



THE PUBLIC DEFENDER'S OFFICE: A FUNCTION ESSENTIAL FOR ACCESS TO JUSTICE AND FOR GUARANTEEING EQUALITY OF ARMS IN LEGAL PROCEEDINGS

A DEFENSORIA PÚBLICA: FUNÇÃO ESSENCIAL PARA O ACESSO À JUSTIÇA E PARA A GARANTIA DE PARIDADE DE ARMAS NOS PROCESSOS JUDICIAIS

LA DEFENSORÍA PÚBLICA: UNA FUNCIÓN ESENCIAL PARA EL ACCESO A LA JUSTICIA Y PARA GARANTIZAR LA IGUALDAD DE ARMAS EN LOS PROCESOS JUDICIALES



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ABSTRACT

In the past ten years, the Public Defender's Office has experienced significant growth both in the number of offices distributed across the country and in the prominence of its actions. This evolution reinforces its importance, already recognized in the Federal Constitution, which designates it as an essential function of justice, located in Chapter IV. This research aims to clarify this fundamental role from two main perspectives: the first related to access to justice; the second, to the guarantee of equality of arms in judicial proceedings. To this end, it relies on bibliographic works and relevant documents, with the goal of examining whether, in practice, access to justice has been merely an opportunity to be assisted by someone with legal capacity or if there is, in fact, an effective guarantee of parity of arms in judicial processes. The objective is to promote a satisfying justice that ensures the effectiveness of judicial protection and thus preserves the litigant's substantive rights.

Keywords: Access to Justice. Equality of Arms. Satisfying Justice.

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RESUMO

Nos últimos dez anos, a Defensoria Pública tem experimentado expressivo crescimento tanto na expansão de seus núcleos pelo território nacional quanto na relevância de sua atuação institucional. Essa evolução consolida a importância do órgão, já reconhecida pela Constituição Federal como função essencial à justiça, conforme disposto no capítulo IV. A presente pesquisa tem por objetivo analisar o papel constitucional da Defensoria Pública sob dois eixos centrais: (i) a promoção do acesso à justiça e (ii) a garantia da paridade de armas nos processos judiciais. Para tanto, o estudo baseia-se em pesquisa bibliográfica e documental, buscando verificar se o acesso à justiça assegurado pela defensoria Pública institui mera possibilidade formal de representação jurídica ou se efetivamente se concretiza a igualdade material entre as partes no processo judicial. Pretende-se, assim, demonstrar que o fortalecimento da Defensoria Pública é condição indispensável para a realização de uma justiça satisfatória, capaz de assegurar a efetividade da tutela jurisdicional e a preservação dos direitos materiais dos jurisdicionados, especialmente daqueles em situação de vulnerabilidade.

Palavras-chave: Defensoria Pública. Acesso à Justiça. Paridade de Armas. Efetividade Processual. Justiça Satisfatória.

RESUMEN

En los últimos diez años, la Defensoría Pública ha experimentado un crecimiento significativo, tanto en la expansión de sus delegaciones en todo el país como en la relevancia de sus actividades institucionales. Esta evolución consolida la importancia del organismo, ya reconocido por la Constitución Federal como una función esencial de la justicia, como se establece en el Capítulo IV. Esta investigación busca analizar el rol constitucional de la Defensoría Pública bajo dos ejes centrales: (i) promover el acceso a la justicia y (ii) garantizar la igualdad de armas en los procesos judiciales. Para ello, el estudio se basa en una investigación bibliográfica y documental, buscando determinar si el acceso a la justicia garantizado por la Defensoría Pública establece una mera posibilidad formal de representación legal o si logra efectivamente la igualdad sustantiva entre las partes en el proceso judicial. De esta manera, se busca demostrar que el fortalecimiento de la Defensoría Pública es una condición indispensable para lograr una justicia satisfactoria, capaz de garantizar la tutela judicial efectiva y preservar los derechos sustantivos de quienes se encuentran bajo su jurisdicción, especialmente de quienes se encuentran en situación de vulnerabilidad.

Palabras clave: Defensoría Pública. Acceso a la Justicia. Igualdad de Armas. Eficacia Procesal. Justicia Satisfactoria.



1 INTRODUCTION

The Public Defender's Office is a fundamental institution in the Brazilian justice system, responsible for ensuring access to justice and the defense of the rights of the underprivileged. According to article 132 of the Federal Constitution, this defense, in addition to being free, is full; that is, it must provide the search for satisfactory justice.

However, in practice, this view does not always materialize in the perception of the subjects that make up the judicial process. This discrepancy is largely due to the treatment that the Public Defender's Office receives from magistrates and prosecutors, rather than from its own performance. In other words, the Public Defender's Office has often been a voice that is often unheard. Although there are exceptions – in which the Judiciary and the Public Prosecutor's Office listen to this defense in a technical way and the right is effectively recognized – this is not the reality of most cases, especially in the criminal sphere, in which the Public Prosecutor's Office and the Judiciary often act as parties to the litigation, contrary to the accusatorial system provided for in the Federal Constitution. In addition, it is common to see that both the accuser and the magistrate adopt a posture of "deaf ears" in the face of the defense presented, often failing to answer specific questions raised, limiting themselves to cliché phrases such as "the truth is more than proven" or using the literal text of the accusation as motivation for the sentence.

Given this scenario, it is essential to reflect on the role of the Public Defender's Office and how it should be perceived by all actors in the judicial process. It is essential to demystify the belief that judicial protection is limited to the right of access to the Judiciary. The principle of effectiveness in the provision of jurisdiction must guide and consolidate this access, promoting parity of arms between the parties, with a view to producing satisfactory justice.

The effectiveness of the right of equal access to justice is based not only on the prohibition of any mechanism or barrier that prevents the exercise of the right of action, but also has a positive dimension, which translates exactly into the obligation imposed on the State to ensure that everyone has effective conditions to postulate and defend their rights before the justice system. regardless of their condition of fortune⁴. The economic barriers that prevent or hinder access to justice should not be overcome only in the negative dimension, through exemption from the collection of procedural expenses, and it is also essential to make parity of arms viable, guaranteeing the poor litigant legal assistance provided by a duly qualified professional.

(Esteves; Silva (p.1, 2018) apud Alves (p.36 2006) and Johnson Jr p.167, 2009)¹

The principle of parity of arms establishes the need for the defense and prosecution to have equal opportunities to influence the trial. Its effective implementation goes beyond the simple right to manifest in the process, encompassing the guarantee that both sides are heard and their speeches duly considered. Thus, the arguments presented by the defense

must be taken into account, and, when any of them refuses, this decision must be duly reasoned. In addition, the points highlighted in the sentence must reflect these arguments, with clear justification for possible disregard, whenever applicable.

In view of this, the question arises: has the performance of the Public Defender's Office effectively provided access to justice as an opportunity to be assisted by someone with postulatory capacity? Or, more precisely, has the principle of parity of arms been correctly observed by magistrates and prosecutors in cases in which the Defender's Office acts as a defense? In addition, have the principles of the inalienability of jurisdiction and parity of arms really promoted satisfactory justice?

The present research has as its object the analysis of the principles of inalienability of jurisdiction and parity of arms, with the purpose of verifying whether the essential function exercised by the Public Defender's Office has been, in fact, respected and carried out in forensic practice by the subjects of the judicial process.

This study seeks to stimulate critical reflections on the institutional performance of the Public Defender's Office and its relevance for the realization of the fundamental right of access to justice. In this way, it is intended to contribute to the strengthening of satisfactory justice, based on the effectiveness of judicial protection and material equality between the parties.

To achieve these objectives, the work will be developed through literature review, covering doctrinal works, legal texts and documents that deal with the theme in focus.

2 ACCESS TO JUSTICE FROM THE PERSPECTIVE OF RENEWAL WAVES

When we talk about access to justice, we do not refer only to entry into the Judiciary, but to the use of all appropriate methods of access to the Law. In addition, it is worth mentioning that access to justice is a fundamental right directly related to the existential minimum of the dignity of the human person.

In view of this, the Public Defender's Office emerges as an essential institution to the jurisdictional function, guaranteeing this access to the underprivileged. This guarantee is affirmed in the Federal Constitution and this represents a mechanism that ensures a fundamental right (art.5, LXXIV). However, it was not always like this. History records a passive state, in which only those who could afford the legal costs had access to the justice system. Nabuco's famous question — "What does it matter to have a fair complaint, if we cannot present it and follow it due to lack of money?" — highlights this scenario that, in the past, was a reality.



To understand the evolution of this fundamental right, the present study uses the theory of renewal waves of access to justice, proposed by Mauro Cappelletti and Bryan Garth (GROSTEIN, Julio, 2023).

The first wave of access to justice is related to economic obstacles. As a way to overcome them, the provision of full and free legal assistance was guaranteed, including free justice. Thus, the main objective of this phase was to develop methods that would allow those who cannot afford a lawyer to have access to the justice system. As a consequence of this movement, the following stand out:

4Federal Constitution:

Article 5, LXXIV - The State shall provide full and free legal assistance to those who prove insufficient resources.

Article 134. The Public Defender's Office is a permanent institution, essential to the State's jurisdictional function, and it is incumbent upon it, as an expression and instrument of the democratic regime, fundamentally, to provide legal guidance, the promotion of human rights and the defense, at all levels, judicial and extrajudicial, of individual and collective rights, in a comprehensive and free manner, to the needy, in accordance with item LXXIV of article 5 of this Federal Constitution.

5Code of Civil Procedure:

Article 98. The natural or legal person, Brazilian or foreign, with insufficient resources to pay the costs, procedural expenses and attorney's fees are entitled to free justice, in accordance with the law.

Thus, the Public Defender's Office emerges as a fundamental instrument of access to justice, which must guarantee not only formal access to the Judiciary, but also material access to a fair legal order.

The second wave of access to justice is related to organizational obstacles and collective protection. This phase arises from the insufficiency or difficulty of protecting rights individually, evidencing the need for a broader, macro approach to achieve satisfactory solutions to collective problems. At this stage, collective actions began to represent an effective strategy to ensure access to justice, seeking to resolve diffuse, collective and homogeneous interests of the population.

The third wave addresses procedural obstacles, especially the excessive instrumentalism of the system and the search for alternative methods of conflict resolution. This phase aims to simplify the process and the effectiveness of justice in its practical application. Thus, Law No. 9,099/95 (Law of Special Courts) emerges, as well as the



strengthening of service through more unbureaucratic procedures in the new Code of Civil Procedure (CPC). In addition, the multi-door model of access to justice stands out, which promotes a new procedural and extra-procedural ethics, seeking to strengthen access to law through methods that are not limited to the Judiciary. This third wave aims to make justice more accessible through simplified procedures and alternative channels, such as mediation, conciliation, and other dispute settlement mechanisms.

These waves illustrate the obstacles faced over time and the changes implemented in the procedural system, with the aim of progressively guaranteeing effective material access to justice. However, this reality is not yet fully reflected in practice. According to Cappelletti (1988, p. 15), the full effectiveness of access consists in "complete 'equality of arms' – the guarantee that the decision depends exclusively on the legal merits of the parties, without influences from differences outside the Law that may affect the affirmation and vindication of rights."

Understanding this trajectory is essential to recognize the achievements already achieved, understand the current scenario and envision possibilities for improvement in the full exercise of a constitutionally guaranteed right.

3 HISTORY OF LEGAL ASSISTANCE

Legal aid is not a recent issue; on the contrary, there are old documents that address the topic, even if they do not use modern terminology. One of the oldest records is the Code of Hammurabi, dated approximately 1700 B.C., created in the Babylonian Empire, which provided rights for the "oppressed".

Another relevant document is the Law of the Twelve Tables, elaborated in Ancient Rome around 450 BC. This set of laws addresses the concept of "legal aid", by establishing the first rules on free sponsorship. In Greece, the recognition of the right of defense is evidenced in the defense of Socrates, as narrated by Plato in his *Apology of Socrates*, where the importance of truth and virtue is emphasized, even in the face of accusations of impiety and corruption of youth.

In the Brazilian context, records of legal aid date back to the colonial period. At that time, the defense of the poor was a religious ethical imperative, dependent on the goodwill of lawyers who provided legal aid free of charge. Subsequently, the Philippine Ordinances also contemplated free justice, allowing exemption from costs for the filing of grievances.

During the Brazilian Empire, the figure of the "Lawyer of the Poor" emerged, the first public initiative for the defense of the miserable. Despite this, the Constitution of 1824 did not mention any provision regarding legal/legal assistance. It was only in 1934 that the Brazilian



Constitution provided for legal aid. It is important to highlight that this Constitution differentiated the public service of legal aid from the bodies that would provide such services, creating special entities linked to the Union and the States.

The Constitution of 1934 was a pioneer in expressly providing for legal aid:

⁷Constitution of 1934: Art. 113, 32

The Union and the States shall grant legal aid to the needy, creating, for this purpose, special bodies ensuring exemption from emoluments, costs, fees and stamps.

However, the trajectory of legal aid is marked by advances and setbacks. The Constitution of 1937, a Charter granted, omitted any provision on legal aid, even allowing the creation of Courts of Exception and the death penalty for those who tried to subvert the political and social order by violent means.

The 1946 Constitution once again mentioned, albeit vaguely, that the Public Power, according to the law, would grant legal aid to the needy. This limitation was overcome by Law No. 1,060/50, which actually implemented legal aid and free justice.

The Constitutions of 1967 and 1969 brought the idea of legal aid again, but in a vague way. Aluísio Nunes criticizes the 1967 Constitution for using a "vague and subjectless wording, in a passive voice, to elude state responsibility" ⁸.

Finally, the 1988 Constitution, known as the "Citizen Constitution", not only provides for legal aid, according to article 5, LXXIV, but also brought the Public Defender's Office as an instrument for the materialization of this right, under the terms of article 134, of the Federal Constitution: ⁸.

Federal Constitution:

Article 5, LXXIV - The State shall provide full and free legal assistance to those who prove insufficient resources.

Article 134. The Public Defender's Office is a permanent institution, essential to the State's jurisdictional function, and it is incumbent upon it, as an expression and instrument of the democratic regime, fundamentally, to provide legal guidance, the promotion of human rights and the defense, at all levels, judicial and extrajudicial, of individual and collective rights, in a comprehensive and free manner, to the needy, in accordance with item LXXIV of article 5 of this Federal Constitution.

Furthermore, various laws and constitutional amendments will shape the trajectory of legal aid. First, Law No. 1,060/50 stands out, which implemented legal aid and free justice, regulating article 141, paragraph 35, of the 1946 Constitution, which led many states to create public legal aid services.



Complementary Law No. 80/94, in turn, organizes the Public Defender's Office of the Union, the Federal District and the Territories, establishing general rules for its organization in the States and other provisions. This regulation was later amended by Complementary Law No. 132/09, which consolidated the Public Defender's Office in the national legal-political scenario. Among the innovations introduced by this legislation, according to the doctrine of José Augusto Garcia, are:

- a) New definition for the Public Defender's Office, recognized as an "instrument of the democratic regime", closely linked to the promotion of Human Rights;
- b) Positivization of the objectives of the Public Defender's Office, starting with the primacy of the dignity of the human person and the reduction of social inequalities;
- c) Expansion of institutional functions, with emphasis on extrajudicial action and collective protection;
- d) Extension of the so-called "atypical" institutional functions, aimed at protecting vulnerable social groups and people who are victims of serious forms of oppression or violence, regardless of their economic condition;
- e) Enumeration of the rights of those assisted by the Public Defender's Office, providing for public hearings for the planning of institutional actions and the creation of external ombudsman offices, an innovative measure in the Brazilian legal context;
- f) Reformulation of several rules related to the Federal Public Defender's Office.¹

Constitutional Amendment No. 45 expressly established the autonomy of state public defenders' offices, ensuring, in paragraph 2 of article 134, the functional and administrative autonomy and the initiative of their budget proposal, within the limits established in the law of budgetary guidelines.

Constitutional amendments No. 69 and 74 reinforced this autonomy. Finally, Constitutional Amendment No. 80 (known as the PEC Defensoria para Todos or PEC das Defensorias) created an exclusive section for the Public Defender's Office, differentiating it from the legal profession and consolidating the concept of Public Defender's Office in the caput of article 134, as established in Complementary Law No. 80/94. This amendment also consolidated the institution's legislative initiative and institutional principles, namely: unity, indivisibility and functional independence. It was established, in article 2 of the Constitutional Amendment, that "the number of public defenders in the jurisdictional unit shall be proportional to the effective demand for the service of the Public Defender's Office and to the respective population". To this end, "within eight (8) years, the Union, the States and the



Federal District must have public defenders in all jurisdictional units, observing the provisions of the caput of this article".

It is also worth mentioning that legal assistance is a constantly evolving topic, covering legislation such as the Public Civil Action Law, the Injunction Warrant Law, the Child and Adolescent Statute, the Elderly Statute, the Criminal Execution Law and the Maria da Penha Law, among others.

5 THE DISPARITY OF ARMS AS A VIOLATION OF THE FUNDAMENTAL RIGHTS TO EQUALITY, TO A FULL DEFENSE AND TO THE RIGHT TO BE HEARD

Parity of arms is a fundamental principle in the judicial process, especially in the criminal and civil spheres. This principle derives from due process of law and is directly related to procedural isonomy. It implies that the parties must have equal opportunities to participate in the process, in a balanced way, with the same means and conditions to defend their interests. For example, if one party has access to a certain document, the other party must also have that same access. Therefore, this is linked to equal treatment between prosecution and defense (in criminal proceedings) or plaintiff and defendant (in civil proceedings), as well as the rights to a full defense and adversarial proceedings. According to Guilherme de Souza Nucci:

"The principle of parity of arms assures the defendant real equality in the criminal process, so that he can fully exercise his defense, with the same means and opportunities as the accuser, avoiding the prevalence of the stronger party"
(Nucci, Guilherme de Souza. Code of Criminal Procedure Commented. 17th ed., RT, 2022, p. 45).

This principle is essential to ensure a fair process, reflecting the idea that it is not enough to judge; it is necessary to judge fairly. The Code of Civil Procedure mentions, in its article 7, that procedural equality must be guaranteed during the exercise of procedural rights and faculties, means of defense, burdens, duties and application of procedural sanctions:

Article 7 - The parties are guaranteed parity of treatment in relation to the exercise of procedural rights and faculties, the means of defense, the burdens, the duties and the application of procedural sanctions, and it is the judge's responsibility to ensure the effective adversarial procedure.

According to the principle of parity of arms, the judge's relationship with both parties must be equidistant, ensuring equality of conditions in his ability to influence the judicial decision. This also extends to the material sense in full. Eugênio Pacelli argues that this



principle not only guarantees the right to information, but also the right to react to the same intensity and extent.

In this way, parity of arms ensures that the process is fair, preventing any of the parties from suffering losses due to inequalities in opportunities. It is essential that the observance of this principle occurs in all phases of the process, from the initial petition/complaint to the appeal phase.

However, in practice, the principle of parity of arms often does not materialize. The problem lies not only in the opportunities for defense, but in the reception of these defenses presented. Although they have been filed, they are often ignored, especially in the criminal sphere, where it is common for sentences not to mention even one argument defended, either to accept it or not.

Although the principle of the judge's free conviction guarantees that he decides with autonomy and freedom, such a decision must be based on evidence, demonstrating that the parity of arms was respected. Thus, free conviction is not absolute: the judge must justify his reasons, explaining why he believes in a certain piece of evidence and rejects another. Ignoring arguments or evidence from one of the parties may constitute nullity due to curtailment of defense. Aury Lopes Jr. (2021) states that:

"The violation of the principle of parity of arms implies curtailment of defense, which compromises the validity of the judicial decision, even when based on motivated free conviction" (Lopes Jr., Aury. Criminal Procedural Law. 17th ed., RT, 2021, p. 150).

In view of the above, it is concluded that the principles of the judge's free conviction and parity of arms are not antagonistic; on the contrary, they complement each other. The former sets out the conditions for a fair trial, while the latter ensures that the decision is the result of a free and careful analysis of the evidence presented in that context. This understanding is corroborated by Cássio Scarpinella Bueno (2021), who points out that motivated free conviction should not serve as a justification for procedural violations that compromise the adversarial process.

6 FINAL CONSIDERATIONS

Given the challenges of access to justice and the historical trajectory of legal aid, it is indisputable that the Public Defender's Office plays a fundamental role in the implementation of the principle of parity of arms in the Brazilian judicial system.

It is evident that the principle of parity of arms, which aims to ensure that neither party is at a disadvantage in the exercise of its rights, is fully realized when the judge's free

conviction is exercised in a way that respects the allegations presented by both parties in an equitable manner.

In this scenario, the Public Defender's Office acts as an arm of the State, ensuring procedural equality by providing free and comprehensive legal assistance to people who cannot afford to hire a lawyer. In this way, the Defender's Office ensures that vulnerable citizens can fully exercise their rights of defense, balancing the scales and promoting parity of arms between the accused (or hyposufficient party) and the opposing party.

However, as already pointed out, the parity of arms is not only achieved by the performance of the Public Defender's Office, but also depends on the judge, who must analyze the allegations presented in an equitable manner, without ignoring arguments or evidence from one of the parties.

Thus, by analyzing the history of legal aid and the barriers overcome in access to justice, it is possible to identify those that still persist. The present study reveals that the parity of arms is not yet fully effective in practice, since the Judiciary, under the allegation of the principle of free conviction of the judge, has handed down decisions that do not adequately consider the evidence and allegations presented in the process. This reality hinders the mission of the Public Defender's Office, which is to materialize the principle of parity of arms, promoting equitable justice and ensuring that access to the Judiciary is not a privilege, but a right for all, especially the most vulnerable.

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