

The challenges of access to justice and enforcement of the right to counsel in Brazil

Isadora Fingermann points out that, while the law guarantees rights, reality on the ground often tells a different story

In a country the size of a continent, with high income inequality – which is directly related to unequal access to justice by the different groups in society (Adorno, 2002) – the criminal justice system of Brazil faces many challenges in providing quality legal aid to the disadvantaged population.

The struggle for social and individual rights in Brazil only found legal support with the enactment of the 1988 Federal Constitution, which provides for principles of social justice in line with democratic constitutionalism. The Brazilian Federal Constitution, Article 5, provides that all citizens have a right of access to a lawyer of their choice, and guarantees free legal aid for those who cannot afford a private lawyer. Legal aid is provided by public defenders who, according to article 134 of the Federal Constitution, are essential to the jurisdictional role of the State; they are responsible for providing legal assistance and advocacy at all levels for those who need it.

However, although these rights have been set out in Brazil's Federal Constitution since 1988, many Brazilian States have taken a long time to put them in practice. In the city of São Paulo – which is Latin

America's largest city – public defenders were only introduced in 2006.

Public defenders – far too few
In São Paulo State public defender services are still completely inadequate. At the end of 2012, there

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were only 500 public defenders qualified to practice in civil and criminal law for the entire State. The population of the State with a monthly income of less than US\$ 1,000, the limit for receiving assistance from a public defender, is more than 29 million (Censo, 2010). That means that each public defender has to

serve a potential client population of 59,000 people. The appointment of a further 400 public defenders has recently been approved, 110 of whom took office in early 2013. However, whilst this will improve the situation a little, the number is still woefully inadequate. Of even greater concern is the fact that out of the 645 municipalities of São Paulo State,

organised into 275 judicial districts, only 23 have a public defender's office.

Of the 500 public defenders in the state at the end of 2012, only 211 of them were engaged in criminal proceedings, and therefore there is not – and there could not be considering those figures – a single public defender located at a police station or prison. This obviously restricts the availability of legal aid for people who have been arrested or detained, especially at the early stages of the criminal process. Following arrest, suspects 'caught in the act' (and witnesses) will be questioned by police, but in practice no public defender will be available to provide them with advice and assistance.

Brazil's huge prison population

An important context to this grim scenario is the fact that Brazil ranks fourth in the world in terms of the size of its imprisoned population, coming after the United States of America, Russia, and China. In the last two decades, Brazil's incarcerated population has grown by a staggering 350 per cent, which means that the country currently has 270 prisoners per 100,000 inhabitants. This is shocking considering that in most countries imprisonment rates range between 50 and 150 per 100,000 inhabitants, and is evidence of the conclusion of Wilkinson and Pickett that 'in terms of the correlation between imprisonment and income

inequality, the countries with the highest income inequality tend to have relatively high imprisonment rates' (Wilkinson and Pickett, 2007).

Forty two per cent of those in prison in Brazil have not been convicted; in

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other words, nearly half of Brazil's incarcerated population is composed of pre-trial prisoners. These statistics,

coupled with an assessment carried out in 2009 by the Brazilian Ministry of Justice – according to which 80 per cent of the prisoners in Brazil are unable to afford a private lawyer and require advice from a public defender (Defensoria Pública, 2009) – show the precarious state of legal aid in Brazil and the size of the challenge in enforcing the right to legal assistance and access to justice for all.

The right to legal assistance

There is no requirement under Brazilian law for suspects to have access to legal advice during police investigation. In fact, some scholars believe that the involvement of a lawyer during the pre-trial phase is contrary to Brazil's inquisitorial tradition. However, as is recognised in many other inquisitorial jurisdictions, legal advice during the early stages of a case, and especially during police questioning, is critical to the prospects of fair trial. In practice, access to a lawyer at the pre-trial stage is only available to those who can afford to pay for it.

The picture becomes even more dramatic when we consider the rules of criminal procedure in Brazil, which show contempt for the right of personal contact between the accused and their lawyer. This results from the fact that there is no pre-trial custody hearing in Brazil – individuals arrested are questioned at the police station, in the absence of a public defender, and are then transferred to prison (temporary detention centre) within 48 hours. The accused has their first contact with a judge and a public defender on the date of the trial hearing, when in most cases the witnesses for the prosecution and for the defendant (witnesses are called without the public defender having met his or her client), the accused himself or herself, the prosecutor and the public defender will be heard, and the final decision made. The first, and often

only, personal contact between the accused and their lawyer – which in most cases lasts for about 10 minutes at the courtroom door – occurs on average 109.2

days after the date of arrest for men, and 135.7 days for women (ITTC/Pastoral Carcerária, 2012). According to the São Paulo Centre for the Study of Violence (Núcleo de Estudos da Violência / USP, 2011), in more than 50 per cent

of cases of alleged drug dealing, the first hearing takes place between three and five months after arrest,

while in 27 per cent of cases this period of time is even longer. To make things worse, according to the same study, in 82 per cent of such cases the first contact between the

accused and the public defender is the date of the first hearing.

Looking to the future, dealing with the present

There is, therefore, still much to be done before Brazil complies with international criminal justice norms and rules. Not only do different elements of the Brazilian legal system systematically fail to abide by international principles, such as those in the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (particularly its first principle, the right to legal aid as an essential element of a functioning criminal justice system based on the rule of law), but the authorities choose to ignore what should be one of the cornerstones of our State, which purports to be a democratic State governed by the rule of law.

The Brazilian state is not ready to guarantee full and equal access to justice, and particularly the right to

defence for all citizens. A recent decision of the Supreme Court restricted the use of *habeas corpus* in the Superior Courts (STF, HC No.

109.956/PR), and this limitation has been systematically followed by the Superior Courts of Justice. This decision was not based on principle. Rather it was the direct consequence of an increasing number of *habeas corpus*

applications, which coincided with the development of the Public Defender's Office in São Paulo.

Rather than trying to awaken the (so far) sleeping economic power, Brazil should turn its eyes first to the basic legal and social rights that are necessary for building a fair society. Rather than looking to the future, Brazil should look first at the present and the many ills that haunt it. The World Cup – due to be held in Brazil in 2014 – will not help us if there are not enough stadiums to support the shamefully high number of people in our prisons, full of so many poor and black inmates that 'Justice' cannot see. ■

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