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Legal defense in Latin America: challenges within change

Ludmila Ribeiro[1] · **Gustavo Fondevila**[2]

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Introduction

Over the past few decades, Latin American countries have reformed their criminal justice systems to strengthen the rule of law by reducing the authoritarian powers previously enjoyed by the State (Langer, 2007). The final decades of the twentieth century were dedicated to the transition from authoritarian to democratic regimes, with the criminal justice system a focus of major changes (Duce, 2009). One of the main reforms to the criminal justice system was to enforce the rule of law through the use of an accusatorial method to manage penal conflicts.

As argued by Ribeiro et al. (2022), in the adversarial system, defense and prosecution alike participate in investigations and agree on the validity of evidence to be submitted before a judge, who then counterbalances the powers between the two parties. As a result, the adversarial system searches for "proof" intended to produce evidence "beyond a reasonable doubt" throughout the cross-examination. On the other hand, the inquisitorial system searches for the "truth" through a secretive investigation conducted by the judge, who decides what evidence is to be presented in court, in addition to directly examining defendants, witnesses, and experts. The final outcome is the "truth" about the offense and the offender.

The change towards an accusatorial system has resulted in the adoption of new Legal Defense agencies, charged with providing proper assistance to citizens who cannot afford a private lawyer. While most Latin American countries have implemented this system, they have not all followed the same model. This has opened up a field of comparative analysis in the region. When planning this special issue, we took on the challenge of creating a database of these agencies, including their year of institutionalization, their main features, and how they work on a daily basis.

✉ Gustavo Fondevila
gustavo.fondevila@cide.edu

Ludmila Ribeiro
lmlr@ufmg.br

[1] Federal University of Minas Gerais, Av. Pres. Antônio Carlos, 6627 - Pampulha, Belo Horizonte, MG 31270-901, Brazil

[2] Center for Economic Research and Teaching (CIDE), Carretera México-Toluca 3655, Col. Lomas de Santa Fe, 01210 Mexico City, Mexico

Unfortunately, we were unable to complete the database as intended. In the following table, we present the name of these offices and the year in which they started. This is the only information available on all the institutional websites. According to our data collection, public legal defense agencies have come to fruition over the past three decades, though there are systems that have been working for almost a century, such as in Costa Rica (Table 1).

Data regarding the number of public defenders working in these offices, how they became employees of these agencies (and more importantly, how they are held accountable), as well as the mechanisms developed to select them, are still under way. Using mechanisms of active accountability, we have requested information regarding the budget, the number of citizens served and subjects most demanded. This attempt at gathering information was also unsuccessful, highlighting the importance of case studies in each country to provide a picture of not only what these agencies are capable of achieving on a daily basis; but also what role they have in securing the Rule of Law and the proper functioning of the accusatorial system.

The main consequence of the scarcity of public information on the Legal Defense Agencies institutional websites is the relatively limited dialogue that is thus possible between countries, inhibiting a systemic and comparative perspective (King & Smith, 2014). Hence, one of the aims of this special issue is to motivate scholars to explore this comparison, identifying how legal defense varies across the region, even when institutions have common features, such as the role that they play in

Table 1 Agency responsible for the provision of public legal defense, and year of creation, per major countries in Latin America

Country	Name of the agency	Year of creation
Argentina	Defensoría del Pueblo	1993
Bolivia	Defensoría del Pueblo	1997
Brazil	Defensoría Pública Federal	1988
Chile	Defensoría Penal Pública	2001
Colombia	Defensoría del Pueblo	1991
Costa Rica	Defensa Pública	1928
Dominican Republic	Defensoría del Pueblo	2001
Ecuador	Defensoría Publica	2008
El Salvador	Unidad de Defensoría Pública	2008
Guatemala	Instituto de la Defensa Pública Penal	1994
Honduras	Defensa Pública	2014
Mexico	Defensoria Pública	1998
Nicaragua	Defensoria Pública	1998
Panama	Defensoría del Pueblo	1992
Paraguay	Defensoría del Pueblo	1992
Peru	Defensoría del Pueblo	1993
Uruguay	Defensores de Oficio	1992
Venezuela	Defensoría del Pueblo	1999

Source: Governmental website of each country

counterbalancing the power of prosecutors, the judicial workload, management tactics, infrastructure design, access to detainees, and the ability to reduce incarceration rates (pretrial and conviction).

The organization of this special issue

This special issue includes ten papers from four different countries: Argentina, Brazil, Chile, and Mexico. As organizers, we invited scholars from all the countries mentioned in Table 1, as these are both the most prominent countries in Latin America and the ones that have implemented Legal Defense Agencies to improve the quality of democracy in their criminal justice systems. While various authors responded positively to this call, many papers did not meet the criteria established by the journal. Nevertheless, information on the issue should not be overlooked, as reports on the workings of these legal defense agencies have not been widely disseminated. On one hand, this prevents the internationalization of law studies developed in the region, as English speakers cannot access studies written in Spanish or Portuguese. On the other hand, it compromises the development of the Legal Defense agencies themselves, as these institutions cannot learn from the changes implemented successfully in neighboring countries.

After a careful selection of contributions, we have been able to include various methodological approaches used to understand legal defense in Latin America, as most of the papers included in this Special Issue use ethnographic methods. A probable explanation for this is the lack of proper data, as illustrated by our own efforts to gather information on Legal Defense Agencies. Despite the Freedom of Information Laws that came into force at the beginning of the twenty-first century, agencies show little willingness to comply, and do not respond properly to requests for information. In addition, Latin American social scientists have a certain distaste for quantitative methods, although this has slowly started to change as more students complete their doctoral studies in the United States and return to their countries of origin to improve methodological knowledge (Cano, 2012). The combination of these two elements makes quantitative studies on the workings of Legal Defense a poorly examined area, preventing a broader understanding and a regional perspective.

The majority of papers in this Special Issue are from Brazil, which was unanticipated. This may be attributable to the substantial efforts of the Ministry of Education to make Brazilian Social Science more international (Mosbah-Natanson & Gingras, 2014). These included a partnership created in the 1990s with the Ford Foundation to transfer knowledge of quantitative methods developed in the United States to Brazilian sociologists and political scientists (Soares, 2005; Neiva, 2015), combined with financial aid for internships at the top universities in the USA to develop skills on quantitative data gathering and analysis (Cano, 2012), and grants from the Ministry of Science and Technology for Brazilian publication in high impact journals (Neiva, 2015). These factors might account for six of the ten papers selected for this special issue being from Brazil. They also explain why three apply statistical analysis to assess whether assistance by public lawyers is statistically associated with a better outcome for the client served.

This Special Issue also includes four papers written by Latin American scholars living in the United States and England. These professionals have migrated from their home countries to the Global North seeking better training and jobs, and are increasing their understanding of the criminal justice system in the region. It is worth pointing out that they are based at institutions with a high Spanish speaking composition, such as the Texas State University, University of Texas at San Antonio and Rutgers University Newark. Their training at such schools is likely to have prepared them well for meeting the requirements of publication in International Journals, which may explain why they were more successful than colleagues who have not had the opportunity to study in English-speaking countries.

New agencies, new services: The professional commitment

This Special Issue aims to describe how legal defense has been structured in Argentina, Brazil, Chile, and Mexico over the past decades, and the challenges faced by these institutions to provide a proper service for those who cannot otherwise afford a defense. Initially, there was an expectation that the availability of public defenders would reduce the use of pretrial detention, with quicker trials and shorter prison sentences. However, papers published in previous years have noted that public defenders do not affect the likelihood of pretrial detention at initial appearance hearings in Colombia (Rengifo & Marmolejo, 2020) and Brazil (Lages & Ribeiro, 2019). Fondevila and Quintana-Navarrete (2020) found that private lawyers were more effective in guaranteeing measures other than pretrial detention in Mexico between 2010 and 2014. In Guatemala and Chile, when defendants have private lawyers, the case is likely to be treated differently, with an increased likelihood of a milder punishment (Michel-Luviano, 2011). A possible explanation for these different results is that the new legal defense institutions are not able to cope with the informal dynamics in which courts are embedded, preventing the defense from playing a more prominent role (Dressel et al., 2017).

In all four countries included in this Special Issue, Legal Public Defense was focused on presenting how courtroom environments work and how the decision-making process is affected by the presence of public defenders. The results are promising, with public defenders more likely to achieve better results.

Ang's study in Mexico shows that most citizens facing a judicial process are assisted by public defenders, even though this agency receives around one-tenth of the budget allocated to District Attorney and Judiciary offices. Yet, much of a public defender's time is taken up by waiting. Curiously, this turns out to be a specific feature able to achieve a more favorable outcome: while waiting, public defenders can (i) exchange key information about specific cases with other operators; (ii) establish cordial interagency relations; and (iii) enforce "forced encroachment," meaning developing skills that will better secure their clients interests. In sum, even something that appears to be useless, such as waiting to be served in public bureaucracies, can be used to improve the service provided by legal defenders. Nevertheless, this demands a certain commitment by public lawyers, given the amount of time devoted

to waiting in offices, an interval that allows them to discuss their cases, and reach agreements that have proven to be effective for their clients.

Along the same lines, Arraigada highlights how professional commitment is indispensable for the endurance and success of these new agencies. Through 45 in-depth interviews with lawyers working in the Unit of Penitentiary Defense in Chile, she identifies how these professionals create biographies of their clients with four specific categories: identification, privilege, calling, and admiration. Even though the institution calls for a universal service of all indigent defenders, these lawyers provide specific services depending on their level of personal involvement with a case or person served. These features are helpful for understanding why some offenses and offenders are more successful in terms of their demands than others: it all depends on how their story touches the hearts of their lawyers.

Godoi examines how public defenders are actors of the utmost importance in the assurance of a stable flow of inmates inside the penitentiary system. He shows how the Legal Defense Office was institutionalized in different Brazilian states and the challenges that they continue to face as they are not recognized as equal partners by judges and prosecutors. When examining the sentence enforcement proceedings, the role of these public lawyers is described as "absolutely essential": they oversee the length of imprisonment, guaranteeing that inmates do not serve even one extra day. Therefore, legal defenders have to call for judicial attention in terms of rights and benefits that detainees could take advantage of, especially regarding an early release. Though, it also implies extra work. Public defenders must register everything at the time of the trial, since requests that are not documented are forgotten even by public prosecutors who are responsible for oversight of prison sentences.

Ciocchini and Kostenwein analyze the changes that occurred in Argentina following the reforms to the Code of Criminal Procedure in the 1980s. These reforms converted this criminal justice system into an accusatorial one, especially in terms of the procedures adopted to impose pretrial detention. On the wave of these reforms, public defenders were pushed to develop a professional identity, which "sets them apart from the other legal professional peers, i.e., public prosecutors and judges". However, the introduction of managerial techniques has changed their perspective of what ought to be provided to their clients. Instead of guaranteeing a due process of law to all, they have to handle different cases, ranging from simple to complicated ones. In this sense, public defenders have to break the differentiation line, creating boundaries with police officers, prosecutors and judges to guarantee their clients rights. As a result, public defenders have become contradictory operators. On one hand, they have a discourse of commitment and differentiation from other legal professional peers, even though they are involved in practices that fall far outside of their prescribed job.

In Mexico, Chile, and Brazil, professional commitment is the primary factor that explains the success of defense requests for people who cannot afford legal services. This means that public defenders have been forced to create an identity composed of features that differ completely from those that characterize their counterparts (such as judges and prosecutors). These public lawyers are perceived as professionals able to bond with poor, indigenous and Black people (who are most likely to be brought to the criminal justice system as victims and offenders). Public defenders are also

framed as more committed to their work: since Legal Defense Offices are new agencies, their employees do not enjoy the same level of respectability or legitimacy as other criminal justice system operators. In institutional terms, Legal Defense Offices pay less to their employees, have more barriers to access bureaucratic authorities, and make their professionals wait to be served. In sum, the job requirements are difficult and salaries are not comparable with those received by other judiciary members and by defenders working in the private sector. This creates the impression that only people with a particular calling are able to act as public defenders.

Nevertheless, to achieve proper access to justice for their clients, these public defenders need to create genuine bonds with other criminal justice actors, such as police officers, prosecutors, and judges. As a result, they participate in the same leisure activities, share coffee in the courtroom between hearings, and come to agreements that imply curtailing their defense arguments to achieve a more favorable outcome in a difficult case. All these situations reinforce the sense of secrecy around the decision-making process and the inquisitorial features of the criminal justice system, rather than challenging them. As a result, all four papers that present the Legal Defense Offices as new institutions that provide a democratization of legal services also point out how these same committed actors end up creating side effects. These analyses are important as they focus on issues that still need to be addressed through theoretical developments of how the criminal justice system works in Latin America, and how specific aspects could be improved by regional public policies to make justice achievable to the poor.

New agencies, old problems: Barriers to institutional development

In this special issue, we have gathered studies able to explain how criminal justice systems have changed to provide new services without major reforms to the law. This is especially the case in Brazil, where the institutionalization of Criminal Justice dates back to the 1941 Code of Criminal Procedure that created the police structure and the judicial organizations and duties (Ribeiro et al., 2022). Despite the reforms implemented in the last decades, criminal procedure in Brazil is still divided into two specific phases: an inquisitorial one, managed by the police forces with their secretive investigations (police inquiries); and an accusatorial one, with the presence of the defense once charges have been presented to the judge by the public prosecutor.

Kant de Lima (2010) argues that despite this regulatory division between inquisitorial procedures and accusatorial ones, all practices are in fact inquisitorial. First, the police investigate and trials are devoted to the "discovery of truth", without any reasonable doubt (instead beyond a reasonable doubt as an adversarial system would require). Second, once trials start, judges are the driving force: instead of counterbalancing defense and prosecution powers, the judge decides what evidence will be presented, which questions will be asked and comes to a final verdict. Seeking a specific outcome means not only learning the old rules, but also creating secretive agreements, and supporting police arguments to better frame the discourse about the offense and the offender. Thus, new institutions created by the Brazilian Republican

Constitution of 1988, such as the Public Defense Office, are captured by this inquisitorial framework. Public lawyers are obliged to apply rules from an authoritarian regime, and since they share the courtroom with actors and agencies that have been operating within that regime, they end up creating a stock of knowledge that is far from democratic (Ribeiro et al., 2022). These are some of the stories presented in the second part of this special issue, with far less optimistic results.

To provide better assistance to people served by public defense agencies in Brazil, public defenders have been sent to other countries for training. The United States is the preferred destination, as it is considered to be an example worth following by Brazil's fragile democracy (Langer, 2021). However, the cultural features of the two systems are completely different, even though rules themselves may be mimicked from one country to another. Engelmann, Menuzzi and Pilau analyze the international cooperation between Brazilian and United States agencies of public defense from 2008 to 2018. They note how this bridge has increased the fight against corruption in Brazil, using mechanisms widely available in the USA (a post charge plea bargaining variation). One of the consequences of this cooperation has been the strengthening of the inquisitorial features of the justice system, since the agreements are secretive and sentences are not subject to major revisions.

Oliveira, Alvarez and Almeida provide an in-depth examination of the changes carried out within the juvenile justice system. Their conclusions are paradigmatic examples of how legal reforms have been unable to create consensus among the various legal institutions regarding the causes of crime and the measures needed to contain it. Using a unique data set of all young people brought to the juvenile justice system in São Paulo between 1990 and 2006, they are able to show that judges apply their own stock of knowledge, regarding how things are done within the adult criminal justice system, to the juvenile system, something prohibited by law. The final result of this mimetic operation is that the two systems strongly resemble each other, despite the reforms that have attempted to make juvenile justice more progressive with more guarantees for vulnerable youths.

Rodrigues and Lages analyze custody hearings that were implemented in Brazil in 2015 to reduce the use of pretrial detention and police violence in flagrante delicto arrests. They argue that these hearings aim to introduce accusatorial features in an inquisitorial phase, since they are held after a person is caught red-handed by the police. This hearing also commits prosecutors, defenders and judges to agree on a final decision about the cautionary measures that ought to be imposed. Using data gathered in Belo Horizonte, they argue that public defense appears to be a powerless institution: prosecutors decide with judges what measures will be imposed on arrestees even before they are presented to the courts. In addition, decisions taken at these hearings are accepted as the absolute truth regarding the crime and the suspect. In fact, pretrial detention often anticipates the conviction. It not only shortens the length of criminal trials, but also increases the chances of a conviction. In the end, the defense plays only a ceremonial role in these hearings: they are present in courts, but only to agree with the requests made by the prosecutor, without the possibility of arguing for a better outcome for their clients.

The same conclusions are reached by Gonçalves, Lages and Leocádio when analyzing cases of drug trafficking trialed in a Brazilian city. They found that

convictions and length of imprisonment were determined by legal prescriptions as well as by defendants' characteristics. There was no statistical difference regarding the type of legal assistance provided: whether public or private, the final outcome is associated with the defendant's criminal records and the material seized by the police force, such as firearms, precision scales and plastic bags. Moreover, the legacy of slavery still impacts decision-making, as non-whites and less educated defendants are more likely to be convicted. Again, the Legal Defense agencies are framed as helpless institutions.

Moving from Brazil to Mexico, Rengifo, Avila and Ibanez show the persistence of racial bias in the criminal justice system. Their point of departure is understanding the mechanisms mobilized by legal defenders to achieve better results for their clients. Defenders are successful in their use of instrumental arguments when suspects are accompanied by friends and relatives. On the contrary, when offenders are alone in the courtroom, public lawyers need to rely on expressive methods, something that weakens the accusatorial model and converts it into a more inquisitorial one (or more similar to how the Brazilian Criminal Justice System operates). In both scenarios, the defendant's skin color plays a prominent role: the darker the skin, the worse the result. Some explanations for this outcome are based on the legacy of colonization and slavery that has created a social structure that marginalizes Blacks citizens (and their descendants), and makes them more likely to be victims of violence (including being murdered by the police and other state officials), to die from malnutrition, and to be held in prison without a trial.

In sum, in this second section the papers show how the legacy of slavery continues, and implies an absence of effective public assistance for people who cannot afford a lawyer to represent them. The Public Defense Officers, created in recent decades, are new, but they still operate within old frameworks. They are still favoring Whites, the more educated or those who are able to influence the public prosecutor to request that judges impose minor measures as their final sentence. Despite the new actors, the selectivity of the criminal justice system, as in colonial times, is reinforced.

Final remarks

Comparative case studies from different Latin American contexts can enrich theoretical concepts and policy implications in this area, something that is not addressed in this Special Issue. Most of the papers in this volume are data-driven, meaning they have departed from sociological concepts to understand how the law prescribing the work of the Legal Defense Offices is transformed into practice by people who are new to the job. Some theoretical frameworks used by these scholars are imported from the US. Even though some authors overlook the specificities of Latin American countries, they present a more in-depth explanation about the role played by the legal defense institutions in guaranteeing citizen rights. Looking to the future, a second special issue might be called for, given the developing nature of the law.

Data availability No data was generated or analyzed.

Declarations

Conflict of interest None.

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