pp. 48. See also: Código Processual do Estado da Bahia de 1918 (art. 38-43); Law No. 1763, 29 December 1920 of the State of São Paulo.

[18] MACEDO SOARES SOBRINHO, Jose Eduardo. "Justiça Gratuita aos Pobres". In: Anais do 1?. Congresso Brasileiro de Direito Social. Vol. 3, pp. 295 and 316 (1943).

[19] Article 113, No. 32, of the Brazilian Constitution of 1934 provided: "The Union and the States will provide legal aid to needy persons creating special entities to that end and assuring the exemption from emoluments, costs, taxes and stamps."

[20] CAVALCANTI, Themístocles. Manual da Constituição. Rio de Janeiro, 1963. See the debate on the subject that occurred during the National Constituent Assembly of 1934 in "Anais da Assembléia Nacional Constituinte de 1934", vol. 21, pp. 214-219 and 279-280.

Code of Penal Procedure of 1941 (Decree Law No. 3689/41) was based on laws according to which, if the accused or the complainant in a private penal action was not in a condition to hire an attorney, the Judge would name one, and finally [3] that the Consolidated Labor Laws (Decree No. 5452/43) established the obligation of trade unions to provide legal assistance to their members.[21]" Vargas, who exercised legislative authority in place of the legislative branch, which had been dissolved by him, simply decreed these infraconstitutional laws.

With the redemocratization of Brazil after the Second World War, a National Constituent Assembly was convened which in 1946 promulgated a new Constitution. While that document revived the constitutional principle that had been established in the Charter of 1934 that needy citizens had a right to legal aid (Art. 6, Par. 5), this still failed to change things in practice and for some time thereafter the right remained a largely abstract standard. An important step, however, was taken in 1950 with the approval of Law 1060/50, which specifically addressed the matter of legal aid for the poor. Although the law did not introduce substantial modifications in the beginning, it did have the merit of at least placing the topic once again on the agenda of the National Congress, and once again affirmed the universal understanding that legal aid should be recognized as a basic right of citizenship. Law 1060/50, which is still in effect albeit with modifications and alterations, also drew into one document the diverse standards on legal aid that had been spread throughout various codes and, as a result, made it easier to determine the law applicable to legal aid regardless of the type of proceeding that might be involved.

2.3 From 1946-1950 to 1988-1994

The Federal Constitution of 1946 and the standards established by Law 1060 of 1950 led several Brazilian States to enact laws to once again address the need for public legal aid. Accordingly some states created services anew and others adapted laws already in existence. In Minas Gerais this occurred through Decree Law No. 2131/47 and Decree Law No. 2841/47; in the former Federal District (then, the City of Rio de Janeiro) through Law No. 216/48; in the former State of Rio de Janeiro (whose capital was the city of Niterói, at that time) through Law No. 2188/54; and in Pernambuco through Law No. 2028/54. Law 2188/54, of the former State of Rio de Janeiro, it may be noted, was the first legislation in Brazil to use the term "Public Defender" to designate the lawyers salaried by the Government to provide legal services for the poor[22].

The original text of Law 1060/50 underwent changes as the Brazilian programs for legal services began to take shape. The original text contemplated the provision of legal services as an obligation of both the federal and state authorities (Article 1) and provided that appointment of a private lawyer to render such service would only occur in the absence of the respective public service program (Article 5). The term "Public Defender," not present in the original text, was introduced through an amendment added to Article 5, by Law No. 7871 on November 8, 1989.

The legal standards for the effective access of the poor to justice established in the period between 1946-50 and 1988-94 remain the foundation upon which Brazil's present day model is built. That model envisions the creation, at either the federal level or state level, of a public entity specifically (the "Defensoria Pública") dedicated to providing legal representation both in the courts and extra judicially, more particularly an office staffed by professionals remunerated from the public coffers who are invested with certain prerogatives and legal guarantees. Legal aid programs of the past, all of which eventually became known as Public Defender services, greatly extended their reach and at present attend to criminal

[21] MASCARENHAS FILHO, Breno Cruz. A Dinâmica do Individualismo na Defensoria Pública do Rio de Janeiro. Master's Dissertation presented to the Department of Law of PUC - Rio, Rio de Janeiro, 1992, p. 68.

[22] See ROCHA, Jorge Luís. "História da Defensoria Pública e da Associação dos Defensores Públicos do Estado do Rio de Janeiro". Rio de Janeiro, Lúmen Júris, 2004.

and non-criminal cases alike. At the same time, state-run Public Defender services continue to be complemented by private attorneys who, unremunerated by the public treasury, either act on their own or do so as a result of their association with diverse private organizations and entities that provide legal aid to the needy.

The period of 1946-50 and 1988-94 also saw the consolidation of various procedural provisions affecting the activities of professionals who acted in the defense of needy persons, either as Public Defenders or as private lawyers, as well as the establishment of various other provisions through which equal access to justice is guaranteed.

The political crisis that the country lived through in the 1960's was followed by a new constitutional regime in which legal aid continued to be recognized as a constitutional guarantee, albeit with a subtle change in the language of the text. Thus the Constitutions of 1968 and 1969 recognized the needy individual's right to legal aid "in the form of law[23]", but failed to state whether the service would be provided by public authorities or by private lawyers. However, since no alteration occurred in the existing infraconstitutional laws, these laws continued to define the field such that legal aid was effectively maintained as an obligation to the State despite the fact that, until 1988, the Constitutions themselves made no direct provision for such services.

While the Constitution of 1969 was in effect, many States that did not have legal aid services set about establishing them. Thus, with the exception of the State of Santa Catarina, the States eventually organized public legal aid services in criminal as well as civil matters, and for this purpose created entities affiliated with other public entities, such as the State Attorney's Offices, the Secretariats of Justice, and in some cases, the Public Ministry. At the federal level, during the authoritarian military regime, a legal aid service was established for military justice in order to provide for defense of the accused (generally soldiers) that lacked resources to pay a lawyer. However, at the federal level, as in the United States, where the courts have jurisdiction to decide cases in which a federal question is present, no program to provide legal aid to poor persons was established. Thus, in the federal courts, a party unable to pay for a lawyer -- whether plaintiff or defendant -- had to depend on lawyers especially appointed by the judges. These lawyers received no remuneration from the public coffers; their only fees were those payable by the adverse party if the appointed attorney prevailed on behalf of his client.

In the middle of the 1980s, Brazil underwent a profound period of reestablishing its democratic institutions, including convening a National Constituent Assembly to draw up a new constitution. The resultant Constitution, promulgated on October 5, 1988, inaugurated a new phase in the history of legal aid in Brazil. Following the precedents of the Constitutions of 1934 and 1946, the 1988 Charter, in a chapter dealing with Fundamental Rights, included a provision guaranteeing full access of the poor to the justice system. The new Constitution also 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.

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 establish insufficiency of resources."

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. 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

[23] Art. 153, Par. 32, of the Constitution of 1969 (reproducing the text of Art. 150, Par. 32, of the Constitution of 1967) said: "Legal aid will be provided to needy persons, in the form of law." The prior text, in Art. 141, No. 35, of the Constitution of 1946, had expressly mentioned that legal aid would be provided "by the Public Authority."

constitutional history of Brazil, according to Article 134, the Public Defender system was deemed "an institution essential to the jurisdictional function of State, being assigned the responsibility of providing legal orientation and defense, at all levels, to needy persons, as provided in Article 5, LXXIV." (Art. 134) Article 134 establishes that Public Defenders must be organized as established by infraconstitutional law.

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 competition, 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 may 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. They are prohibited from the private practice of law.

2.4 The Present Situation and Perspectives For The Future

The establishment of a Public Defender System at the constitutional level enshrines the right of all needy citizens to receive free and full legal assistance, judicial and extra-judicial, in any area of the law, and affirms that such service is different from other kinds of public assistance that the State provides (*e.g.* construction of hospitals, dwellings, etc.). It is not merely an aspect of promoting the general welfare or eradicating poverty. Ultimately legal aid involves a duty of the State inherent in the very concept of citizenship, one which cannot be made to depend upon restrictions of a budgetary nature. In the same way that the State cannot allege a lack of budgetary resources to justify refusing to provide physical security to the citizen, it cannot fail to fulfill its obligation to maintain legal machinery for declaring the law in concrete cases and for resolving conflicts[24]. In short, the State cannot, on the pretext of insufficiency of financial resources, fail to create and maintain a functioning Public Defender system capable of rendering effective legal assistance to all citizens who cannot pay a lawyer, a system which will represent their interests in litigation whatever the nature of the cause, civil or criminal.

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 fact, according to Law No. 8906/94 (Article 22, Paragraph 1), the new 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.

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[25], or it may be because of a lack of material resources, that is, physical

[24] Reginald Heber Smith cites Dean Wigmore, to emphasizes the role of legal counsel: "The lawyer is a necessary part of the State's function doing justice. In the part he plays, he is as essential as the judge". SMITH, Reginald Heber. "Justice and the Poor". Reprint edition. New York , Arno Press, 1971. p. 32.

[25] On a national scale, the number of public defenders is far too low to meet the need. The 3100 public defenders in Brazil represent just 1.86 (less than two) per 100,000 inhabitants. By

space and minimally necessary equipment for rendering appropriate service. Particularly at the federal level, the number of Public Defenders in proportion to those who need them is wholly inadequate. In May of 2004, there were only 96 Federal Public Defenders in service. By way of contrast, in the same period there were 1,000 Federal Judges in the country.

In order to appreciate the importance of the legal aid in Brazil, it should be borne in mind that, except in rare cases, a litigant may only appear before the court through 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 from the public authorities, 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.

Fortunately, the process of consolidating Public Defender Systems and their strengthening institutionally has advanced considerably in recent years. In January 2003, President Luis Inácio Lula de Silva established among his priorities the implementation of a Reform of the Judicial Power, and in December 2004, by means of a constitutional amendment, this was largely accomplished. One of the principal objectives of the reform was the strengthening of the Public Defender System. 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. These guarantees are important for the accomplishment of the institutional mission of Public Defenders and reinforce their independence. Defenders may now act without being subject to pressures from governing authorities and are at liberty to defend the interests of citizens even when those interests might come in conflict with those of the governing authority.

3. Public Defenders as an "Essential Function" of Brazilian Justice

3.1 Institutional Profile of Public Defender System

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 even administrative areas, but also to assistance in terms of counseling and legal orientation. Additionally, by reason of an express constitutional provision, this service must be provided through the Public Defender System.

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

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comparison, there are an average of 7.7 judges for every 100,000 inhabitants of Brazil (almost four times the number of public defenders per capita).

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.

Diverse legal mechanisms guarantee the independence of Public Defenders, both in general and with regard to the individuals who comprise it, *i.e.* the Public Defenders themselves. The selection of lawyers to exercise the function of Public Defender does not depend on political or partisan considerations, since selection is accomplished by means of public competition open to any law school graduate. Candidates who obtain a minimum score in the competition are approved and vacancies are filled by those who finish with the highest scores. This criterion of selection, by itself, is deemed sufficient to confer upon those who are successful, significant independence in the eyes of their superiors and of political occupants of elected positions in the Executive and Legislative branches. Moreover, by force of law, Public Defenders, as well as Judges and Prosecutors, are guaranteed tenure of office (until retirement), which means that they are not dependent upon a vote of confidence of their administrative superiors to keep their jobs. A Public Defender may only be discharged by reason of grave fault, as determined in a formal administrative proceeding. 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. 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.

Brazilian law provides that the leadership of a Public Defender System will be exercised by professionals chosen from the ranks of career Public Defenders; that is, they must originally have been admitted to service by means of the public competition. The Public Defender System – at both the Federal and State levels – is administered by a General Public Defender, who is ordinarily named by the Chief Executive (President or Governor of the State, as the case may be), for a given term of office. The General Public Defender cannot be removed from his office before the end of his mandate except for grave fault. This represents an important guarantee of institutional independence vis-a-vis the Executive Power. In some States, such as Rio de Janeiro, a career Public Defender who aspires to a leadership position has the right to demand that an internal vote be taken among his peers leading to the formation of a list of three candidates who receive the highest votes. The Governor of the State is then obliged to choose the Chief Public Defenders for the State from among the three individuals whose names appear on the list.

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 provide representation in judicial proceedings, whether the needy person is suing or being sued 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.

3.2 The Law 1060 of 1950 and the Constitutional and Legal Prerogatives and Guarantees of Public Defenders

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".

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[26]. 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.

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.

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[26] Although the current Constitution states that "The State will provide integral and free legal aid to those who can establish 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 infraconstitutional law.

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.

3.3 The Public Defender Systems 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 700 Public Defenders[27] serving a population of 7, 792,574 inhabitants. If one considers only the poorest population, who receive priority service from the Public Defenders, the result is an average of one defender for every 11,164 persons.

Each trial court or court of first instance in the State of Rio de Janeiro (called a "vara") has one designated 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 "Centers of First Resort," 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 an 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 Older 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.

4.0 The Role of Other Institutions That Contribute to Access of the Poor to Justice

In addition to the Public Defender System, other institutions and entities play important roles in providing effective access to justice for persons whose economic situation is precarious.

4.1 Public Ministry

In accordance with the Federal Constitution, the Public Ministry is charged with the defense of the legal order and of indispensable social and individual interests. Traditionally the Public Ministry has been the organ charged with enforcing criminal law. However, especially as of 1988, the Public Ministry began to play a significant role in the defense of rights affecting large groups of individuals, *i.e.* diffuse and collective rights. This has extended to protection of public and social patrimony, of the environment, of consumers, of children and adolescents, etc. The involvement of the Public Ministry occurs, through so-called "public civil actions" which roughly correspond to class actions of American law.

4.2 Centers for Legal Aid in the Law Schools – Law Clinics

[27] There are some 800 Judges for the Rio de Janeiro's State Judiciary System, for the same population.

Another important collaboration in the defense of the rights of poor persons is provided by the law schools, in legal practice centers, which are very much like law clinics of the law schools in the United States. Brazilian law requires that all law students complete a professional training obligation of a minimum of 300 hours during the two last years of the university course. This hourly requirement may be completed in the law school itself in the law practice centers. Many students fulfill this requirement by providing legal advice and counseling, as well as representation in court cases (always under the supervision of a lawyer). Although the principal objective of the law school centers is the formation of future professionals, the centers make a significant contribution to meeting the demands for legal aid.

4.3 The Brazilian Bar Association *(Ordem dos Advogados do Brasil*) and Private Lawyers

Although the Brazilian Constitution establishes a salaried Public Defender's office as the official model for legal aid, voluntary (*pro bono*) service provided by lawyers continues to be not only possible but also praiseworthy. In such cases, since the lawyer agrees handling the case without fee, he may request the benefit of free justice, that is, he may seek to exempt his client from the payment of costs and taxes normally covered in a proceeding (*in forma pauperis*). The Brazilian Bar Association (OAB) maintains legal aid offices in Brazil's principal capitals and cities, where lawyers are available to provide *pro bono* service.

4.4 Other Organizations of Civil Society and Professional Unions

Numerous non-governmental organizations, especially those affiliated with the Catholic Church, also provide legal aid services to the poor. Additionally, in the labor courts, where the Federal Government has yet to establish a Public Defender program, legal aid to workers is provided principally by trade unions.

5.0 Conclusion

In a democratic legal regime, integral legal aid has to be accessible to everyone. Without regard to one's financial situation, he should be able to count on the effective assistance of a professional technically capable and prepared to defend his interests as they may be contested in litigation. It is equally important that everyone have access to a professional capable of giving counsel and orientation in legal matters in order to enjoy the full exercise of rights assured by the Constitution and by the laws of the country. In Brazil, these guarantees are established by the Constitution of 1988, which requires the creation and maintenance of Public Defender Systems in all the States of the Federation and in all the judicial venues linked to the Federal Union. Nevertheless, fulfillment of this constitutional mandate remains a major challenge in Brazil because there are simply not enough Public Defenders to meet the need. Additional resources must be committed in order to recruit and maintain an adequate number of Defenders.

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