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ARTICLE

Institutionalisation, Reform and Independence of the Public Defender's Office in Brazil*

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The aim of this article is to investigate the institutionalisation of the state Public Defender's Offices before and after the reform that granted independence and new functions to the Public Defender's Offices in Brazil. We attempt to understand these processes based on theories of judicial empowerment (ideational and governance perspectives), analyse them in the Brazilian states by means of an analysis of two indicators in three different time periods (before, during and after the reform) and verify to what extent the formal (de jure) advances were involved in the exercise of autonomy in the states. The analysis reveals that in spite of the formal achievement of independence, the majority of state Public Defender's Offices are not actually independent and there is a great gap between what the laws stipulate and what actually happens in the public provision of access to justice in Brazil.

Keywords: Public defender's office; institutionalisation; independence; judicial strengthening; access to justice.

Introduction¹

The aim of this article is to investigate the institutionalisation of the state Public Defender's Offices before and after the reform that granted independence and new functions to the Public Defender's Offices in Brazil. This reform, created by the 1988 Federal Constitution with the aim of guaranteeing access to justice to the less privileged groups in Brazilian society with the public provision of legal assistance, took over two

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The replication dataset can be found in bpsr.org.br/files/arquivos/Banco_Dados_Madeira.html

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¹ This article was developed based on a wider piece of research titled *Acesso à justiça em contexto de judicialização da política: um estudo sobre o papel e a efetividade da atuação da Defensoria Pública do Rio Grande do Sul* (Access to justice in the context of the judicialisation of politics: a study on the role and effectiveness of the actions of the Rio Grande do Sul Public Defender's Office). Funded with resources from the FAPERGS (Fundação de Amparo à Pesquisa do Rio Grande do Sul – Rio Grande do Sul Research Foundation) and carried out between 2011 and 2013.

decades to be implemented by the states in their institutions. After a slow process of institutionalisation, it underwent a great change with the enactment of Constitutional Amendment nº45 in 2004, which, in the context of the reform of the Judiciary Branch, granted independence and new attributions to the Brazilian Public Defender's Office. The PDO is today an institution of great power and visibility in the legal system. However, considerable differences exist between the states in terms of their independence.

As a research problem, we initially sought to understand the reform and the attainment of independence based on theories of judicial empowerment – whether through ideational perspectives, which suggest that the Public Defender's Office was reformed as part of a general movement towards democratisation and guaranteeing access to rights in Latin America, or from governance perspectives, which indicate the attempt by the Executive Branch to modernise public assistance in Brazil, reducing differences between the states. We also sought to understand the movement of institutionalisation and independence of the Brazilian state Public Defender's Offices, verifying to what extent formal (*de jure*) advances were connected to the exercise of autonomy in the states.

There are three reasons for studying the Brazilian Public Defender's Office. Firstly, Brazil is one of the few countries in Latin America that has a constitutional institution with public servants providing legal assistance to vulnerable citizens². Secondly, given income inequality in Brazil, almost 90% of the population qualifies for free legal assistance, the criterion being earning up to three minimum wages (IBGE, 2010). Thirdly, the Public Defender's Office is a young institution, with great relevance as a political actor, and whose relationship with the other justice bodies must be better researched.

This article is inscribed in the domain of comparative judicial studies, which through the lens of political science has carried out a series of investigations on the role of different legal and judicial institutions in Latin America, particularly on their role as providers of social justice and on the relationship between legal processes and politics (TAYLOR, 2008).

Specifically in Brazil, since the mid-1990s, this research field has been discussing the role of the interaction of judicial processes with the democratic political system, whether in terms of the debate on the separation between the spheres of government and the judicialisation of politics, or through the effects in terms of the formulation and implementation of public policies (CASTRO, 1997). In institutional terms, the first Brazilian studies on the justice system focused on the Judiciary and its various aspects, such as the role of the Constitutional Court in its relationship with the political system, especially the impacts of injunctions issued against the actions of the Executive and Legislative Branches (CASTRO, 1997; VIANNA et al. 1999, 2007); the process of recruitment of the Brazilian judiciary (VIANNA et al., 1999); and the discussions on the Judicial Branch and the changes and reforms undergone since the country's redemocratisation (SADEK, 1999, 2004). More recently, several studies have been dedicated to investigating the State Prosecutor's Office and its institutional changes, its role in defending diffuse and collective rights and the vision and activism of its members (ARANTES, 1999); and its role as a political actor and the processes of achieving autonomy and accountability (CARVALHO and LEITÃO,

2 Few Latin American countries have constitutionalised Public Defender's Offices (Brazil, Colombia, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru and Venezuela). In the majority of countries, there are either no PDOs (Antigua and Barbuda, Bahamas, Barbados, Costa Rica, Cuba, Dominica, Grenada, Guyana, Haiti, Honduras and St. Lucia) or there are systems created by infra-constitutional legislations (Argentina, Belize, Bolivia, Chile, El Salvador, Ecuador, Guatemala, the Dominican Republic and Trinidad and Tobago).

2010, FORTHCOMING). However, there is still a great scarcity of work dedicated to investigating the other bodies that make up the justice system, the other courts and the relationship of these institutions with the processes of judicialisation and increasing access to justice in the country. Another aspect that has not yet been much explored in Brazil is the role of the Judicial Branch regarding public policies (TAYLOR, 2008) and the role of actors such as the State Prosecutor's Office and public defenders in the process of implementing public policies.

In order to understand the context of the reform, we use the concepts of institutional and judicial independence (AGUIAR, FORTHCOMING; CARVALHO and LEITÃO, 2010, FORTHCOMING; RÍOS-FIGUEROA and STATON, 2009, 2011) and the theoretical discussion on judicial empowerment (FINKEL, 2005; HILBINK, 2009; HILBINK and WODS, 2009; HIRSCHL, 2000; INGRAM, 2012; NUNES, 2010a, 2010b; WHITTINGTON AND DEVINS, 2005). The research was carried out based on an analysis of qualitative and quantitative sources. The qualitative sources included documents and legislation, as well as observations and interviews with public defenders. The quantitative data was obtained mainly from the Diagnósticos da Defensoria Pública no Brasil [Diagnostics of the Public Defender's Offices in Brazil] (MINISTÉRIO DA JUSTIÇA, 2004, 2006, 2009). This data, along with demographic data, was analysed using software package SPSS, which enabled indexes to be established.

This article is organised in three sections. Following this introduction, the second section deals with the history of the Public Defender's Office in Brazil in the context of democratic institutions in Latin America. It presents a theoretical discussion on independence and judicial autonomy and discusses the reform, especially from the public defender's point of view. The third section presents an analysis of the processes of institutionalisation and independence in the Brazilian states by analysing two indicators. The final section is the conclusion.

The Brazilian public defender's offices: historical and comparative perspectives

In the Brazilian judicial system, there are bodies that function at a federal level and at state level. At the federal level, the Judiciary Branch includes the following units: the Federal Courts (courts of general jurisdiction) – including the federal small claims courts – and the courts of special jurisdiction – composed of the Labour Courts, Electoral Courts and Military Courts. The organisation of the state Courts, which includes small civil and criminal claims courts, is an attribution of each one of Brazil's states and the Federal District. The state Public Defender's Offices operate within the State Courts and the federal Public Defender's Office operates in the context of the Federal Courts. Article 5 of the 1988 Federal Constitution lists individual rights and the role of public defenders in guaranteeing access to justice. The Public Defender's Office is governed by Complementary Law nº 80 of 1994, which establishes rules for how it is organised in the states. This law was altered by Complementary Law nº 132 of 2009, which regulates the alterations resulting from Constitutional Amendment nº 45 of 2004, which guaranteed the independence of the state Public Defender's Offices.

The Federal Constitution of 1988 prescribes full legal assistance to those in need of it (art. 5 LXXIV) and also raises the status of the Public Defender's Office to that of institution essential to the exercise of the jurisdictional function of the State, which is responsible for legal advice and defence at all levels of need (art. 134). With the return to democracy, the Federal Constitution assigned to the Public Defender's Office the role of guarantor of access to justice for all the population.

Historical perspective

In the process of the access to justice in Brazil being increased³, the expansion of the Judicial Branch took place in three waves.

The first wave of expansion of Brazil's Judicial Branch, which happened between 1930 and 1940, was propelled by a deeper, more lasting trend in Brazilian politics – one of mistrust of political representative institutions and of the democratic regime's capacity to meet society's needs (ARANTES, 2007, p. 104).

The second one, from the 1970s, saw the responsibility for the defence of diffuse and collective interests before the Judicial Branch be attributed to the State Prosecutor's Office, as a body of the State. The third saw the 1988 Constitution consolidate itself as an instrument for carrying out social justice and promoting rights, incorporating values of social, economic and cultural equality at the same time as it consolidated the expansion of the justice system for protecting collective rights, and also increasing access to justice, especially through innovations in the judicial structure.

The first signs of the Public Defender's Office in Brazil appeared in the context of the dictatorship, but it developed systematically only after the 1988 Constitution was promulgated, when democracy returned to Brazil and to other Latin American countries. From this phase onwards, the Public Defender's Office started being considered vital as a guarantor of rights and for ensuring access to justice.

Currently, the Public Defender's Office is established by law as permanent and essential to the State's jurisdictional function and as an instrument for democracy, responsible not only for offering legal assistance and free defence to those who need it, but also for the individual and collective promotion and defence of rights at all judicial and extrajudicial levels. The institutional principles of unity, indivisibility and functional independence are guaranteed by law. Additionally, certain objectives establish the work of the Public Defender's Office as an instrument of democracy, such as the primacy of the dignity of man, reduction of inequalities, the affirmation of the Democratic Rule of Law and the effective guarantee of human rights and of the constitutional principles of legal defence. These new functions were added by article 4 of Complementary Law 132.

Since the 1990s, the Public Defender's Office has been the object of analysis of few but very important studies in the social sciences. The studies in question concern the trajectory, the profile of the defenders and the effectiveness of guaranteeing access to justice of the Rio de Janeiro PDO, the first one to be institutionalised in the country (ALBERTI, 1996; COSTA, 2000; MOTTA, 2007, 2009; MOTTA and RIBEIRO, 2007; SANTOS, 2013). The recent institutionalisation and its difficulties are portrayed in studies on the PDOs of the states of São Paulo (ALMEIDA, 2005) and Paraná (SANTOS and CARON, 2013). Other studies attempt to understand the Brazilian experience by means of a comparative view (ALVES, 2005).

3 The work of Cappelletti and Garth (1988) is a milestone in the discussions on access to justice. Among their publications, we found the thesis on the development of access to justice in three waves. It assumes the expansion of the offer of legal services to poor sectors of the population, the incorporation of collective and diffuse interests and the consideration of alternative mechanisms for settling disputes.

Institutional independence

Currently, the state Public Defender's Offices have greater independence than the federal government's Public Defender's Office. Article 6 of the Federal Constitution prescribes that the Brazilian President must choose the federal Chief Public Defender and article 99 prescribes that the choice of state Chief Public Defenders must be made by the state governors. These choices are made from a list of civil servants whose names are chosen by the board of the public defender's office by secret ballot.

With Constitutional Amendment nº 45 of 2004, the federal Public Defender's Office came to have its own council, and councils were also created at state level. These councils are meant to be the highest normative and decision-making bodies of their institutions.

Regarding career security, public defenders – like judges and prosecutors – are functionally independent in their roles, including in their terms of office, and there is no possibility of salary reduction. The law that governs the Public Defender's Office provides for competition in the filling of posts, sets out the makeup of the board and established the institution's functional and administrative independence. Given these legal guarantees, the aim of this study is to understand the institutional changes, especially after the creation of these formal guarantees, and their consequences for the Brazilian states. Concepts and theories on the independence of legal institutions will help us understand the reform in the context of Latin America's return to democracy.

Comparative perspective

The debate on judicial reform in Latin America has focused on a number of targets, including the quest for justice, for quicker, more efficient and predictable trials, an external control of the Judicial Branch, the adoption of alternative conflict resolution mechanisms and control of the lower courts by the higher courts. These goals follow the orientation of several international bodies, including the World Bank.

Access to justice is provided in the whole world by three systems⁴. The first one is the "honour system", in which lawyers are obliged to represent poor clients without being paid. The second one is the "bureaucratic system", in which state agencies and public attorneys provide legal services for poor people. This model is characteristic of Latin America, where the creation of Public Defender's Offices has been the rule in the last few years. In the third system, characteristic of European countries, legal services are provided by bar associations or by independent associations of private attorneys (SMULOVITZ, FORTHCOMING, p. 07).

The Public Defender's Offices in Latin America were structured in the 1990s and 2000s. They were created with the aim of guaranteeing access to justice with assistance, representation and adequate defence, and guaranteeing the rights of those in need. Some PDOs are limited to the penal area (in Bolivia, Chile and Argentina, for example) but in other countries legal assistance is given in both criminal and civil questions (Brazil, Costa Rica, Mexico, Panama and Uruguay, for example). The Inter-American Association of Public Defenders (AIDEF – Associação Interamericana de Defensorias Públicas) was created in 2003 to establish a permanent system

4 For a more detailed version of the structuring of legal assistance services from a comparative perspective, see Cleber Francisco Alves's (2005) doctoral thesis, which presents the experiences of the United States, France and Brazil.

of coordination between the Public Defender's Offices in the Americas and the Caribbean. The aim of this association is to defend human rights, promote the independent functioning of PDOs and to strengthen it in relation to the State Prosecutor's Office.

Countries with a federative structure such as Brazil, Argentina and Mexico developed different legal structures for their federal and state courts. In Brazil, the state Public Offices of the Defender, which are the focus of this article, were created mainly between 1990 and 2000. They are more independent than the federal Public Defender's Office, created in 2004 and bound to the Executive Branch, and its fight for independence is currently following the legal channels in the National Congress.

In Mexico, the Public Defender's Office was created in 1998, "to guarantee the right to defence in civil, administrative and tax issues and in criminal cases" (IFDP, 2012). One example of a state Public Defender's Office is the Instituto *Veracruzano*, created in 2006. This institution has the additional responsibility of dealing with indigenous, young people's, and gender issues. The Mexican Public Defender's Offices are only technically and operationally independent. The federal public defenders are civil servants who work for the Judicial Branch and the state Public Defender's Offices are government agencies.

In Argentina, access to justice is guaranteed by the *Ministerio Público de Defensa de la Nación*, a federal institution that became independent in 1994 with a constitutional reform. In the provinces, "provision of public defence in Argentina is currently regulated by 25 different laws. Each provincial unit has its own law" (SMULOVITZ, FORTHCOMING, p. 09). In terms of independence, over 90% of defenders in the provinces are linked to the Judicial Branch.

The three countries are similar in their differentiation between the federal and state Public Defender's Offices. The difference between them is their degree of independence and the provision of access to services of a non-penal nature.

Judicial independence and autonomy

Independent judicial institutions have the capacity to promote and maintain human wellbeing, stabilise democratic regimes and protect human rights (RÍOS-FIGUEROA and STATON, 2009). As a rule, they are part of an institutional dimension related to preventing arbitrariness by governments, an individual dimension related to correcting discriminatory practices in law enforcement and a social dimension related to social stability (RÍOS-FIGUEROA and STATON, 2011). Studies show that these are the roles of the courts in helping to consolidate democratic regimes.

There is a difference between judicial independence and judicial power or between judicial independence *de facto* and *de jure*. Feld and Voigt (2007, p. 02) define *de jure* independence as "the independence of courts as it can be deduced from legal documents" and *de facto* independence as "the degree of independence that the courts factually enjoy."

Judicial independence "demands that judges do not suffer any interference that makes them unable to judge cases. Therefore, it is not a sufficient condition for a Rule of Law, but it is a necessary condition" (LEIRAS et al., FORTHCOMING, p. 06). It means having the freedom to decide on certain cases without restrictions imposed by other political actors. The judicial sphere also demands political accountability, as judicial independence alone is not sufficient without the power to impose decisions. The independence of other actors depends on legal provisions that establish the relationship between judges and other branches of government, and whether politicians are

acting in accordance with the legal provisions (RÍOS-FIGUEROA and STATON, 2009).

The debate on the relationship between judicial independence and judicial power can be useful for understanding to what extent gaining formal independence can be a source of empowerment for a judicial institution.

The independence of the Public Defender's Office is a way in which to formally capacitate the Judicial Branch. Why did Brazil do this? There are several theories aimed at explaining judicial strengthening or empowerment, that is, the granting by the Executive and Legislative Branches of part of their power to the Judicial Branch. The most prominent theories are insurance theory (FINKEL, 2005), hegemonic preservation theory (HIRSCHL, 2000), the thesis of governance (NUNES, 2010a, 2010b; WHITTINGTON AND DEVINS, 2005) and the theories of ideational empowerment (INGRAM, 2012; HILBINK, 2009; HILBINK and WOODS, 2009).

Insurance theory presupposes that institutions set the "rules of the game", defining the procedures that govern the economic and political behaviour of actors. According to this theory, electoral competition determines whether the reforms made for judicial empowerment will be implemented. Finkel (2005) states that:

[...] when political players are uncertain about the future division of power, even if they currently hold the reins of power, they may seek to increase the availability of institutional checks on political authority as a hedge against their possible loss of political dominance. Judicial reform thereby becomes a trade-off in which ruling parties are willing to accept short-term costs in exchange for long-term security (FINKEL, 2005, p.88).

The theory of judicial hegemonic preservation argues that empowerment is the result of strategies by political and economic elites to preserve their hegemonic influence on peripheral groups in the arenas of formulation of majority policies. According to this theory, the process of judicial empowerment that takes place by means of the constitutionalisation of rights speeds up when hegemonic elites are threatened by peripheral groups, as they would rather transfer power over to the courts because courts tend to act according to the cultural tendencies of the hegemonic community (HIRSCHL, 2000, p. 95).

Insurance theory explains judicial empowerment during periods of uncertainty, such as transitions to democracy in contexts dominated by traditional elites, when these are threatened by the appearance of minority groups. In these situations, "politicians empower courts to constrain incoming majorities" (NUNES, 2010a, p. 03). However, these theories do not explain the institutional reforms proposed in the context of stable electoral competition. It is in these contexts that theories of governance gain ground.

Governance theories explain judicial empowerment as a means to facilitate presidential agendas and to avoid threats such as federalism, entrenched interests, and rebel and pressure coalitions. Using Whittington and Devins's (2005) theoretical argument, Nunes shows that "a friendly judiciary has increased the expected benefits of judicial review for Brazilian presidents while lowering the likelihood of judicial vetoes against their legislative outputs" (2010a, p. 04). Based on a revision of insurance and rational theories, Hilbink and Woods (2009) have explored ideas as variables in the study of judicial strengthening/empowerment.

Ideational arguments suggest that decisions to build or reform courts are due to substantive aims. Decisions are taken according to the need for these changes by the countries in question. "This sense of purpose or mission as conditioning factors of profoundly rooted ideas is what determines the reactions of actors to the limitations of their institutional environment" (NUNES, 2010b, p. 41).

Ideational explanations highlight the influence of the immaterial, of ideological engagements. Specifically, actors react less to the material, to cost-benefit calculations based

on rational/strategic interest, and more in response to engagements of an immaterial nature, that is, to the roles of courts in society (INGRAM, 2012, p. 441). Reforms are linked to political and ideological postures, especially those to the left in the political spectrum. What tends to delegate power to the courts is the belief in their very role, that is why “ideas also clarify why actors promote reform despite material costs, obstacles, and constraints, even expending great effort over long periods of time to overcome those obstacles” (INGRAM, 2012, p. 440).

In ideational theory, social movements and interest groups are seen as key actors in processes of institutional change. Analysing the process of judicial empowerment in Spain during the transition to democracy, Hilbink (2009, p. 404) describes the role of the lawyers mobilised for promoting political liberalism in terms of:

(1) judicial independence aimed at the moderation of executive power; (2) greater autonomy for civil society in the form of free speech, press, associations and assembly; and (3) guarantees of basic civil rights, such as bodily integrity, due process and equal treatment under law.

When analysing the processes of judicial strengthening/empowerment in Brazil, insurance theories can help to explain the attainment of independence by the State Prosecutor's Office during the transition to democracy (AGUIAR, FORTHCOMING). On the other hand, it is possible to understand the process of empowerment of the Federal Supreme Court based on the governance thesis defended by Nunes (2010a, 2010b), which explains the strategy of the Executive to grant power to the courts in order to meet its government agenda, using the Judicial Branch as a partner. Next, we will see how the attainment of independence by the Public Defender's Office can be viewed both from the point of view of ideational theories and from theoretical perspectives of governance.

Independence of the Brazilian public defender's offices

The process of independence and autonomy of the Public Defender's Office in Brazil, achieved through constitutional and legislative changes, must be understood in terms of Brazil's transition to democracy. This transition took place in a context of ample participation by actors and social movements, especially those of lawyers, whose role in defending human rights was vital to establishing public policies. The rise to power of a left-wing political party reflects an increase in concern for social justice, equality and vulnerable groups and sectors of the population. The attainment of independence by the Public Defender's Offices can therefore be seen as part of two larger movements, according to ideational theories and theoretical perspectives of governance.

In ideational terms, the possibility of increasing access to justice is part of Latin America's democratic political project. All the pressure groups that contributed to this project, including national and international actors, are committed to democracy and to its consolidation.

Regarding the domestic actors, through the National Association of Public Defenders (ANADEP – Associação Nacional dos Defensores Públicos), the political mobilisation of the state and federal PDOs showed itself to be a fundamental element for realising legislative alterations. Other bodies of members of the justice system such as associations of the State Prosecutor's Office and of judges also participated. The massive mobilisation of civil society organisations such as NGOs, social movements, lawyer networks and the Catholic Church – through the National Confederation of Bishops of Brazil (CNBB – Confederação Nacional dos

Bispos do Brasil) and its pastoral branches, especially the Pastoral Carcerária (Prison Pastoral Commission) –revealed the social demand for expanding the activities of public defenders.

As for the actions of international actors, international organisations were very concerned with institutionalising rights and increasing access to justice. The UN, for example, whose report on the independence of judges pointed to a need for strengthening the public practice of law in order to guarantee access to justice, stood for the adoption of a reform of the justice system as an important – albeit insufficient – step, and suggested monitoring the impact of the reform and of administrative and financial independence, as well as creating Public Defender's Offices in states that did not have any (DESPOUY, 2005).

It is interesting to look at the role performed by the ANADEP alongside the AIDEF in strengthening the Public Defender's Offices in all member-countries, using the Brazilian experience as an example. This action was incorporated into the Regras de Brasília [Rules of Brasília] (2011) and its implementation plan. Additionally, international bodies such as the OAS continue to encourage increasing access to justice by means of legal assistance, including working jointly with the Inter-American Court of Human Rights (ORGANIZAÇÃO DOS ESTADOS AMERICANOS, 2011).

From a governance point of view, the process of independence can also be understood in the context of a coordinating strategy by federal government, recurrent in several other movements of formulation and implementation of public policies. Within them, the actions of the federal government, in an attempt to formulate policies that are executed by subnational entities, aim to reduce regional differences and inequalities (ALMEIDA, 2005; ARRETCHE, 2004, 2010). National legislations tend to give greater uniformity to institutional design, aiming at the creation of a single performance standard. The Executive Branch showed its support for making the PDO autonomous by authoring the legislation aimed at reform. The almost unanimous vote in the Senate also showed the endorsement of the Legislative Branch, backed up by the social and electoral appeal of expanding access to justice.

We will later see how this objective has not yet been attained in spite of the efforts made.

The defender's view on the reform and achievement of independence

It could be argued that because of the concession of de jure independence, the Brazilian Public Defender's Office saw institutional advances towards greater autonomy, visibility and equivalence with the other bodies of the justice system. Perhaps in the medium and long term these alterations will change the interplay of forces in trials, especially in the criminal system. However, as the literature on judicial independence shows, de jure independence is necessary but not sufficient for an effective exercise of independence. In the next section, we will discuss to what extent achieving formal independence resulted in the actual exercise of independence by the state PDOs.

In the defender's view, the Public Defender's Office is the justice system institution that most grew in terms of guarantees and structuring in the last decade. The reform and attainment of autonomy were the result of external elements and an internal mobilisation by the field's professionals. A great window of opportunity was provided by the actions of the federal Executive Branch and its allied base in the Legislative Branch, which saw the need for the inclusion into the justice system of people from classes C and D, whose social mobility took place through social programmes of income distribution and the policy of minimum wage increase.

We achieved this change in Law 132 for two reasons: because of the judicial reform – because the Judicial Branch needs the Public Defender's Office, because the State needs the Public Defender's Office. In truth, we're in a paradigm of inclusion of people from class C and D into the market. You need people to be included into the justice system; this is natural from the point of view of the organisation of the State. Now, this only happened because the political context was favourable for it to happen (Interview nº 10, 2012).

After the legal achievement, understood as *de jure* independence, the great difficulty for the state Public Defender's Offices is the implementation of *de facto* independence, which means generating their own budgets, setting wages, creating posts and holding competitive civil-service examinations. Thus, it is also important to appreciate the defender's view about the extent to which the very exercise of functional independence depends on *de facto* independence:

It's no use being administratively and functionally independent without budgetary independence, so I can know how much I'm going to spend, how many defenders I can hire, if I can create another 10 posts for defenders... if I'm stuck to the Judicial Branch, I don't have that sort of independence. Because we have functional autonomy, I can file a lawsuit against whomever I want and the governor can't take me away from here. But he can punish me through the budget if I file a civil suit against the state. So to us, this [budgetary autonomy] is very important (Interview nº 6, 2012).

In the public defender's view, as well as independence, the mobilisation ended up resulting in the expansion of the competent jurisdiction of the Public Defender's Office. Previously an institution aimed only at individual legal assistance, it also came to file class actions and, at a third stage, became a human rights defence institution whose model altered the very configuration of the Rule of Law, being then copied by other Latin American countries.

In terms of advances, if we now talk a bit about Law 132, the Complementary Law that altered Law 80 of 1994, which is our Organic Law, what do we have there? The article to me is symbolic. It assigns three basic functions to the Public Defender's Office – two that we already performed and one new one, which we didn't yet know how to. The first one is integral, free legal orientation – which we already did in all contexts – civil, crime, etc; it was nothing new. The other one is the protection of collective rights, which is a little bit of a novelty, but collective representation was already in the system. And the new one, which is the following: to take care of human rights in the Democratic Rule of Law, and this is a gigantic incumbency. Why? This, for me, is a big turnaround, in the symbolic terms of the Democratic State, a State has historically been a State that oppresses, judges and prosecutes – it's very good at that. It's very good at judging and prosecuting people, it's a State that now offers to defend, and we don't really know how this is going to be done, do we? How are we going to create a State that cares, that sees, that understands and defends? (Interview nº10, 2012).

These changes can cause great alteration in the Brazilian criminal system, which is still seen as a traditionally inquisitorial model, and which after redemocratisation did not reform its legislation to draw closer to more prosecutorial models (AGUIAR, FORTHCOMING), as the existence of a state institution capable of defence with a strength equivalent to that of the prosecution can destabilise a penal system so marked by punishment:

I think that there's a change in the Democratic State that's largely reflected in the criminal model. We are advancing towards a State where, 'it is the monopoly of the State to accuse',

you see... today we have a model of a State that defends, but we are moving towards a model in which the State Prosecutor's office, it is the *custos legis* of the procedures, you see. Perhaps we'll migrate towards a model in which the Public Defender's Office will assume the function of *custos legis* of criminal defence. Because if I have a State that is strongly armed to prosecute you, we have to have a State strongly armed to defend you (Interview nº10, 2012).

As it is a struggle with material and symbolic aspects, in the public defender's view, the reform – with its expansion of competent jurisdictions, gain of autonomy and consequent salary equalisation – caused a change in the very “tripod” of the justice system:

We make up the tripod of the justice system. In truth, this is the justice system: the judge judges, the prosecutor prosecutes and the defender defends. Without that, there is no criterion for justice, not to mention any equality, so we need to give it its due recognition (Interview nº 11, 2012).

This generates quite a clash, which is part of this process of institutional construction and of other constructions, part of assimilating the fact that ‘when a new player enters the field, the others have to adapt’, so I see these asymmetries as natural. What was the question of wages, of salary equalisation about? This is a very important question, not just for the institution, but also socially because the Public Defender's Office previously used to be just a temporary career (Interview nº 10, 2012).

The judge is assisted by two justice bodies, the SPO that prosecutes and the PDO that defends. Does it seem fair to you that the one who prosecutes should earn more than the one who defends? This was something that used to make us very uncomfortable (Interview nº 11, 2012).

Although it is not the direct focus of this article, which focuses on internal institutional analysis, we must contextualise the external and inter-institutional aspects of this process of attaining autonomy, which does not occur without fighting and conflict. This is the case particularly among the actors of the justice system themselves, with the political and judicial struggles between the Public Defender's Office and the State Prosecutor's Office regarding the legitimacy of filing public-interest civil actions and the defence of diffuse and collective rights⁵. It is also true of the Public Defender's Office and the OAB (Ordem dos Advogados – Brazilian Bar Association), both regarding the professional exercise of the defenders and the requirement that they be members of the OAB because they are lawyers, and the other way around, between the OAB and the Public Defender's Offices against the increase of people qualifying for free legal assistance, including legal entities⁶. Furthermore, the fact that the OAB's political power in some states delayed the structuring of some Public Defender's Offices⁷ must also be mentioned.

Having understood the reform and attainment of independence from ideational and governance points of view, we will now look at how the processes of institutionalisation and independence occurred in the Brazilian states.

5 ADIN 3943 (Direct Action for the Declaration of Constitutionality 3943) is currently following the legal channels through the STF (Supremo Tribunal Federal – Federal Supreme Court). It was proposed by the Associação Nacional de Membros do Ministério Público (CONAMP – National Association of Members of the State Prosecutor's Office) and contests the constitutionality of the law that allows the Public Defender's Office to file public-interest civil actions – article 5 of Law 7,347/1985, as drafted by Law 11,448/2007 (<http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=2548440>), as well as ARE 690.838 (Extraordinary Interlocutory Appeal 690.838), which recognised the general repercussion of the constitutional question (<http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=223069>). It is also worth referring to the literature on the achievement of autonomy by the State Prosecutor's Office itself and the construction of the legitimacy of proposing this type of action (ARANTES, 1999).

6 News on this clash can be found at <<http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=185914>>.

7 The thesis of Frederico Ribeiro de Almeida (2010) portrays the resistance of OAB/SP (Brazilian Bar Association of São Paulo). The following report illustrates the conflict in the state of Santa Catarina: <http://www.probono.org.br/defensoria-publica-de-santa-catarina-enfrenta-a-resistencia-da-oab>.

Institutionalisation and independence in the Brazilian state public defender's offices

In order to demonstrate the changes caused by the institutionalisation of the Public Defender's Office in Brazil, we analysed three time periods. The data presented for the first period (2004) covers the institutions before the reform, the data from 2006 shows the institutional transition and the data from 2009 shows a stable institution five years after the constitutional changes that guaranteed independence.

In order to investigate a possible relationship between institutionalisation and the achievement of autonomy and independence by the state PDOs, we built two indicators. The first one, regarding institutionalisation, was created with the variables time of creation and number of competitive civil-service examinations held. To build the second indicator, one regarding independence, from which we would be able to measure the independence of the Public Defender's Office institution in the states, we established a ranking system that computed the presence or absence of certain powers. The index consists of a two-point interval attributed to the presence or absence of each feature, making it possible to see a greater degree of independence in states with high scores. It must be mentioned that the study analysed the independence of exclusively *de jure* measures. Along with the analysis of the indicators, the variables promoting collective actions and legal representation in the Inter-American System of Human Rights served to present a panorama, albeit a restricted one, of the actions in each period.

Figure 1. Institutionalisation and independence of the state Public Defender's Offices

Institutionalisation		Weight given to each variable	Institutionalisation index		
Time of creation		1	1 point = Public Defender's Office in the process of institutionalisation (I)		2 points = Consolidated Public Defender's Office (C)
Number of competitive civil-service examinations held		1			
Independence			Independence index		
<i>Powers of the Chief Public Defender</i>			Between 1 and 3 points = no independence (NI)	Between 4 and 6 points = low independence (LI)	Between 7 and 10 points = autonomous (I)
Creating new posts		1			
Holding competitive civil-service examinations		1			
Abolishing posts		1			
Setting and adjusting wages		1			
Imposing disciplinary sanctions		1			
<i>Institutional procedures</i>			Between 1 and 3 points = no independence (NI)	Between 4 and 6 points = low independence (LI)	Between 7 and 10 points = autonomous (I)
Choosing the Public Defender from a three-candidate list		1			
Existence of an organic law		1			
Existence of a maintenance fund		1			
Existence of a Higher Council		1			
No subordination of Public Defender's Office to state departments (Executive Branch)		1			

Source: Brazilian Public Defender's Office Database.

In line with studies on the independence of judicial institutions, our data on independ-

ence considered two larger areas – one regarding the institutional procedures that rule the institution and the other one regarding the Chief Public Defender's exercise of power. In the first dimension, there are variables aimed at verifying the presence of independence in legal terms, such as the existence of an organic law and a board of the public defender's office, and other variables focusing on the procedural exercise of independence, such as the selection of a Chief Public Defender from a three-candidate list. Finally, there are variables that indicate the actual exercise of independence, such as the availability of financial resources without subordination to the state administration. The second dimension includes variables that indicate the amount of power in the hands of the Chief Public Defender, in terms of creating and abolishing posts, hiring, discipline and budgetary choices.

Figure 2 illustrates the process of independence and institutionalisation by state, according to the measures and key in Figure 1.

Figure 2. Institutionalisation and independence of the state public defender's offices

State	Institutionalisation			Independence		
	2004	2006	2009	2004	2006	2009
AC	I	I	I	I	LI	LI
AL	I	I	I	LI	LI	I
AM	C	C	C	LI	LI	LI
AP	I	I	I	LI	LI	LI
BA	C	C	C	LI	I	I
CE	I	I	C	LI	I	I
DF	C	C	C	NI	NI	NI
ES	I	I	I	LI	LI	LI
GO*						
MA	I	I	I	LI	LI	LI
MG	C	C	C	LI	LI	LI
MS	C	C	C	I	I	I
MT	I	I	C	I	I	I
PA	I	I	I	NI	LI	LI
PB	I	I	I	LI	LI	LI
PI	C	C	C	LI	LI	LI
PE	I	I	I	NI	LI	LI
PR*			I			NI
RJ	C	C	C	I	I	I
RN*		I	I		LI	LI
RR	I	I	I	LI	I	I
RO		I	I	LI	I	I
RS	I	I	I	NI	I	I
SC*						
SE	I	I	I	LI	LI	LI
SP*		I	I		I	I
TO	C	C	C	NI	I	I

Source: Brazilian Public Defender's Office Database.

* States in which there was no PDO or where data was not provided to the research.

From the indicators built, we carried out various analyses using as a reference the three time periods (2004, 2006, 2009), which portray the scenario of the institution before and after the reform.

Before the reform: state Public Defender's Offices in 2004

In 2004, five Public Defender's Offices had no independence (DF, PA, PE, RS and TO)⁸, 12 had low independence (AL, AM, AP, BA, ES, MA, MG, PB, PI, RO, RR and SE) and five were considered independent (AC, CE, MS, MT and RJ).

From the analysis of the state PDOs prior to the reform that granted independence, we saw that even before the reform there was a trend of increasing powers in the institution. In the non-independent Public Defender's Offices, the degree of interference in decisions was very high, without the possibility of the institution defining its job posts, and especially not its budget and wages. The scenario was different in the independent institutions, although they were few in number and still had no significant prerogatives regarding wages and budgetary issues. Regarding people served, whether or not the PDOs were independent bore no relation to an increase in the number of people served and suits filed.

Before the reform, there was great variation in the independence of the Chief Public Defender. It was in states without independent PDOs that there was most difficulty in creating or abolishing posts, adjusting wages, imposing disciplinary sanctions and promoting civil servants. The more the Public Defender's Offices became independent, the greater the power of the Chief Public Defender, but his role was always limited in budgetary and wage issues.

During the reform: state Public Defender's Offices in 2006

In 2006, the data showed very significant changes, with only one PDO remaining without independence (DF). However, the number of PDOs with low independence rose in 14 states (AC, AL, AM, AP, CE, ES, MA, MG, PA, PB, PE, PI, RN and SE) and the number of states with PDOs considered independent rose to nine (BA, MS, MT, RJ, RO, RR, RS, SP and TO).

During the reform, the political characteristics of the Federal District and the fact that it is the federal capital directly affected the granting of independence. In institutions with low independence, the formal and procedural prerogatives remained, since in each state there was an organic law and a Higher Council, and in half the states the Chief Public Defender was selected from a list of three candidates. There was a trend of increasing power held by the head of the institution relating to the establishment of internal criteria such as disciplinary sanctions. However, there were still restrictions on the exercise of power regarding financial questions, such as setting and adjusting wages and creating and abolishing posts.

This panorama drastically changes when the independent Public Defender's Offices are compared with one another during the reform, as for the first time they saw an increase in

8 Brazilian states and their abbreviations: AC – Acre, AL – Alagoas, AM – Amazonas, AP – Amapá, BA – Bahia, CE – Ceará, DF – Distrito Federal, ES – Espírito Santo, GO – Goiás, MA – Maranhão, MG – Minas Gerais, MS – Mato Grosso do Sul, MT – Mato Grosso, PA – Pará, PB – Paraíba, PI – Piauí, PE – Pernambuco, PR – Paraná, RJ – Rio de Janeiro, RN – Rio Grande do Norte, RR – Roraima, RO – Rondônia, RS – Rio Grande do Sul, SC – Santa Catarina, SE – Sergipe, SP – São Paulo, TO – Tocantins.

the exercise of their autonomy, both in formal and procedural terms. In all states, an organic law and a Higher Council came into existence, with the choice of the chief of the institution being made from a list of three candidates. The Chief Public Defender's exercise of power also increased in practically all states, allowing him to create new posts and abolish posts and to set and adjust wages in more than half the institutions.

A trend of growing independence and prerogatives regarding the institution's internal and organizational aspects could be seen. However, decisions regarding finances were still made by the federal administration in the majority of cases.

From the analysis of the state Public Defender's Offices during the reform, we saw a trend of rising autonomy, observed in the increase of prerogatives for deciding on posts and holding competitive civil-service examinations, but still restricted in budgetary and wage issues. We saw a gain in terms of the institution's power of organisation from an internal point of view, but the financial decisions were still being made by the administration of the states in the majority of cases.

As for people served, it is interesting to see a trend of PDOs initiating class actions, in keeping with the legal system, although the experience of legal representation in the Inter-American System of Human Rights was a rare exception in the states.

After the reform: state Public Defender's Offices in 2009

In 2009, the Federal District remained the only Public Defender's Office without independence. It is important to highlight that the data for that year showed the presence of new PDOs, such as those of Paraná and Goiás, which in spite of having been created, did not provide data for the research. There was no data for the state of Santa Catarina, either, as it did not have a PDO at the time. In that year, the number of PDOs with low independence fell to 13 (AC, AM, AP, CE, ES, MA, MG, PB, PA, PE, PI, RN and SE) and the number of PDOs considered independent rose to 10 (AL, BA, MS, MT, RJ, RO, RR, RS, SP and TO).

If we ignore the Federal District as the only Public Defender's Office that remained without independence after the reform, it is interesting to note that inequality remained in the independent and low-independence Public Defender's Offices, especially regarding the Chief Public Defender's exercise of power. Another interesting fact is that in low-independence states, there were cases of reduced guarantees in the 2006-2009 period. Thus, among the low-independence PDOs, the number of states that could choose a Chief Public Defender from a three-candidate list decreased, and among the powers of the Chief Public Defender, the possibility to hold competitive civil-service examinations also decreased. Regarding the filing of class actions, these remained the same in PDOs with low independence and rose in the independent ones, with legal representation in the Inter-American System of Human Rights limited to one PDO from each group.

Figure 3 synthesises the variables of achievement of independence for each one of the groups and Figure 4 presents the variables by state throughout the three periods.

Figure 3. Institutionalisation and independence of the state public defender's offices

	No independence			Low independence			Independent		
	2004	2006	2009	2004	2006	2009	2004	2006	2009
Creating new posts	■	■	■	■	■	■	■	■	■
Holding competitive civil-service examinations	■	■	■	■	■	■	■	■	■
Abolishing posts	■	■	■	■	■	■	■	■	■
Setting and adjusting wages	■	■	■	■	■	■	■	■	■
Imposing disciplinary sanctions	■	■	■	■	■	■	■	■	■
Choosing CPD by three-candidate list	■	■	■	■	■	■	■	■	■
Existence of an organic law	■	■	■	■	■	■	■	■	■
Existence of maintenance fund	■	■	■	■	■	■	■	■	■
Existence of a Higher Council	■	■	■	■	■	■	■	■	■
No subordination to state departments	■	■	■	■	■	■	■	■	■

Key:

1. No variables found	2. variables found in few cases	3. variables found in the majority of cases
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Source: Brazilian Public Defender's Office Database.

The comparative analysis of the 2006 and 2009 periods – that is, before and after the reform – does not show very significant changes. It is interesting to note that the achievement of *de jure* autonomy, or gaining autonomy in legal terms, has the effect of driving change. Yet the actual implementation of autonomy does not consolidate itself, and the characteristics found immediately after the constitutional and legislative change remain. The prerogatives of internal interference in institutions increase and consolidate themselves, but the powers regarding financial issues turn out to be hard to consolidate in several states.

If we compare the institution's degree of institutionalisation with its degree of autonomy in 2004, 2006 and 2009, we see that there is no direct relation between the fact that the Public Defender's Offices were institutionalised and their autonomy.

What the analysis reveals, which corroborates a great part of the studies on judicial independence and some theoretical studies on the autonomy of the State Prosecutor's Office, is that in spite of them having *de jure* independence (by law, stipulated by it), in fact, many state Public Defender's Offices are not independent because autonomy means meeting prerequisites which at the time the states had not met. Although we see an evolving panorama, we can draw conclusions from the gap between what the law stipulates and what actually occurs.

In an attempt to reveal national disparities, and bearing in mind the social differences between Brazilian states, we established a comparison between the Human Development Index in the states and their independence indicator for each period.

Figure 4. Achievement of independence in states by variable in the three time periods (2004, 2006, 2009)

State	Creating new posts			Holding competitive civil-service examinations			Abolishing posts			Setting and adjusting wages			Imposing disciplinary sanctions			Choosing CPD from a three-candidate list			Existence of an organic law			Existence of a maintenance fund			Existence of a Higher Council			Subordination to state departments		
	2004	2006	2009	2004	2006	2009	2004	2006	2009	2004	2006	2009	2004	2006	2009	2004	2006	2009	2004	2006	2009	2004	2006	2009	2004	2006	2009	2004	2006	2009
AC	Y	N	N	Y	Y	N	Y	N	N	Y	N	N	N	Y	Y	Y	N	N	Y	Y	Y	N	N	N	Y	Y	Y	N	N	N
AL	N	N	N	Y	Y	Y	N	N	N	N	N	N	N	Y	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N	N
AM	N	Y	N	Y	N	N	N	N	N	N	N	N	N	N	Y	Y	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N	N
AP	N	N	N	Y	Y	N	N	N	N	N	N	N	N	N	Y	Y	N	N	Y	Y	Y	N	N	N	N	Y	Y	N	N	N
BA	N	N	N	Y	Y	Y	N	Y	N	N	N	N	N	Y	Y	N	Y	Y	Y	Y	Y	N	N	N	N	Y	Y	N	N	N
CE	Y	N	N	Y	Y	N	N	N	N	N	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N	N
DF	N	N	N	N	N	N	N	N	N	N	N	N	N	Y	Y	Y	N	N	N	N	Y	N	N	Y	Y	Y	Y	Y	Y	Y
ES	Y	Y	N	Y	Y	N	N	N	N	N	N	N	N	Y	Y	N	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	H	N	N
GO*																														
MA	N	Y	N	N	N	Y	N	N	N	N	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N	N	N	Y	Y	N	N	N
MG	N	Y	Y	N	N	N	N	N	N	N	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N	N	N	Y	Y	N	Y	N
MS	Y	Y	Y	Y	Y	Y	N	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N	N
MT	Y	Y	Y	Y	Y	Y	N	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N		Y	Y	Y	N	N	N
PA	Y	N	N	N	N	N	N	N	N	N	N	N	N	Y	Y	Y	Y	Y	Y	Y	Y	N	Y	Y	N	Y	Y	Y	N	N
PB	N	N	N	Y	N	N	N	N	N	N	N	N	N	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N	N
PI	Y	N	N	N	Y	Y	N	N	N	N	N	N	Y	Y	Y	Y	N	N	Y	Y	Y	N	Y	Y	N	Y	Y	N	N	N
PE	N	N	Y	Y	Y	N	N	N	N	N	N	N	N	Y	N	N	Y	Y	Y	Y	Y	Y	Y	Y	N	Y	Y	Y	Y	N
PR*																														
RJ	Y	Y	Y	Y	Y	Y	Y	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	Y	Y	Y	Y	Y	N	N	N
RN*		N	N		Y	N		N	N		N	N		Y	Y		Y	N		Y	Y		Y	N		Y	Y	N	N	N
RR	N	Y	Y	Y	Y	Y	N	Y	Y	N	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	N	N	Y	N	Y	Y	N	N	N
RO	N	Y	Y	Y	Y	Y	N	Y	Y	N	Y	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	N	N	N	N	Y	Y	Y	N	N
RS	N	Y	Y	N	Y	Y	N	Y	Y	N	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	N	Y	Y	Y	Y	Y	Y	N	N
SC*																														
SE	N	N	Y		Y	N	N	N	N	N	N	N	N	Y	Y	Y	Y	N	Y	Y	Y	N	N	N	N	Y	Y	N	N	N
SP*		N	N		Y	Y		N	N		N	N		Y	Y		Y	Y		Y	Y		Y	Y		Y	Y		N	N
TO	N	N	N	Y	Y	Y	N	N	N	N	N	N	N	Y	Y	Y	Y	Y	N	Y	Y	N	Y	Y	N	Y	Y	Y	N	N

Key: Y= existence of the prerogative; N= non-existence of the prerogative.

* States in which there was no PDO at the time of research or for which there was no data available.

Source: Brazilian Public Defender's Office Database.

In 2004, out of the five Public Defender's Offices without independence, two of them were in states with a high HDI (RS and DF), two in a state with a medium low HDI (PE and TO) and one in a state with a low HDI (PA). Out of the 12 PDOs with low independence, one of

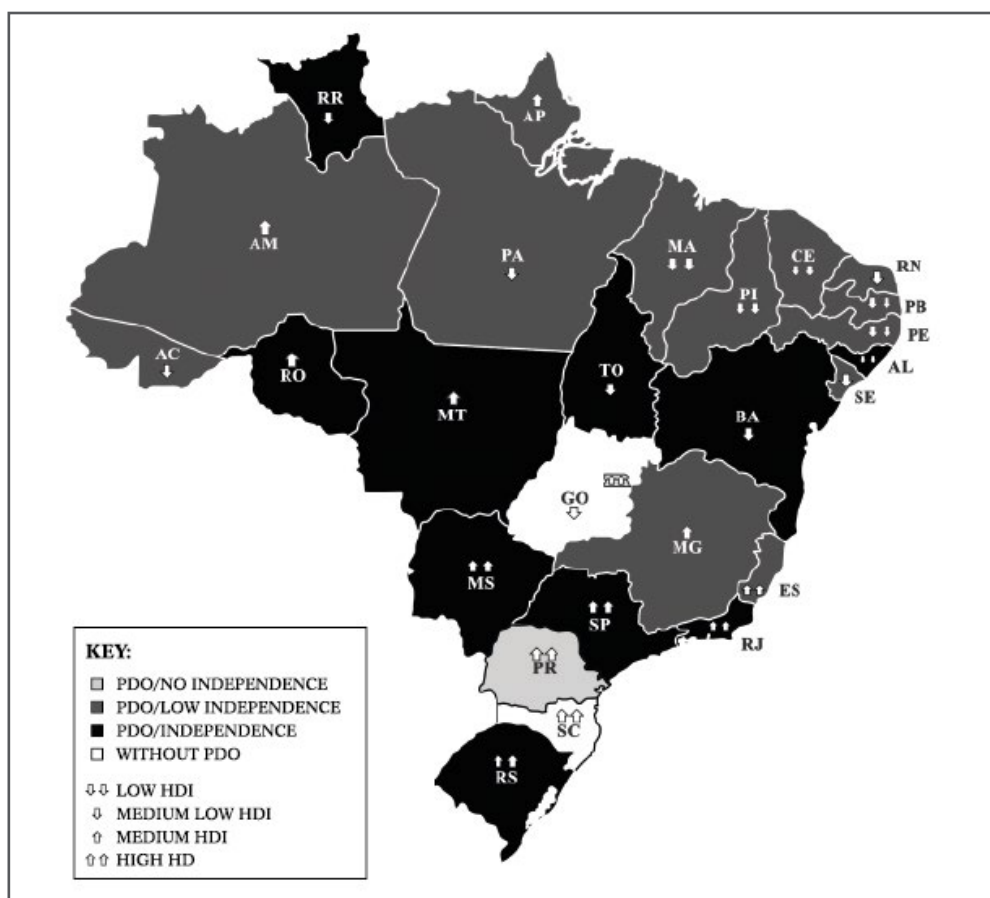
them was in a state with a high HDI (ES), four in states with a medium high HDI (AM, AP, MG, RO), three in states with a medium low HDI (BA, RO, SE) and four in states with a low HDI (AL, MA, PB, PI). Lastly, out of the five independent PDOs, two were in states with a high HDI, one in a state with a medium high HDI (MT), one in a state with a medium low HDI (AC) and one in a state with a low HDI (CE).

In 2006, the only Public Defender's Office without independence was found in a state with a high HDI (DF). Out of the 14 PDOs with low independence, one was in a state with a high HDI (ES), three in states with a medium high HDI (AM, AP, MG), four in states with a medium low HDI (AC, PA, RN, SE) and six in states with a low HDI (AL, CE, MA, PB, PI, PE). And lastly, out of the nine independent Public Defender's Offices, four were in states with a high HDI (MS, RJ, RS, SP), two in states with a medium high HDI (MT, RO) and three in states with a medium low HDI (BA, RR, TO).

In 2009, the two Public Defender's Offices without independence were found in states with a high HDI (DF and PR). Out of the 13 PDOs that had low independence, one was in a state with a high HDI (ES), three in states with a medium high HDI (AM, AP, MG), four were in states with a medium low HDI (AC, PA, RN, SE) and five in states with a low HDI (CE, MA, PB, PI, PE). Lastly, out of the 10 independent PDOs, four were in states with a high HDI (MS, RJ, RS, SP), two in a state with a medium high HDI (MT, RO), three in one with a medium low HDI (BA, RR, TO) and one in a state with a low HDI (AL).

The map below illustrates the panorama in the last period.

Map 1. Independence of Public Defender's Offices an HDI in Brazilian states in 2009



Source: Brazilian Public Defender's Office Database.

This distribution shows that prior to the reform there was no valid relationship between independence and HDI. In spite of this, we were able to see that during the reform there was a tendency for non-independent states with a low HDI to remain so. They seemed incapable of establishing independent Public Defender's Offices. A comparison between periods showed a tendency towards an expansion of independence after the reform, including in states with a low HDI. However, the fact that states with a high HDI remained non-independent after that reform is worthy of attention, as it shows that as well as socioeconomic criteria, cultural and political factors also interfere in the institutional trajectories of states such as Paraná and the Federal District.

Conclusion

This article has investigated the institutionalisation and reform that granted independence and new functions to the Public Defender's Office in Brazil, with a focus on the process in the states. Our main findings can be summarised as follows:

In the Brazilian case, the achievement of independence can be explained based on two theoretical references of judicial empowerment. In ideational terms, the reform and attainment of independence originate from a long process of fighting for democracy and for guaranteeing rights in Brazil, even before the end of the military regime. The presence of pressure groups, associations and political actors in the institutionalisation of democratic policies in Brazil has shown itself to be vital, as has the great pressure exerted by international bodies, which have been eager for justice systems reforms and for executive bodies that are actually independent. From the governance point of view, there has been a visible change in the patterns of Brazilian federalism in the last few decades, from the granting of independence to the three subnational entities (federation, states and municipalities), resulting in a strengthening of regional inequalities, to a more recent one by the federal Executive attempting to establish uniformity, often using judicialisation as support. The PDOs' independence can be seen as an attempt to standardise public assistance to the most vulnerable sectors in the states, thus aiming at guaranteeing more equitable access to justice in the country.

This process did not occur without struggles and conflict, especially among the justice system's actors themselves, revealing an overt clash between the Public Defender's Office, the State Prosecutor's Office and the Brazilian Bar Association.

The institutionalisation and implementation of independence in the states took place in a slow and varied fashion. There was a rise in independence in procedural terms, an increase in the Chief Public Defender's power, but there are still restrictions as to his power in budgetary matters. Public defenders are now more independent in the exercise of their new powers, such as in the filing of class actions. In spite of a constant increase in the number of defenders in the states, of the higher budgets in the institutions and of the average wages of these professionals, there are still deficits (in terms of active and needed defenders) and inequalities (compared to other bodies of the justice system).

Few studies have aimed to investigate the role of the other institutions integrating the justice system. An understanding of the processes of institutionalisation and independence of these new institutions – considered vital for the consolidation of democracy in Latin American countries – is crucial for carrying out comparative analyses of legal studies in political science. And this is a debate that has only just begun.

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