

## TO PUNISH OR TO PROTECT: THE ROLE OF THE PUBLIC DEFENDER'S OFFICE IN THE CRIMINAL ENFORCEMENT OF HOMELESS INDIVIDUALS

## PUNIR OU PROTEGER: A ATUAÇÃO DA DEFENSORIA PÚBLICA NA EXECUÇÃO PENAL DE PESSOAS EM SITUAÇÃO DE RUA

## CASTIGAR O PROTEGER: EL PAPEL DE LA DEFENSORÍA PÚBLICA EN LA PERSECUCIÓN PENAL DE LAS PERSONAS SIN HOGAR



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### ABSTRACT

This article aims to discuss the role of the Public Defender's Office in the context of penal execution when applied to homeless individuals. The research intends to investigate the incongruity between punishment and protection in light of human dignity, the guarantees ensured by the Constitution, and social vulnerability. The study was based on a literature review and analysis of legal documents, which provided support for the theoretical debate. It was found that the Public Defender's Office possesses competence and potential regarding punitive practices and to be effective in relation to human rights, especially those of homeless individuals; however, it is necessary to overcome the structural limitations that reduce its performance. It is up to everyone—the State, civil society, and educational institutions—to promote reflections and practices that can lead to social justice.

**Keywords:** Public Defender's Office. Exclusion. Penal Execution. Homeless Individuals. Vulnerability.

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## RESUMO

O artigo possui como objetivo principal discutir a atuação da Defensoria Pública no cenário da execução penal quando aplicada à pessoas em situação de rua. A pesquisa tem a pretensão de averiguar a incongruência entre punição e proteção em face da dignidade da pessoa humana, das garantias asseguradas na Constituição e da vulnerabilidade social. O estudo fundamentou-se em uma revisão de literatura e análise de documentos legais, os quais deram suporte para o debate teórico. Constatou-se que, a Defensoria Pública possui competência e potencial no que se refere às práticas punitivistas e para ser efetiva em relação aos direitos humanos, principalmente das pessoas que estão em situação de rua, no entanto, é necessário sobrepujar os limites estruturais que reduzem sua atuação. Compete a todos: Estado, sociedade civil, academias educacionais, promover reflexões e práticas que possam se voltar para a justiça social.

**Palavras-chave:** Defensoria Pública. Exclusão. Execução Penal. Pessoas em Situação de Rua. Vulnerabilidade.

## RESUMEN

Este artículo busca analizar el rol de la Defensoría Pública en el contexto de la ejecución penal aplicada a personas en situación de calle. La investigación busca indagar en la incongruencia entre el castigo y la protección a la luz de la dignidad humana, las garantías constitucionales y la vulnerabilidad social. El estudio se basó en una revisión bibliográfica y un análisis de documentos legales que respaldaron el debate teórico. Se concluyó que la Defensoría Pública posee competencia y potencial en materia de prácticas punitivas y para ser eficaz en relación con los derechos humanos, especialmente los de las personas en situación de calle; sin embargo, es necesario superar las limitaciones estructurales que limitan su desempeño. Corresponde a todos —Estado, sociedad civil e instituciones educativas— promover reflexiones y prácticas que conduzcan a la justicia social.

**Palabras clave:** Defensoría Pública. Exclusión. Ejecución Penal. Personas en Situación de Calle. Vulnerabilidad.

## 1 INTRODUCTION

People who are on the margins of society make up one of the most marginalized groups within Brazilian society. With regard to the context of criminal law, this vulnerability is made increasingly greater by the scarcity of access to rights, resources, and, above all, appropriate legal representation. From this scenario, the Public Defender's Office emerges as an institution that is necessary and essential to justice, playing a role that goes beyond technical defense in achieving the promotion of constituted and fundamental rights.

There is a duality with regard to penal execution, whose stage is to give visibility to the fulfillment of the sentences imposed, since it reveals a certain mismatch between the system that punishes and the social needs of a portion of the population most in need.

The study is relevant due to the urgency of reflecting on the effectiveness of the State's protection of those most vulnerable, being, therefore, the Defender's Office, the institution that represents access to justice. In addition, it is justified by the full need to promote debates, which can trigger more inclusive public policies. From a social point of view, it seeks to contribute to guaranteeing the rights of the most vulnerable people, alerting to the risks of a penal execution that further accentuates exclusion. Scientifically, it is intended to broaden the debate in academies on critical criminology, social vulnerability, criminal guarantees, and the performance of justice institutions.

It is based on the following objectives to achieve the purpose of the research: general: to research how the Public Defender's Office acts in the criminal execution of homeless individuals and if this operation is close to a more guaranteeing or punitive connection. And the specifics are: mapping the normative foundations that govern criminal execution and the performance of the Public Defender's Office; analyze the fundamental rights of homeless people in the light of the Constitution and the Penal Execution Law; discuss the main legal, institutional and social obstacles to a protective performance of the Public Defender's Office, and systematize academic and institutional proposals that seek to strengthen the protection of hypervulnerable people in the social context.

The methodology used in the study was based on a qualitative research with a descriptive and analytical approach, with literature review and national and international legal document analysis. Texts that bring legality were used, such as the Federal Constitution of 1988, the Penal Execution Law – Law No. 7,210/84 -, the Complementary Law No. 80/94, in addition to international human rights treaties. Doctrines and scientific articles that address the Public Defender's Office, criminal execution and homelessness were also consulted.

## 2 HOMELESSNESS AND THE PENAL SYSTEM: SOCIAL AND LEGAL ASPECTS

Homelessness is not only a condition of extreme poverty, but an expression of a process of structural exclusion. This condition is marked by social exclusion, lack of access to essential services and, in many cases, a relationship of conflicts with the repressive apparatuses of the State. When it comes to the penal system, this reality acquires even more serious contexts, since hypervulnerable people face obstacles and limitations to the real exercise of their rights, including, and especially, during the penal execution.

When it comes to the Brazilian State, homelessness is one of the phenomena that most attacks society and that gives visibility to a glaring social inequality, as well as criminal selectivity. Historically, this group has always been the target of marginalization with rights violated or neglected, including by the criminal justice system itself. The criminalization of misery is a framework composed of the intersection of extreme poverty, social vulnerability, and incarceration.

Zaffaroni *et al* (2018, p. 65) bring to light the concept of criminal selectivity in the legal sphere, since it constitutes a mechanism by which the penal system concentrates its action in vulnerable sectors.

Criminalization is selective and this selectivity is not a deviation from the system, but rather its own way of functioning. Punishment and criminal proceedings do not apply to everyone equally, but focus primarily on the most vulnerable sectors of society. In other words, the penal system is not a mechanism of global control, but rather an instrument of power directed preferentially against the poor and marginalized. Primary criminalization—the creation of criminal law—may seem neutral, but secondary criminalization—law enforcement—is profoundly selective.

The authors' words reveal a critique of the repressive apparatus that is not neutral, but rather functional to maintain the social order that becomes exclusionary. It is noted that prison, within this context, is seen as a deposit of undesirable individuals, where homeless people are incarcerated for crimes of lesser offensive potential such as hunger theft, possession of drugs for consumption or simply for occupying public spaces.

One should not ignore the work of the Public Defender's Office, which represents a barrier of resistance to all this punitive mechanism. As Silva (2021, p. 87) points out, "the Public Defender's Office has a strategic role in protecting the rights of homeless people, acting not only in judicial defense, but in promoting citizenship and combating the institutionalization of exclusion". This presence in the spaces deprived of liberty makes it possible to design the exclusionary structures of the penal system and guarantee a minimum of dignity to the hypervulnerable.

The Federal Constitution of 1988, in its article 1, item III, enshrines the dignity of the human person as the foundation of the Republic. However, this commitment remains unfulfilled when we see thousands of people living on the streets who are deprived of elementary rights, with arbitrary and illegal arrests, precautionary measures that are disproportionate and the absence of minimum conditions in prisons.

According to data from the Institute of Applied Economic Research – IPEA – "the number of homeless people in Brazil increased by more than 200% between 2012 and 2022" (IPEA, 2022, p. 34). This is a contingent of the population whose condition of vulnerability is multifactorial: homelessness, unemployment, chemical dependency, mental disorders and breakdown of family ties. However, what can be observed is the performance of the penal system as the only visible state response, suppressing the failure of public assistance and housing policies.

This time, the interface between homelessness and the penal system decrees not only a sensible and guaranteeing legal response, but a reconstruction of the role of the State in social protection. The criminalization of poverty, under the veil of formal legality, perpetuates historical inequalities and deepens exclusion. As Foucault (1996, p. 61) asserts, "prison manufactures delinquents, instead of correcting them; exclusion is its most effective product." Therefore, it is urgent to profoundly reformulate public policies, combined with critical and humanized legal action, so that we can break the perverse cycle of vulnerability and punishment (BATISTA, 2015).

### **3 PUBLIC DEFENDER'S OFFICE AND PENAL EXECUTION: LEGAL AND INSTITUTIONAL FOUNDATIONS**

The role of the Public Defender's Office in criminal enforcement is one of the most significant expressions of the realization of fundamental rights within the Brazilian penal system. Since the 1988 Constitution (BRASIL, 1988), especially with the enactment of Constitutional Amendment No. 80/2014, the Public Defender's Office has been recognized as an essential function of justice, in charge of legal guidance, promotion of human rights and defense, at all levels, of the needy, in a comprehensive and free manner (BRASIL, 2014).

Constitutional Amendment No. 80/2014 reinforces the essential role of the Public Defender's Office in promoting social justice and addressing inequalities in the penal system. By determining that the Defender's Office be present in all jurisdictional units within 8 years, the amendment sought to ensure that no citizen, regardless of their social and territorial condition, is left without access to justice. In the context of the criminal execution of homeless

people, this amendment gains special relevance. This group, marked by extreme vulnerability and social exclusion, faces numerous barriers in the justice system (BRASIL, 2014).

In the context of criminal enforcement, the Public Defender's Office plays a crucial role in protecting the rights of people deprived of liberty, who are often forgotten or made invisible by the justice system. Its performance is legally based on the Penal Execution Law itself, Law No. 7,210/1984, especially on articles 16, 81-A and 83, which expressly provide for legal assistance to prisoners, and recognize the Public Defender's Office as one of the organs of penal execution, alongside the Public Prosecutor's Office and the Execution Court (BRASIL, 1984).

Article 16 of the LEP establishes that the "Public Defender's Office shall ensure the regular execution of the sentence and the security measure" (BRASIL, 1984, p. 42). This article confers on the Ombudsman's Office express attribution in the supervision of criminal execution, which includes the verification of legalities, excesses of time, undignified conditions of custody and absence of minimum state assistance. For homeless people, this action is crucial to ensure the exercise of rights that are usually denied to them, such as access to health, prison work, and education in prison.

Article 83 establishes that "the prisoner and the internee may present, in person or through an attorney, a petition, representation or complaint to any authority, in defense of rights or against illegality or abuse of power". Although the article recognizes the right of the prisoner to petition, in practice, without effective legal assistance, this right becomes illusory. The Public Defender's Office, through Article 134 of the CF/88, becomes the channel through which these rights can be claimed in a technical and effective manner.

The Penal Execution Law (LEP), since its origin, has been guided by the rehabilitation of the convict and the protection of his dignity. This principle becomes even more urgent when it comes to homeless people, who accumulate several layers of social and institutional exclusion. (BRAZIL, 2014). In this context, the performance of the Public Defender's Office, strengthened by EC No. 80/2014, is essential to ensure effective compliance with the LEP (BRASIL, 1984).

The Defender's Office's work is not limited to the exercise of technical defense in court, but extends to the protection of fundamental rights in daily prison life, such as access to health, education, family visitation, physical and moral integrity, and regime progression (DU PRAT, 2015). In this area, it acts both individually and collectively, through public civil actions, *collective habeas corpus* and periodic visits to prison units, being a fundamental agent of supervision of the fulfillment of the sentence in the mold of the dignity of the human person (DU PRAT, 2015).

In the conception of Lima (2021, p. 95),

The Public Defender's Office is the main instrument of legal resistance to the selective punitivism of the State, being the only institution that, in an organic way, has as its institutional mission the defense of those who, historically, occupy the most vulnerable positions in the gears of the penal system.

The Public Defender's Office, as the institutional voice of the vulnerable, assumes a fundamental role. As Lima (2021, p. 82) argues, "its performance must transcend the forensic space, inserting itself in the streets, squares, shelters in order to promote real access to justice for those whose citizenship is routinely denied". This extrajudicial and multidisciplinary action becomes essential to denounce abuses, guarantee rights and foster articulation with social protection networks.

However, as long as the State maintains a punitive and hygienist posture – which expels, imprisons or silences bodies that are uncomfortable with public order – breaking the cycle of vulnerability and incarceration will not be possible. As Wacquant (2017) points out, the state government, with neoliberal conceptions, tends to reduce its presence in maintaining the security of social rights, concomitantly intensifies its punitive presence in areas of urban marginality.

To overcome this latent reality, it needs to demand a new paradigm of justice, based on solidarity, equity and the recognition of the intrinsic dignity of all human beings. In Almeida's (2019) view, it is necessary to decriminalize poverty, recognize the structural determinants of exclusion, and ensure effective public policies for housing, mental health, and social assistance. Without this, the penal system will continue to be the inevitable fate of those who have been excluded from all other spaces.

#### **4 BETWEEN PROTECTION AND PUNISHMENT: CHALLENGES IN THE DEFENSE OF HOMELESS PEOPLE**

The homeless population represents one of the most vulnerable segments of Brazilian society, marked by multiple forms of social and institutional exclusion. The performance of the justice system in relation to this population shows a constant tension between the bias of social protection and the logic of punishment, especially in the criminal field. The Public Defender's Office emerges as a central protocol actor in the mediation of this duality, and assumes the difficult mission of guaranteeing fundamental rights in a panorama of criminalization of poverty.

The Magna Carta, by establishing the Democratic Rule of Law, enshrined the Principle of the Dignity of the Human Person as one of its foundations – article 1, III-, which implies the

duty of the State to ensure full protection to all citizens, including those in situations of extreme vulnerability. However, it is observed, in practice, that public security and criminal justice mechanisms often operate under a selective and punitive logic, as denounced by Zaffaroni *et al* (2018), when they state that the Latin American penal system does not punish all crimes, but rather selects perpetrators and facts in a discriminatory manner, criminalizing poverty and protecting the interests of the elites.

The Public Defender's Office, as an institution essential to the jurisdictional function of the State, under the terms of article 134 of the Constitution, plays a fundamental role in containing punitive excesses and promoting public policies aimed at inclusion (BRASIL, 1988). His performance in criminal enforcement and in the defense of homeless people requires not only technical knowledge, but also social sensitivity and the ability to articulate between institutions. According to Justice Vieira (2016) in which the Public Defender's Office is present both in the courts and in the spaces of public policy formulation in the promotion of the realization of social rights.

Meanwhile, the challenges facing the Public Defender's Office are great. The absence of civil documentation, the breakdown of family and community ties, barriers to access to public services, and social stigmas make it difficult to build effective defense strategies (GIAMBERNARDINO, 2016). In addition, the precariousness of housing policies, the scarcity of mental health programs, and the dismantling of initiatives aimed at the homeless population contribute to the worsening of the problem. As stated by Ramos and Muszkat (2011), the street is a stage for physical and psychic suffering, in which this individual is deprived of his identity, of his belonging to a society and of the protection of state institutions.

In this sense, it is urgent to rethink the role played by justice institutions in protecting the rights of this portion of the population, and to promote action that is based on the principles of dignity, equality and inclusion (SANTOS, 2014). The Public Defender's Office must be strengthened both at the legal-individual level and at the collective and structural level, whether through public civil actions, inspections or institutional dialogues. To this end, it is necessary to ensure autonomy, resources, and territorial capillarity, as well as training for its members, with a focus on human rights and the intersectionality of vulnerabilities.

## 5 CRITICAL ANALYSIS OF LITERATURE AND PROPOSITIONS FOR A MORE HUMANIZED PERFORMANCE

The performance of the justice system, especially in the criminal field, over the years, has been guided by practices of exclusion, selectivity and dehumanization of subjects in situations of vulnerability. This finding is supported by a critical analysis of contemporary legal

literature, which reveals the urgency of rethinking the normative and institutional paradigms that govern state action, especially in the face of marginalized populations, such as homeless people, drug users, adolescents in conflict with the law, and black people (KARAM, 2023).

The criticism of the punitive model is shared by authors such as Eugenio Raúl Zaffaroni, Vera Alessandro Barata and Nilo Batista. For Baratta (2002), the Brazilian penal system is heir to a slave-owning and authoritarian logic, which treats the 'social undesirables' as enemies to be eliminated. In this sense, critical criminological literature plays an essential role in unveiling the ideological character of punitive action and proposing action based on human rights, dignity, and inclusion (KARAM, 2023).

It is within this whole context that the Public Defender's Office emerges as an institution focused on the promotion of human rights and the effectiveness of access to justice by the most marginalized groups. However, merely technical action, detached from an empathetic and contextualized look, can reproduce the exclusionary logics of the penal and judicial system. Thus, a more humanized performance of the Public Defender's Office is proposed, based on a human approach as a fundamental hermeneutic vector (COUTINHO, 2017).

Humanization in the Public Defender's Office determines, first of all, the recognition that the recipient of its services is, most of the time, a person in a situation of extreme vulnerability – not only economic, but also social, cultural, racial, psychological and institutional. As Almeida (2019, p. 93) points out, "inequality is structural and operates in a way that marginalizes and dehumanizes historically excluded subjects". Therefore, the public defender and all those who work in the Defender's Office need to be aware of the multiple oppressions that affect their assisted, and must adopt a legal practice that is sensitive to these social markers.

In this sense, it is proposed that the training of public defenders and all those who, directly or indirectly, deal with this clientele, include content on human rights, structural racism, gender, mental health, public policies, and legal anthropology. The performance of a defender, therefore, cannot be limited to formal legality. It also needs to involve commitments to social transformation. By means Streck (2014, p. 132) assures "the Constitution is not an appendix of the legal system, but its reason for being. Legal dogmatics must be constitutionalized."

In addition, humanization involves qualified listening to the assisted. It is necessary to break with the vertical logic in which the defender decides, unilaterally, the best defense strategy. On the contrary, the protagonism of the individual must be promoted, and his autonomy and narrative must be respected. At this point, Boaventura de Sousa Santos (2014)

argues for the need for an 'epistemology of the South', in which popular knowledge is valued as legitimate forms of knowledge and resistance.

Another essential aspect for humanized action is the extrajudicial and collective action of the Public Defender's Office. This includes institutional visits to places of deprivation of liberty, articulation with social movements, the proposition of public civil actions, and active participation in public policies (CONDEGE, 2001). In this way, the National Council of General Public Defenders aims to articulate and institutionally strengthen the Brazilian Public Defender's Office at the national level. Its mission is to promote the integration, strengthening, standardization and development of Public Defenders' Offices, in order to ensure coordinated and effective action in the defense of the fundamental rights of the population, especially people in vulnerable situations (CONDEGE, 2001).

It is also essential to strengthen the institutional structure to enable quality performance. This involves a greater budget, administrative autonomy and internal control mechanisms aimed at ethics and accountability. The humanization of action does not dispense with adequate material conditions and appreciation of civil servants and defenders.

Finally, the trend of criminalization of poverty and criminal selectivity must be combated. The Public Defender's Office has an ethical duty to denounce punitive practices that disproportionately affect the black, peripheral and homeless population. According to Zaffaroni *et al* (2018, p. 165), "the penal system is not blind, but selective; punishes the same as always, perpetuating historical inequalities". Thus, a truly humanized performance must challenge these structures and promote substantive justice.

Therefore, the propositions for a more humanized Public Defender's Office go through a critical, interdisciplinary action focused on social transformation, committed to fundamental rights and the dignity of the human person. It is about rescuing the centrality of the subject of law and promoting equity as a pillar of justice.

## 6 FINAL CONSIDERATIONS

The present research started from the concern about the role of the Public Defender's Office in the criminal execution of homeless people, in the light of a penal system that is known to be selective, exclusionary and little sensitive to social inequalities. The hypothesis that guided the investigation – that the Defender's Office's performance can represent a more guaranteeist and humanized path in the face of the current punitive logic – was confirmed throughout the theoretical, legal and critical analysis of the data and references used.

By achieving the proposed objectives, especially the general one – to analyze how the Public Defender's Office acts in the criminal execution of homeless people and whether this

action is aligned with a guaranteeing or punitive logic – it could be seen that the Defender's Office, even though it faces institutional, budgetary and structural limitations, constitutes itself as the main way of resistance to the criminal criminalization of the most vulnerable. The study revealed that its work goes beyond forensic limits and also takes place in the extrajudicial field, in the promotion of public policies and in the articulation with protection networks. In this way, the Public Defender's Office is substantially close to a guarantor connection, even if inserted in a structurally punitive system.

In the initial chapter, it was demonstrated how homelessness in Brazil represents not only a condition of material misery, but the most extreme expression of social exclusion. The analysis of IPEA data and legal frameworks showed the lack of structuring public policies and the use of the penal system as a mechanism for controlling and containing social undesirables. Criminal selectivity was approached from Zaffaroni and other authors of critical criminology, showing how criminal law, although apparently neutral, applies unequally, and disproportionately affects the poor, blacks, drug users and, notably, the homeless.

The second chapter reinforced this finding by addressing the legal fundamentals and institutions of the Public Defender's Office, especially its constitutional provision as an essential function of justice and its attribution in the full and free defense of the needy. It was observed that the Defender's Office is supported by the Penal Execution Law and Complementary Law No. 80/94 to act not only in the technical defense, but in the supervision of the execution of the sentence with dignity, which involves the fight against abuses, the guarantee of social rights and the promotion of citizenship in penal establishments.

The investigation also made it possible to achieve the proposed objectives: the normative framework of penal execution and defensive action was mapped; the fundamental rights of homeless people and institutional obstacles were analyzed, such as the absence of documentation, breaking of ties, prejudice and the lack of intersectoral policies; and, finally, propositions aimed at the humanized and structuring performance of the Public Defender's Office were systematized. Among them, the following stand out: continuous training in human rights and intersectionality, the strengthening of institutional visits, collective defense and strategies, and the role of those assisted in the defense process.

The final chapter, by proposing a more humanized performance, consolidated the elements raised earlier, arguing that the practice of defense should break with the rigidity of legal dogmatics and assume an ethical-political commitment to historically invisible subjects. Qualified listening, recognition of the subjectivity of those assisted, and the adoption of interdisciplinary strategies were presented as structural pillars.

Therefore, it is possible to affirm that the Public Defender's Office, although immersed in an unequal and selective justice system, has the potential to resignify its performance and constitute itself as a transforming agent in the criminal execution of homeless people. Such action, in order to be effective, requires institutional strengthening, political commitment to human rights, and the adoption of legal practices sensitive to the complexity of vulnerabilities.

It is concluded that, in the face of a penal system that, according to Foucault, manufactures exclusion and feeds marginalization, the Public Defender's Office must assume the role of resistance, being the bridge between law and social justice. Their humanized performance is not only an ethical option, but a constitutional and historical necessity in the face of the reality of the streets and prisons. Justice, therefore, will only be full when it is able to reach and protect those who are currently kept on the margins, not only of the urban space, but of citizenship itself.

Finally, it should be noted that this article does not intend to exhaust the debate about the role of the Public Defender's Office in the criminal execution of homeless people, nor to offer absolute answers to the challenges surrounding the theme. On the contrary, it is intended that the present analysis serves as a starting point for broader and more in-depth reflections, fostering future investigations on aspects not yet explored, such as local institutional practices, the impacts of intersectoriality in the care of the homeless population and the successful experiences of advocacy in different regions of the country. The complexity of the reality dealt with here establishes a continuous, critical look committed to social justice.

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