

**USING CLASS ACTIONS IN BRAZIL TO PROTECT THE HOMELESS: public defenders and the protection of social rights of vulnerable people, through legal aid and class action the case of “social rent” program in rio de janeiro**

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**ABSTRACT**

This paper aims to demonstrate the activity of the Public Defender's Office of the State of Rio de Janeiro, in Brazil, in the protection of social right to housing, through legal aid services delivered to low income citizens, be it in an individualistic and traditional approach or, sometimes in a more effective way, in a collective perspective, by means of class actions and other mechanisms. It also explains the extrajudicial measures and proceedings taken by the public defenders, lobbying at the State Parliament, with the goal to revert a political decision of the Governor which - if not revoked - could have resulted in the extinction of the “social rent” program, that currently is indispensable to safeguard the right to housing to thousands of families in the State of Rio de Janeiro.

**Keywords:** Class Actions; Legal Aid; Public Defenders; Right to Housing.

***UTILIZAÇÃO DE AÇÕES COLETIVAS NO BRASIL PARA PROTEÇÃO DE PESSOAS SEM MORADIA: a defensoria pública e a proteção dos direitos sociais de pessoas vulneráveis, através da assistência jurídica e da tutela coletiva - o caso do programa “aluguel social” no rio de janeiro***

**RESUMO**

Este trabalho tem como objetivo demonstrar a atuação da Defensoria Pública do Estado do Rio de Janeiro, no Brasil, na proteção do direito social à moradia, através de serviços de assistência jurídica prestados a cidadãos de baixa renda, seja em uma abordagem individualista e tradicional ou, às vezes de maneira mais efetiva, numa perspectiva coletiva, por meio de “class actions” e outros mecanismos. Também explica as medidas e procedimentos extrajudiciais conduzidos pelos defensores públicos, fazendo lobby junto ao Parlamento Estadual, com o objetivo de reverter uma decisão política do Governador que - se não revogada - poderia ter resultado na extinção do programa de “aluguel social”, que atualmente é indispensável para salvaguardar o direito à moradia de milhares de famílias no Estado do Rio de Janeiro.

**Palavras-Chave:** Ações Coletivas; Assistência Jurídica; Defensores Públicos; Direito à Moradia.

## INTRODUCTION

The provision of public services and programs related to the social rights of the most vulnerable people is being largely affected by the severe economic crisis that Brazil, and especially the State of Rio de Janeiro, is facing currently. Such economic crisis is aggravated by the dramatic political-institutional crisis, which is a result of very serious corruptions scandals involving both federal and state government. This framework has significantly affected the legal aid services that are also under serious threat: after more than a decade of continuous and progressive public investment to consolidate the Public Defender's Office, as already anticipated in a paper presented in the 2015 edition of ILAG Conference, austerity has already arrived<sup>1</sup>.

One of the government programs affected by the financial crisis was that of "social rent" program, which was created to fund housing rents for about 10,000 homeless families in the state of Rio de Janeiro. This program was implemented as a provisional measure, until it was possible to build enough housing units for homeless people, within the scope of public housing policies to provide a safe place to live for thousands of families that have had to be evicted from their homes, either because of public works (many of them carried out in preparation for the Olympics) or because of natural catastrophes in the mountainous regions of Rio de Janeiro State. However, at the end of 2016, alleging lack of budgetary and financial resources to maintain the program, the Government of the State of Rio de Janeiro issued a decree extinguishing this "social rent aid" program, among, several other measures of austerity that took thousands of people to the streets in protest.

This paper will discuss the measures taken by the Office of the Public Defender to reverse that situation. A class action was filed by the OPD with the purpose of ensuring continuity in the payment of the lease: the Court granted the request, at the outset, and determined the arrest of the amounts necessary for payment in the State Government bank accounts. Parallel, public defenders issued a "technical note" analyzing the question, which was disclosed by the press, demonstrating the unreasonableness and illegality of the measure, which violated the provisions set forth in the Brazilian Constitution on the effectiveness of social rights, among which the right to housing. Lobbying was carried out by the public defenders in the State Parliament, on the basis of this "technical note", which resulted in the formation of a bloc of supra-partisan parliamentarians (including some members of the political parties that are responsible for the state government), who drafted and approved a decree which invalidated the act of the Governor. These measures avoided the need to file thousands of individual lawsuits, which would be necessary to guarantee the rights of the homeless.

In order to allow an adequate understanding of the role of the Public Defender's Office in the specific case addressed here, it seemed necessary to make some preliminary and briefly considerations about "housing rights" in Brazil, which will be done in the first topic, right after this introduction.

Then, some concrete situations of threats and violations of these rights, which occurred in the city and in the State of Rio de Janeiro, will be presented, either in the context of the mega sport events (like the FIFA's World Cup and Olympic Games) that took place in Rio during this second decade of this XXI century, or in cases related to families that have lost their homes due to serious natural disasters that have occurred in recent years. In most of these situations, the intervention of the Public Defender's Office was necessary, as will be demonstrated.

Finally, after a brief presentation of the Brazilian Legal Aid model and the role of the Public Defender's Office, we will discuss the effective activities of this body, in the many varied areas of action, seeking to protect and safeguard the rights to housing for the most vulnerable people of our society, especially through the filing of class actions and also through extrajudicial action, with a preventive scope.

## **1. HOUSING RIGHTS IN THE BRAZILIAN LAW – A RIGHT PROMISED BUT NOT FULLY GUARANTEED**

The right to housing is recognized in many of [international human rights documents](#). Article 25 of the [Universal Declaration of Human Rights](#) recognizes the right to housing as part of the [right to an adequate standard of living](#). It states that: "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, **housing** and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control". Article 11(1) of the [International Covenant on Economic, Social and Cultural Rights](#) (ICESCR) also guarantees the right to housing as part of the [right to an adequate standard of living](#).

Like some Latin American Countries (Argentina, Colombia and Uruguay, for example), and other "growing economies", (as it is the case of South Africa<sup>2</sup> and India), Brazil enshrines in its Federal Constitution a right to housing, among several other social rights. Article 6 of the Constitution reaffirms the social [right to housing](#) along with [health](#), food, [education](#), [security](#), protection of motherhood and childhood, and assistance for people in [poverty](#). In Article 23 Clause 9, the Constitution says that not only the federal, but also the state, and the local/municipal

governments all have the power (and responsibility) to promote housing construction programs and the improvement of housing.

This means that, if the government fails in its duties to ensure these social rights, individuals and most vulnerable groups can apply to the courts to seek appropriate remedies. Unlike the so called civil and political rights (as it is the case of the right to free speech or the prohibition on torture), which impose mostly negatives duties upon states, it is well known a traditional – and, for many scholars, outdated! - human rights discourse stating that the socio-economic rights (as it is the case of right to housing) impose not an “immediate duty” upon the government, but only "progressive obligations".

In any case, there is a consensus that besides the rule imposing the progressive implementation of socio-economic rights, the States are required to ensure a minimum level of effectiveness of those rights, not being accepted the complete deprivation of them on the grounds of lack of financial resources. Also, as an inexorable consequence of the concept of progressivity, States have obligations to not take “regressive measures” that jeopardizes the effectiveness levels of the social rights already achieved (SARLET, 2008)<sup>3</sup>.

With regard to the “positive obligations”, deriving from right to housing, even if it is deemed as a “progressive obligations”, it is possible to identify implementation of public policies with the objective of ensuring effective access to adequate housing (SUSTEIN, 2001)<sup>4</sup>. This may occur through proactive State action, encouraging the provision of financing lines (raised in the private financial market or using public resources) for the acquisition of dwellings, and, in some cases, partially subsidizing the respective costs - or even investing directly resources from the public budget (especially for very low income families) to make feasible the construction of houses and, above all, to provide basic infrastructure such as sanitation, public transport and protection against environmental risks and the prevention of environmental disasters. In Brazil, those obligation were expected to be met through a federal government program, named as “*Minha Casa, Minha Vida*” (my home, my life!), launched in 2009.

At the same time, in cases of emergency situations (for example, due to natural disasters), where it is necessary to shelter homeless families whose income does not allow them to afford living expenses, or in cases of serious need to remove dwellers in order to meet relevant public interest situations, and also in the cases when it is not possible to wait for the construction of new dwellings, the right to housing can be guaranteed by the State through payment of financial assistance for the cost of renting residences belonging to private owners. In Brazil, this kind of program is usually named “social rent” programs. This is the case of the State of Rio de Janeiro that

established the "*Morar Seguro*" program in 2010, stating that this "rent assistance"<sup>5</sup> would be a kind of transitory benefit to be paid until the effective resettlement<sup>6</sup> of the family.

Even though in the last few years some initiatives, in the two above mentioned ways, have been implemented in Brazil, and despite its constitutional and legal provisions, the country still has an enormous rate of housing exclusion, especially among the poorest sections of population<sup>7</sup>. Historically, the issue of the housing deficit, especially for the most vulnerable, has never been tackled with due priority by the various governments, and the inclusion of an express provision in the Federal Constitution (through Constitutional Amendment 26 of February 14, 2006), ensuring the right to housing, had the purpose of providing a legal basis to foster public policies aimed at overcoming this deficit<sup>8</sup>.

In the case of the State of Rio de Janeiro, and especially in the city of Rio de Janeiro, as it is the case of most other Brazilian metropolises, the housing deficit situation is even more serious and originates mainly from the phenomenon of "rural exodus", which deepened sharply with the growth of the country's industrialization in the second half of the twentieth century, without the existence of consistent public policies at that time, able to ensure adequate housing for the poorer population seeking jobs in the cities. The growth of favelas (slums) in the outskirts of big cities is a result of this<sup>9</sup>.

There is also another chronic problem that aggravates the "quest for housing" in the city of Rio de Janeiro and also in the mountainous region of the State, located in the outskirts of the capital city, around 60 to 100 kilometers in average distance. All them are situated in an area with a very rugged relief, and many mountains have lost their natural vegetation due to the irregular occupation of the slopes by low-income population (typically favelas/slums), a situation that - together with the heavy summer rainfall common in the region - favors the occurrence of landslides and floods, with serious risks for the population that lives there. This framework directly affects the issue of the right to safe and adequate housing, which is guaranteed by law, but not effectively ensured by the government, either by its omission in its obligation to supervise the occupation of the land, or by the absence of safe housing options for low-income people.

## **2. THREATS AND VIOLATIONS OF THE RIGHT TO HOUSING OF THE MOST VULNERABLE POPULATIONS IN RIO DE JANEIRO**

In the first decade of this twenty-first century, Rio de Janeiro began a period of enthusiasm with prospects of urban renewal and improvement of its infrastructure, in order to prepare for a succession of worldwide mega-events: the city was chosen to host Pan American Games, in 2007,

and then to the World Youth Day of the Catholic Church, in 2013, for the 2014 World Cup final and finally for the 2016 Olympics. This movement was boosted by a period of significant economic development, especially due to the discovery of huge oil and gas reserves in Brazil, most of them on the coast of Rio de Janeiro<sup>10</sup>.

In 2009 a mega-project to revitalize the port area of the city, known as "Porto Maravilha", was launched. Also with the goal of preparing the city for the mega-sport events, the construction of large road structures and the opening of new transport routes began (Transcarioca, Transoeste and Transolimpica). In the same spirit of remodeling the city, as a legacy to be left by the Olympics, it was also launched the "Morar Carioca" ("Carioca" Dwelling) program<sup>11</sup>, aimed at the urbanization of favelas/slums, supposedly focused on the right to adequate housing, sanitation and urban equipment. However, what needs to be said is that, in practice, all these programs and public works, while they were in progress, led to serious violations of the right to housing, especially to the poorest and most vulnerable populations.

Because of all these interventions in the urban setting, the need for removal of many residences located in the areas in which such interventions would occur was predicted and expected. In view of the time required to comply with the schedules agreed with FIFA and the IOC, and unavailability of funds to cover all the major works being carried out and, in parallel, to invest in the construction of new houses for families whose removal was of interest to the municipal and state authorities, the solution found was the expansion of rent financial aid programs (social rent). This expansion of these programs was due not only to the need for urban interventions in the city of Rio de Janeiro, but also to the need to assist numerous families who were victims of torrential rains that hit the State of Rio de Janeiro in the year of 2010<sup>12</sup> and, even more seriously, in the year 2011.<sup>13</sup>

It is necessary to note that behind this whole process of urban reform, (and also alleged governmental initiatives for protecting low-income families living in areas - supposedly - subject to environmental disaster risks) there was also a strong movement of real estate speculation in the city of Rio de Janeiro, which had as one of its characteristics the purpose of removing the poor from places that were to be destined to projects aimed at the high income population, with the installation of sports, tourism and leisure equipment intended for these new occupants of the requalified urban space, in the context of the so called "Olympics legacy".

The incontrovertible fact is that as a side effect of the implementation of all those projects, measures have been taken that have violated the right to housing of thousands of citizens, with forced removal of residents, and numerous other violations of rights, often with fallacious and unsubstantial arguments (FAULHABER and AZEVEDO, 2016).<sup>14</sup> According to municipal

governmental data, only in the period of 2009 and 2015 (years immediately before the Olympic Games), 77,206 people were evicted from their homes by the City Hall. Very often those evictions forced residents of areas with a better infrastructure – and most valued – to move to peripheral regions and, in addition to all this, thousands of houses were destroyed in a city that had a housing deficit of more than 220,000 units.

Practices to frighten dwellers were also adopted by municipal officers, during the eviction process. They started to carry out frequent visits to the communities, threatening to remove people without any finance compensation if they did not agree with the terms imposed by City Hall. In this same threatening strategy, many houses were marked (with spray paints!) with the acronym SMH (from “Municipal Housing Secretariat”) and those that received the mark were doomed to be destroyed by City Hall. One of the most emblematic cases in this type of situation was the Vila Autódromo community<sup>15</sup>. It is located in a privileged area of Rio’s west zone, a region in which, for the past two decades, there has been a big increase in the number of buildings and a strong real estate speculation, which was further intensified by the installation of numerous sports equipment for the 2016 Olympics in the vicinity of the said community. Because of this, Vila Autódromo began to suffer strong threats of forced removal. Some dwellers ended up giving in and negotiating to leave their houses, and were included in the “social rent” program, while waiting for the building of new houses in other areas. Others, even not wanting to negotiate, were forced to accept court decisions that granted City Hall the right to tear their homes down. The Rio de Janeiro Public Defender’s Office worked strongly in support of the rights of the dwellers, in Vila Autódromo<sup>16</sup>.

Another similar case was the forced evictions in Morro da Providência, as part of the interventions promoted by the urban revitalization project of the Port Zone (Porto Maravilha, mentioned above). The original occupation of that area began between the late nineteenth and early twentieth centuries, initially receiving the name of “Morro da Favela”. The first name of this area became so well known that, until today, it is used to name informal settlements throughout Brazil. The reasons attributed for the evictions in Morro da Providência were that part of the houses were located in areas of risk. However, residents – represented by the State Public Defenders Office, presented a report showing there was no “real” technical justification for those removals. In 2012 the public defenders filed an injunction and a judicial order was given to stop the construction works and evictions. Some families who already had their homes demolished (before the judicial order was issued) have been included in “social rent” program and were expecting to be kept in it until they can receive permanent housing.

This same palliative solution (payment of 'social rent') to safeguard the right to housing has been assured to many other homelessness families who have lost their homes due to climatic

disasters, as already mentioned above. One of the sites most seriously affected by the heavy rains, in 2010, was the locality of Morro do Bumba, in Niterói: 48 lost their lives in a huge landslide<sup>17</sup>. The Public Defender's Office of the State of Rio de Janeiro worked hard to ensure the right to housing<sup>18</sup>, granting through judicial orders the inclusion of families who were victims of the effects of the rains of April 2010, in "social rent" programs (PENALVA SANTOS, 2016)<sup>19</sup>. This also happened in the mountainous region of Rio de Janeiro (cities of Petrópolis, Teresópolis and Nova Friburgo), which was hit hard by torrential rains in 2011 – considered the "country's worst-ever natural disaster"<sup>20</sup> that resulted in the loss of housing for thousands of families (more than 900 hundreds people have lost their lives). The "social rent" palliative solution was also adopted as an emergency transitional measure until it is possible to build such families popular housing. To date, after more than six years, not enough houses have been built to serve this entire population, in both cases above mentioned: Morro do Bumba and mountainous region of Petrópolis, Teresópolis and Nova Friburgo, which makes it necessary to continue "social rent" program.

There is also another group of people who are in a situation of great vulnerability, as regards as their right to housing, which are those who have been convinced (or in some cases compelled) to vacate the houses in which they lived (all in favelas!) under the argument that the state government would promote redevelopment, with the construction of new homes, under better conditions than those previously existing. This occurred, for example, in some communities in the so-called "Complexo do Alemão" area. These interventions and works of the state government, conducted between 2010 and 2012, occurred at a time when the economic and financial situation was very positive and were inserted in the context of the implementation of the public security policy through the "Peacekeeping Police Units – UPP". These families (about 2,500) were removed from their homes, and placed on the "social rent", with the promise that they would receive new housing, within 18 months. However, with the onset of the economic crisis, this promise has not been fulfilled and to this day: everyone continues to depend on the "social rent".

All these specific and diversified factual circumstances above listed, in the capital city and in the interior area of the State of Rio de Janeiro, contributed to further aggravate the housing deficit, which was already chronic in the region and in the whole country. Considering the unavailability of financial resources for the construction of new houses, at a suitable pace to reduce this housing deficit, it was indispensable to maintain the "social rent" programs, as instrument for the effectiveness of the right to housing, guaranteed in the Brazilian Constitution.

Much less costly than it would have been necessary to build new homes to house these homeless people, the "social rent" program represented an expense that was comfortably supported by the public budget of the State of Rio de Janeiro during the period of 'bonanza' in which the



economy of the country was a few years ago. However, already in the year before the Olympic Games, that is, in 2015, Brazil and the State of Rio de Janeiro began to face turmoil in the political and economic scene, which implied a drastic reduction of budget revenues. There was a fear that this financial constraint would even prevent the holding of the Olympics in 2016<sup>21</sup>.

The shortage of financial resources, with delays in the salaries of civil servants, has affected the regularity in the provision of indispensable public services, such as health, education and public security. The monthly payment of the social rent benefit also began to be delayed and numerous families were threatened with eviction by their respective landlords. Under the argument of unavailability of financial resources, the State Governor simply issued a decree, in November 2016, summarily determining the extinction of the "social rent" program<sup>22</sup>. This was done, it is important to emphasize, without the government having had to fulfill the obligation to reallocate (in new houses that should be built for this purpose) families that received the benefit in definitive residences. Throughout the State of Rio de Janeiro, approximately 10,000 families depend on this benefit to pay the monthly rent of their homes, rented from private owners<sup>23</sup>. So, as their family budgets do not allow them afford this expense, if they don't receive regularly the "social rent" they will not be able to pay the monthly rent and surely they will be evicted by their landlords.

Faced with this dramatic scenario of ostensible violation of the fundamental right to housing of thousands of poor people, in a clear situation of social vulnerability, the Rio de Janeiro Public Defenders Office - which had already been involved in various cases related to this issue, as indicated above - decided to act on several fronts, be it through judicial or extrajudicial channels, with the purpose of guaranteeing the right to housing – constitutionally based - of the beneficiary population of "social rent". This will be better explained in the next session of this paper.

### **3. THE PUBLIC DEFENDER'S OFFICE AND ITS ACTIONS IN THE PROTECTION OF THE RIGHTS TO HOUSING**

The Brazilian Constitution of 1988, which consolidated the transition from military government to democratic regime, established a broad catalog of fundamental rights, especially of a social nature, and strengthened mechanisms to ensure the implementation of these rights. Among these mechanisms, as mentioned by the Portuguese sociologist Boaventura de Sousa Santos, is the option for a public model of legal aid and promotion of access to justice, through the Public Defender's Office<sup>24</sup>, considered by the same author, among other institutions of the justice system, "the one that has the best conditions to contribute to uncovering the judicial demand suppressed" (SANTOS, 2011, p. 51)<sup>25</sup>. According to the 1988 Constitution, "integral legal aid", to be delivered

by PDO, covers *legal advice* (preventive advocacy, assistance in writing contracts and legal documents and defence in “extra-judicial” jurisdictions) and *legal representation* by a public defender, as a plaintiff or defendant, in any kind of civil or criminal case. This covers any kind of lawsuit against government decisions or failure by the government to provide adequate public services guaranteed by law, including judicial review (ALVES, 2014)<sup>26</sup>.

Since 1988 the Brazilian Public Defender’s Office has been experiencing a continuous process of consolidation and expansion, as well as transformation, insofar as it reinforces and improves the normative foundation and the effective performance of the institution. It enhances its role to act beyond the classic/traditional functions of an individualistic perspective in providing legal aid services. Thus, in 2009 a broad reform<sup>27</sup> of the Public Defender's Office was approved to strengthen its administrative and financial autonomy and strengthen its independence from other branches of government. It is expressly stated that the **Public Defender's Office must be a "permanent instrument and expression of the democratic regime"**<sup>28</sup>. New attributions are explicitly attributed to the organization's profile in the defence and promotion of human rights, including legitimacy to act in its own name to protect the collective rights of vulnerable people (through class actions<sup>29</sup>) and to promote public legal education and information (PLEI) activities. All this was elevated to constitutional status, through an Amendment to the Federal Constitution, approved in 2014<sup>30</sup>. With respect specifically to class actions, a national law was enacted in 2007 allowing Public Defender's Office to file collective actions to defend the interests of groups of people in situations of vulnerability. After some controversies about the validity of this national law, the Federal Supreme Court in 2015 declared the constitutionality of the norm and definitively recognized the legitimacy of the Public Defender's Office to file this kind of actions, confirming the new role and profile of the Brazilian PDO.

Based on this role established by the Brazilian Federal Constitution and on the multiple possibilities of action, and given the numerous cases of threat and effective violation of the right to housing of low-income families, which are in a situation of vulnerability, the Public Defender's Office of the State of Rio de Janeiro has been acting in recent years on several fronts of action, as indicated below. Such actions have mainly taken place through the "NUTH – Núcleo de Terras e Habitação” (Land and Housing Law Center), which is a specialized office of the Public Defender’s Office, whose proposal is to meet mainly the collective demands related to the right to land and housing, promoting not only the judicialization of lawsuits/class actions, when necessary, but also the empowerment of the holders of these rights so that they can be protagonists of the struggle for their right. In addition, the NUTH also seeks to act as an interlocutor with the authorities of the

Executive Branch and the Legislative Branch to seek the implementation of public policies capable of promoting and expanding the right to housing<sup>31</sup>.

The work conducted by this group was based on the idea of “advocacy techniques”/”strategic litigation”, combined with the judicial litigation in strict sense, with mechanisms of social participation, dissemination of legal information to promote the empowerment of the population whose rights should be protected.

In order to better identify the real needs and demands of communities whose rights have to be protected, a practice widely used not only by the NUTH but also by other organs of the Public Defender's Office in Rio de Janeiro is the holding of public hearings<sup>32</sup>, open to the widest participation of the civil society. These meetings are an important instrument of effective democratic, plural and open action to dialogue with all actors involved, especially the authorities and government bodies with direct responsibility for the problems detected. It is also an effective means of empowerment, of mobilization for the exercise of citizenship. Such public hearings have been used many times, in the case of the protection of housing rights<sup>33</sup>. Very often, the public hearings occurred in the very places where the affected people lived. It was observed that not always the members of the community manifested the same needs and objectives. For example, in some cases of removals/evictions needed to carry out public works, part of the residents sought to ensure the right to receive financial compensation (and that it was fair), while others wanted to be kept in their homes<sup>34</sup>, questioning the public interest (of the works) alleged by the municipality.

Another kind of initiative that can be mentioned is the dissemination of information and collective guidance, through interviews published in newspapers and participation in radio and TV programs, raising the awareness of the population about their rights, as well as providing individual counselling and legal advice of parties seeking the triage/first line legal services centres<sup>35</sup>.

In the cases where the conflict of interest is unavoidable, and where there is a risk of threat or effective loss of rights, the inevitable alternative ends up being the class action<sup>36</sup> instead of traditional individual lawsuits filing<sup>37</sup>. This is what happened in 2016, when the situation of financial chaos faced by the State of Rio de Janeiro resulted in successive delays in the payment of “social rent” to the more than 10,000 families that received the benefit. In June, exactly during the Olympic Games in the city of Rio de Janeiro, the NUTH of the Public Defender’s Office had to file a class action whose main request was to oblige the State Government to immediately pay the “social rent” overdue instalments. It was also required in this class action that the Judiciary determined to the Executive Branch the continuity of the benefit, and to keep up the future instalments. The Court granted the request, at the outset, and – as that the decision was not effectively complied with by the Governor within the time limit set (i.e. no actual payment

occurred!) - the Court authorized the arrest of the amounts necessary for payment in the State Government bank accounts. Since it is a kind of obligation whose compliance has to be repeated monthly, and considering that - even with that judicial order - the State Government is not making regularly the payments due on the due dates, it has been necessary to repeat this same procedure (arrest, by a Court officer, of the necessary amounts in the State Government bank accounts) every month, to ensure that families receive “social rent”: it's a very exhausting monthly "battle"! But this has been the only adequate mechanism to guarantee to the more than 10000 families the effective receipt of the benefit, as a result of the class action filed.

A few months after the filing of such a class action, in November 2016, the governor of the State of Rio de Janeiro, Mr. Luiz Fernando Pezão, issued a decree determining the summary extinction of the benefit, which should occur from June 2017. The idea behind of such a legal-political decision was certainly to suppress the infra-legal normative base that backed the judicial decision, by revoking the previous decree that had created the “social rent” program. The justification given by the Governor was the lack of financial resources to maintain the program.

The Superior Administration of the Public Defender's Office, with technical advice from the Land and Housing Law Centre (NUTH) issued a "technical note" demonstrating the unconstitutionality of the Decree. Intense work (a kind of true legislative lobbying) began towards the members of the State Parliament in order to persuade Members to exercise a prerogative guaranteed by the Constitution: it establishes that the Legislative Branch may nullify a Decree issued by the Executive Branch when considered incompatible with constitutional norms. Such measure is rarely adopted by the Parliament, since it represents a political confrontation with the Executive. The argument invoked was that, although it was a social right, the principle that prevent retrogressive measures (also called ratchet effect<sup>38</sup>) had to be observed, in line with the juridical fundamentals indicated in the initial part of this paper. This “technical note” was also disclosed by the press, emphasizing the unreasonableness, the illegality and unconstitutionality of the intended governmental measure.

The result of these actions taken by the Office of the Public Defender was very positive: although the political parties supporting the Governor had a majority of the seats in the State Parliament, the arguments presented in the "technical note" were accepted and by a large majority of Members. This led to the formation of a bloc of supra-partisan parliamentarians (including many members of government parties), who drafted and approved a Resolution declaring the invalidity of the Governor's Decree. With this, the benefit of the “social rent” was maintained, and budgetary provision was foreseen to ensure its payment in 2017. These measures avoided the need

to file thousands of individual lawsuits, which would be necessary to guarantee the rights of the homeless.

### FINAL REMARKS:

Unfortunately, all this performance of the Public Defender's Office still does not mean a final and fully effective solution to the problem. At the time this paper is being written, "social rent" continued to be paid thanks to the judicial arrests monthly requested by the public defenders. The housing units promised have not yet been constructed and the drama of the homeless people, living in private houses paid with the money from "social rent" program, persists. In this new stage, the Public Defender's Office is acting mainly helping the beneficiaries of the program to organize and articulate themselves politically to put pressure on the competent authorities in order to ensure the continuity and completion of construction work on the new housing.

This case is an interesting example of the Brazilian Public Defender's institutional performance. The use of different tools and actions serve to support the judicial litigation. It is also essential to ensure the social participation in the definition of the objectives and forms of action to be performed by public defenders.

To conclude these reflections, it seems worth mentioning that all this range of actions and measures taken by the Public Defender's Office of Rio de Janeiro in the protection of the social right to the housing of vulnerable people, was only possible due to the characteristics of the Brazilian model of legal aid and access to justice, "provided through public defenders, who are salaried legal professionals who devote themselves exclusively to the provision of legal aid to the poor"<sup>39</sup>.

In addition, the guarantees of independence and autonomy assured by the Federal Constitution to public defenders in Brazil was also indispensable, since their actions very often put in check interests and determinations emanating directly from governmental authorities, as it was the case of judicial and extrajudicial measures taken to reverse and invalidate the Decree of the Governor that intended to extinguish the program of "social rent".

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NOTAS:

<sup>1</sup> Omitted in order not to identify the authors! This note will be reinserted if the article is approved for publication! (Omitido para não identificar os autores! Esta nota será reinserida, caso o artigo seja aprovado para publicação).

<sup>2</sup> According to South African Constitution, in section 26, it is established that: “26 (1) Everyone has the right to have access to adequate housing. (2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”

<sup>3</sup> See: SARLET, Ingo Wolfgang. *Proibição de retrocesso, dignidade da pessoa humana e direitos sociais: manifestações de um constitucionalismo dirigente possível*. In: Revista Eletrônica sobre a Reforma do Estado. N. 15, set-out-nov/2008. Available at: <http://www.direitodoestado.com/revista/RERE-15-SETEMBRO-2008-INGO%20SARLET.pdf>.

<sup>4</sup> According to Professor Cass R SUSTEIN, “what the constitutional right requires is not housing on demand, but a reasonable program for ensuring access to housing for poor people, including some kind of program for ensuring emergency relief”. (See: SUSTEIN, Cass R. Social and Economic Rights? Lessons from South Africa. (John M. Olin Program in Law and Economics Working Paper N. 124, 2001). Available at: [http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1454&context=law\\_and\\_economics](http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1454&context=law_and_economics)

<sup>5</sup> Rental assistance or rent aid (the Brazilian “social rent” program) was then considered a cost-effective, flexible and direct cash subsidy aimed at keeping needy families in the private market, while they do not receive definitive dwellings from public housing programs or until the family improves its economic-financial condition and is able to afford-with its own resources-the cost of housing.

<sup>6</sup> In order to ensure this “definitive” and preventive solution, the State Government even received a loan from the World Bank in 2011, as reported on the bank’s website. See: <http://www.worldbank.org/en/news/press-release/2011/01/18/world-bank-supports-brazils-disaster-prevention-efforts>

<sup>7</sup> According to the Report “Homelessness and the right to Housing” authored by Rafael Lessa Vieira de Sá Menezes, from the “Núcleo Especializado de Cidadania e Direitos Humanos”, of the “São Paulo State Public Defenders Office”, (available at <http://www.ohchr.org/EN/pages/home.aspx>), “the Brazilian housing deficit is due to the logic underlying the housing investment policy decisions. Despite the large-scale production of affordable housing in recent years, largely public investments in the production of houses are subject to the interests of the real estate speculative capital. While there are high rates of housing exclusion, especially for the poorest sections of population, the rate of vacant properties is greater than the demand for housing”. See also: <http://www.brasil.gov.br/governo/2010/12/numero-de-casas-vazias-supera-deficit-habitacional-do-pais-indica-censo-2010> .

<sup>8</sup> In 2009, three years after the Constitutional Amendment, which enshrined the right to housing, the federal government’s “Minha Casa, Minha Vida” (My home, my life) program was launched with the initial objective of constructing 1 million housing units (400,000 of which would be directed specifically to the low income population) within 2 years. However, this goal was not (and still is far from being) achieved, and it has become increasingly distant to be, considering that the economic and political crisis of recent years has made it increasingly difficult to reach the objective of overcoming the country’s housing deficit.

<sup>9</sup> This is exactly what happens in Rio de Janeiro: the Pereira Passos Institute reported Rio had a housing deficit of 148,000 affordable units, while the federal government estimated that the shortage, in 2010, was 220,774 homes. Rio de Janeiro faces an uphill battle to meet the demands of its lower income population; the population of the city’s favelas grew 28% in the first decade of the 21st century, compared to an overall growth rate in Rio of 3.4%. Today 1.4 million Cariocas live in the city’s approximately 1,000 favelas. Over the last 60 years, there have been attempts to upgrade favelas through a number of public policy programs with ambitious, unattained goals. Their levels of success have varied, but they have all been backed by strong legal protections. The federal, state, and municipal governments all support social interest housing in some context, whether explicitly or through policy programs. The truth is that after nearly 120 years of favelas being permitted to develop into the primary vehicle for social housing in Brazil, the nation has established relatively strong squatter’s rights. And yet, Brazil bears fame as one of the countries with the worst land inequality in the world”. (See: “What does the Brazilian Constitution say about housing rights?”, available at: <http://www.rioonwatch.org/?p=25334>)

<sup>10</sup> Proven oil and natural gas reserves in Brazil, estimated by the World Society of Petroleum Engineers (SPE), were 11 billion barrels of oil equivalent in 2002. By 2013, this volume reached 16 billion barrels, or There was an increase of 45% in this period.

<sup>11</sup> According to a report issued by “Rio on watch”, (a website organized by a NGO named “Catalytic Communities”: see <http://www.rioonwatch.org>), “in theory, “Morar Carioca” was set to be the most progressive, comprehensive favela upgrading program in Rio’s history: as a primary Olympic legacy, Rio’s mayor promised all missing infrastructure services would be delivered to all of Rio’s favelas by 2020. After much promise and hope was generated among favela residents, organizers, and urbanists, however, the program was abandoned and its name reappropriated. “Morar

Carioca” has become a label associated with forced evictions, as the City came to use the program’s positive brand to “get away” with evictions in a number of communities”.

<sup>12</sup> See: <http://www.dailymail.co.uk/news/article-1264601/Brazil-floods-Rio-De-Janeiro-mudslide-kills-200-people.html>.

<sup>13</sup> See: <https://www.theguardian.com/world/2011/jan/15/brazilian-landslides-sri-lanka-australia>. Since 2010, after this first natural disaster, the government of the State of Rio de Janeiro has launched a program called "Morar Seguro" (...), the alleged purpose of which was to remove families living in areas considered at risk and to pay them a "social rent" while there were no housing units available for resettlement. The program was developed in partnership with municipalities, which are responsible for identifying risk areas and registering beneficiary families.

<sup>14</sup> See: FAULHABER, Lucas & AZEVEDO, Lena. SMH 2016: Removals on Olympic Rio de Janeiro. Rio de Janeiro, Mórula Editorial, 2015. See also: <https://www.theguardian.com/world/2015/oct/28/brazil-officials-evicting-families-2016-olympic-games>

<sup>15</sup> See: <https://www.theguardian.com/world/2015/jun/03/forced-evictions-vila-autodromo-rio-olympics-protests> .

<sup>16</sup> “The community has fought a long campaign to stay on their site including taking action through the courts and presenting an alternative plan which would allow them to stay and the park to be built. They have been supported by the Rio State Public Defenders’ Office, a body set up under the Brazilian constitution to protect citizen’s rights, whose Housing and Lands Office has been for years fighting plan after plan for eviction.” (Quoted from: <http://blogs.lse.ac.uk/usappblog/2014/04/28/peoples-right-to-the-city-has-been-eroded-by-mega-event-evictions-in-rio-de-janiero/>)

<sup>17</sup> Morro do Bumba is a community/favela that was installed in a geologically unstable area, where until 1982 there was a dump which – after its deactivation - was intended to be transformed it into a grove. However, the occupation of the area by low income homelessness families started few years after the landfill was deactivated, without any control of public authorities, which not only tolerated but even encouraged the occupation of the area, with the realization of urbanization works on a land where nothing should have been built.

<sup>18</sup> Class Action (Ação Civil Pública) against the Municipality of Niterói (number 0082008-77.2010.8.19). For more detailed information see the paper presented by Cleber Francisco Alves and Andrea Sepulveda for the 4th National Access to Justice and Pro Bono Conference, held in Melbourne, whose title is: “Legal Aid Delivery in Brazil: new roles for the office of the Public Defenders”. Available at:

[http://www.nationalprobono.org.au/ssl/CMS/files/cms/ALVES\\_Cleber\\_%20A2J%20in%20Brazil.pdf](http://www.nationalprobono.org.au/ssl/CMS/files/cms/ALVES_Cleber_%20A2J%20in%20Brazil.pdf)

<sup>19</sup> See: PENALVA SANTOS, Angela Moulin e MEDEIROS, Mariana Gomes Peixoto. Direito à Moradia: entre o avanço normativo e a prática institucional. A Política de Aluguel Social no Rio de Janeiro. IN: Geo-UERJ. Rio de Janeiro, n. 29. pp 20-43, 2016. Available at: <http://www.e-publicacoes.uerj.br/index.php/geouerj/article/view/15464>

<sup>20</sup> <http://www.telegraph.co.uk/news/worldnews/southamerica/brazil/8259444/Brazil-floods-worst-ever-natural-disaster-as-death-toll-rises.html>

<sup>21</sup> See <http://www.telegraph.co.uk/news/2016/06/17/rio-declares-state-of-calamity-amid-cash-crisis-ahead-of-olympic/>.

<sup>22</sup> The austerity measures established by the State Government are being strongly opposed by the society, especially because of the perception that this financial crises is a result not only of economic circumstances, but also a result of deplorable practices of corruption by government agents. Therefore, there has been, since last year, strong popular mobilization in protest. See: <http://www.bbc.com/news/world-latin-america-37917138> .

<sup>23</sup> It is not really a too much expensive program. The monthly cost of the benefit is R\$ 5 million (equivalent to 1.5 million American dollars).

<sup>24</sup> For a more detailed understanding of the Brazilian model of Access to Justice and free legal aid, see the "national reports" available on the International Legal Aid Group's website (<http://internationallegalaidgroup.org/>). See also the book "Access to Justice in Brazil "(Authors: Andre Luis Machado de Castro, Cleber Francisco Alves, Diogo Esteves and Franklyn Roger Alves Silva), that was launched during the ILAG Conference, in Johannesburg, in 2017.

<sup>25</sup> SANTOS, Boaventura de Sousa. Para uma revolução democrática da justiça. 3ª ed. São Paulo, Cortez, 2011, p. 51.

<sup>26</sup> See: ALVES, Cleber Francisco. Contemporary Challenges to legal aid in Brazil and England: comparative perspectives on access to justice. In: Amicus Curiae – Journal of the Society of Advanced Legal Studies. London, Institute of Advanced Legal Studies, Issue 98, Summer 2014.

<sup>27</sup> See the paper: “Legal Aid Delivery in Brazil: new roles for the office of the Public Defenders”, mentioned above, footnote 27, authored by Cleber Alves and Andrea Sepulveda. Available at:

[http://www.nationalprobono.org.au/ssl/CMS/files/cms/ALVES\\_Cleber\\_%20A2J%20in%20Brazil.pdf](http://www.nationalprobono.org.au/ssl/CMS/files/cms/ALVES_Cleber_%20A2J%20in%20Brazil.pdf)

<sup>28</sup> See GONZÁLEZ, Pedro. “A Definição Constitucional da Defensoria Pública como expressão e instrumento do regime democrático: para além de sua função simbólica” In: ALVES, Cleber Francisco & GONZÁLEZ, Pedro. Defensoria Pública no Século XXI – novos horizontes e desafios. Rio de Janeiro, Lumen Juris, 2017.

<sup>29</sup> Diverse studies have been undertaken in an attempt to demonstrate the practical results of the performance of the Public Defender in the provision of integral legal aid and in the promotion of human rights. A survey made in 2013 by Prof. José Augusto Garcia de Souza, analyzed around fifty collective actions of the Public Defender, throughout Brazil. The list of beneficiaries of these collective actions is impressive. Amongst many others, one finds beneficiaries of rights such as: clients of public nurseries; people with special needs (the physically disabled or mentally ill); institutionalized



adolescents (juveniles in detention); people imprisoned in inhuman conditions, detained without alimentation or medical attendance; family members of prisoners; women submitted to invasive searches in prisons; street vendors; residents of communities in need; victims of climatic disasters; small farmers affected by environmental damage; the homeless; low income consumers; elderly people facing problems related to health insurance policies; transport terminal users; students of the public education network who use/need free collective transport; the chronically ill; people dependent on electrical health devices; women with breast cancer; sick children; asbestos victims; carriers of Hansen's disease; collectors of recyclable materials; unemployed workers; pregnant women who are undertaking public selection processes as penitentiary employees, and so forth. (See: SOUSA, José Augusto Garcia de. I Relatório Nacional de Atuações Coletivas da Defensoria Pública: um estudo empírico sob a ótica dos “consumidores” do sistema de Justiça. Brasília, Anadep, 2013).

<sup>30</sup> In a paper entitled “The new constitutional regime of public defenders in Brazil”, Alves and Baptista argued that this constitutional amendment of June 2014 is the culmination of the continuous process of consolidation of the Brazilian legal aid model. This process over the past 25 years has also included, besides other previous constitutional amendments, numerous ordinary laws and emblematic decisions of the Supreme Court. Among these previous infra-constitutional laws we should mention Complementary Law 132 of 2009 that brought about important innovations which can be interpreted as aiming to *expand even further the scope of protection of 'integral legal aid'*. The very definition – and the role – of the organization of the OPD has been amended in order to reflect such changes. See: ALVES, Cleber Francisco; BAPTISTA, Barbara Gomes Luppetti. O Novo Regime Constitucional da Defensoria Pública no Brasil. In: I ENCONTRO DE INTERNACIONALIZAÇÃO DO CONPEDI. Organizadores: Nestor Eduardo Araruna Santiago, Karine de Sousa Silva. Barcelona: Ediciones Laborum, 2015, vol. 5.

<sup>31</sup> About these “specialized offices” of the Public Defender’s Office in Brazil, comparing to similar American organizations, see the following comment, made by Justice Earl Johnson Jr. in a recent paper: “the Rio legal aid program also has specialized offices staffed with experienced civil public defenders to provide expertise and strategic legal representation in certain areas: consumer law, senior citizen issues, and the like. These offices resemble the “back-up” or “support” centers the OEO Legal Services Program and the Legal Services Corporation funded before Congress eliminated federal financing for them in 1995. Many of the U.S. back-up centers survive today, but with outside funding from foundations, court awarded fees, and private donation.(...) the existence of similar centers in the Brazilian legal aid program is evidence of the program’s commitment to making the substantive law fair as well as accessible to the nation’s poor.” See: JOHNSON Jr., Earl. *Lifting the ‘American Exceptionalism’ Curtain: Options and Lessons from Abroad*”, a paper published in the *Hastings Law Journal*, in 2016, available for download at: <http://www.hastingslawjournal.org/2016/06/19/lifting-the-american-exceptionalism-curtain-options-and-lessons-from-abroad/>

<sup>32</sup> More than 400 people participated in a public hearing held on August 31, 2016, at the Public Defender's Office in Rio de Janeiro. See: <http://www.defensoria.rj.def.br/noticia/detalhes/3065-Comunidades-relatam-problemas-de-moradia-em-audiencia-publica>.

<sup>33</sup> At a public hearing convened by the Public Defender's Office in the city of Petrópolis, on November 28, 2016, more than 100 people crowded the Town House. The objective was to provide clarification on the measures taken by the Public Defender’s Office to ensure the payment of “social rent”, to discuss and demand measures to be taken by government authorities with a view to the definitive solution of the housing problem; A commission representing the homelessness was formed to accompany the construction of housing estates whose houses will be destined to the beneficiaries of the social rent, whose works were paralyzed. Watch video: <http://g1.globo.com/rj/regiao-serrana/rjintertv-2edicao/videos/t/edicoes/v/audiencia-publica-na-camara-de-petropolis-rj-discute-situacao-do-aluguel-social/5480319/>

<sup>34</sup> Avoiding removals/evictions proved to be the most difficult task. In several cases, it was unmistakable and evident that the location of the houses had no direct relation with the works to be carried out. So it was obvious that the removals were required due to the real estate speculation and the existence of projects to build new condos for the social classes of greater purchasing power. In some cases, public defenders effectively obtained judicial orders determining the suspension of evictions/removals, but in other cases, the houses were arbitrarily destroyed, before an injunction was issued.

<sup>35</sup> In the city of Petrópolis, public defenders were approached by hundreds of beneficiaries of the "social rent" program whose payment was delayed and, therefore, they were being intimidated by landlords and threatened with eviction: a document was written with information about the Tenants' rights and guidance on how they should proceed to enforce such rights. This document was reproduced in hundreds of copies for distribution in the communities (through the municipal social welfare office).

<sup>36</sup> At the end of 2009 and early 2010 (in which the works aimed at the preparation of the city of Rio de Janeiro for the mega-events that would occur throughout the decade, and also when there were major natural disasters due to the heavy tropical rain, as mentioned above), several class actions were filed. All them had a great impact in defending the

housing rights of thousands of families assisted by the Public Defender's Office. As sampling, we can mention: Class Action (Ação Civil Pública) against the Municipality of Niterói (number 0082008-77.2010.8.19); Class Action (Ação Civil Pública) ref. to Complexo do Morro do Estado – (number 0116518-19.2010.8.19.0002); Class Action (Ação Civil Pública) ref. to Community Jacaré do Papo Amarelo Feliz (number 0369821-98.2009.8.19.0001); Class Action (Ação Civil Pública) ref. to Community Ladeira dos Tabajaras (number 0251060-74.2010.8.19.0001); Class Action (Ação Civil Pública) ref. to Community Vila Recreio II (number 0416182-42.2010.8.19.0001); Class Action (Ação Civil Pública) ref. to Community Mackenzie, in Niteroi (number 008200877.2010.8.19.0002); Class Action (Ação Civil Pública) ref. to Community Parque Columbia (number 0194301-90.2010.8.19.0001) ; Class Action (Ação Civil Pública) ref. to Community of Restinga (number 0341911-62.2010.8.19.0001); Class Action (Ação Civil Pública) ref. to Community Rodrigues Alves (number 0010563-36.2009.8.19.0001); Class Action (Ação Civil Pública) ref. to Community of Estrada da Cachoeira e Grota (number 010369258.2010.8.19.0002).

<sup>37</sup> In some cases, from specific and peculiar situations applicable only to a determined person or a small group of persons, it may be the case that individual traditional lawsuits are required, which also are filed by the Public Defender's Office. In fact, throughout the State of Rio de Janeiro, there are hundreds of lawsuits filed by individuals, represented by the Public Defender's Office, claiming "social rent" due to denial or violation of the social right to housing, not necessarily shared by a big group or community.

<sup>38</sup> "The so-called "effect cliquet" or "ratchet mechanism" is described in a case ruled by the European Court of Human Rights (CASE OF GOROU v. GREECE - No. 2 - *Application no. 12686/03*. JUDGMENT, STRASBOURG, 20 March 2009) as follows: the "ratchet mechanism", preventing a cogwheel from turning back once it has moved forward, is a principle that has been developed, particularly in legal opinion, in connection mainly with acquired social rights. It is the principle whereby the legislature is supposed not to pass laws that would have the effect of lowering a level of social protection already achieved. Quoted from: ALVES, Cleber Francisco. "The nature of Legal Aid Rights: civil or social/welfare state right? Possible implications under the "ratchet effect" doctrine. In: ALVES, Cleber Francisco & GONZÁLEZ, Pedro. *Defensoria Pública no Século XXI – novos horizontes e desafios*. Rio de Janeiro, Lumen Juris, 2017.

<sup>39</sup> Although public defenders are civil servants, the PDO is not hierarchically subordinate to the Executive. Public defenders are selected by a competitive public examination, after which they gain permanent tenure, facing dismissals only in the most exceptional situations, and are prohibited from practising law outside these institutional parameters. In this way, the Constitution aimed to create a stable and reliable network of public defenders, comprised of qualified legal professionals who devote themselves exclusively to the provision of legal aid to the poor and empowered to act even against the interests of other government agencies or government if necessary. The autonomy of the PDO has been further strengthened by Constitutional Amendment 45, enacted in 2004". WEIS, Carlos. *The Brazilian Model of Legal Aid: Characteristics of the Public Defender's Office since the Constitution of 1988*. In: FOLEY, Conor (edit.). *Another System is Possible – reforming Brazilian Justice*". Available at: <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=60AD9251-7E9A-4E19-B275-410EA7319F5C>. See also: ESTEVES, Diogo and SILVA, Franklyn Roger Alves. *Princípios Institucionais da Defensoria Pública*. 2ª ed. Rio de Janeiro, Editora Forense, 2017.

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