



JUDICIAL LEGAL DEFENSE SYSTEMS: A COMPARATIVE STUDY ACROSS LEGAL TRADITIONS

SISTEMAS DE DEFESA JURÍDICA JUDICIAL: UM ESTUDO COMPARATIVO ENTRE AS TRADIÇÕES JURÍDICAS

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ABSTRACT

This article provides a comprehensive comparative analysis of judicial systems of legal defense across various legal traditions, focusing on Europe and Brazil. It delves into the pivotal role of the bar in criminal proceedings, examining its organizational structure and operational dynamics. The study contrasts the French-English and Austrian-German bar systems, elucidating their distinct approaches to legal defense and courtroom representation. Moreover, the article explores how historical and cultural contexts shape procedural guarantees and the autonomy of legal representatives. It underscores the lawyer's critical role in upholding fair trial standards and safeguarding human rights, particularly through their involvement in evidence gathering and evaluation during criminal proceedings. The theoretical and practical insights presented contribute to a deeper understanding of legal defense mechanisms, paving the way for future research in judicial systems and human rights practices across diverse legal frameworks.

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Keywords: Advocacy, Judicial system, Legal defense, Criminal procedure, Legal traditions, Comparative study, Legal representation, Legal defense, Brazilian legal system.

RESUMO

Este artigo oferece uma análise comparativa abrangente dos sistemas judiciais de defesa legal em várias tradições jurídicas, com foco na Europa e no Brasil. Ele se aprofunda no papel central da Ordem dos Advogados em processos criminais, examinando sua estrutura organizacional e dinâmica operacional. O estudo contrasta os sistemas de advocacia franco-inglês e austríaco-alemão, elucidando suas abordagens distintas em relação à defesa legal e à representação no tribunal. Além disso, o artigo explora como os contextos históricos e culturais moldam as garantias processuais e a autonomia dos representantes legais. Ele ressalta o papel fundamental do advogado na defesa dos padrões de julgamento justo e na proteção dos direitos humanos, especialmente por meio de seu envolvimento na coleta e avaliação de provas durante os processos criminais. As percepções teóricas e práticas apresentadas contribuem para uma compreensão mais profunda dos mecanismos de defesa legal, abrindo caminho para futuras pesquisas sobre sistemas judiciais e práticas de direitos humanos em diversas estruturas legais.

Palavras-chave: Advocacia, Sistema judiciário, Defesa jurídica, Processo penal, Tradições jurídicas, Estudo comparativo, Representação jurídica, Defesa jurídica, Sistema jurídico brasileiro.

1. RELEVANCE OF THE TOPIC

The Brazilian Constitution upholds honor, dignity, and individual freedom as foundational principles guiding the fulfillment of constitutional duties by state bodies. Central to ensuring the protection of rights, freedoms, and interests within legal processes is the active involvement of defense counsel and attorneys. Lawyers play a critical role in elucidating the intricacies of legal norms, ensuring the accurate application of remedies against legal violations. Meanwhile, attorneys safeguard the rights and interests of all parties involved in legal proceedings.

The origins of the bar date back to ancient Greece and evolved significantly during the Roman Empire. Today, the Bar functions as a pivotal legal institution, encompassing the norms essential for protecting rights, freedoms, and interests. A fundamental aspect of this framework is the participation of defense counsel and attorneys in criminal proceedings, reinforcing the constitutional mandate to uphold justice and legal integrity.



There is ongoing scholarly debate regarding the integration or segregation of two distinct institutions: the legal defense of individuals and citizens, and the structural role of attorneys-at-law as procedural participants. On one side of the discussion, proponents argue for a comprehensive framework of legal norms governing defense, alongside the active participation of attorneys-at-law who serve as procedural advocates safeguarding the interests of all involved parties. Attorneys have the mandate to represent suspects or accused individuals, victims, their legal representatives, civil plaintiffs, and others.

In contrast, opponents advocate for a unified definition of the bar, emphasizing its role in providing both legal defense and judicial representation, thereby ensuring comprehensive protection for participants in legal proceedings. Legal theory views the bar as a specialized class comprising legal experts who secure the rights and interests of all participants throughout the legal process.

In fulfilling their responsibilities, attorneys-at-law function akin to emergency responders: individuals entering the legal arena often lack the expertise to navigate and accurately assess the application of legal norms, particularly when confronted by prosecutorial powers that wield both procedural tools and coercive measures.

The general theory of law categorizes law into public and private domains. In this context, attorneys serve dual roles both from a legal perspective and as active participants in legal assistance in everyday scenarios. From a legal standpoint, attorneys engage in criminal proceedings from the initial notice of suspicion, through investigative procedures, and upon review of criminal case materials. In the realm of legal disputes, attorneys protect the interests of individuals throughout legal processes.

The study of the Bar is increasingly relevant amidst efforts to modernize legal systems and ensure effective justice. In both Europe and Brazil, the criminal process unfolds through two primary stages: pre-trial investigation and trial. Brazilian criminal procedure mandates that initial fact-finding occurs within 10 to 30 days by law enforcement, with the participation of defense counsel governed by procedural guidelines. Significant engagement of attorneys typically occurs during the trial phase.

According to Brazilian law, attorneys are tasked with safeguarding and representing



the interests of all parties involved. They provide legal defense, participate in procedural and investigative actions, collaborate with criminal justice authorities, and counterbalance prosecutors in assessing evidence during trials. Attorneys wield substantial authority to defend clients during criminal proceedings.

Criminal law and procedure stipulate that society and the state publicly prosecute criminal offenders, emphasizing the constitutional duty to uphold general rights and responsibilities by exposing wrongdoers. Every citizen enjoys legal protection and carries a moral obligation to aid in the discovery of crimes, irrespective of personal sentiments.

Official state criminal justice authorities bear the responsibility to expose and prosecute criminal offenders justly, ensuring fair treatment for the guilty while protecting the innocent. Through meticulous adherence to criminal procedure, these authorities secure the disclosure, preparation of charges, and defense of the rights, freedoms, and legitimate interests of all participants.

The organizational structure of criminal proceedings, deemed optimal by legal scholars across Europe, similarly guides Brazil's criminal justice system. This framework ensures protection for individuals who have suffered material, moral, or physical harm due to criminal acts, overseen by state authorities.

The prosecutor, entrusted with procedural oversight and investigation, serves as both an advocate for individuals' interests and a public representative during criminal trials. Their role encompasses safeguarding public and private interests and ensuring the equitable administration of justice.

In the context of European criminal law, the principle of mutual recognition is a cornerstone, driving the harmonization of judicial cooperation across member states. This principle ensures that judicial decisions, particularly those related to criminal matters, are recognized and enforced across borders with minimal procedural obstacles. The evolution of this principle reflects the broader trend towards integration within the European Union, balancing sovereignty with the need for a unified legal framework [1].

A comparative analysis of criminal procedures in Europe and Brazil underscores the critical significance of two primary stages: pre-trial investigation and trial, where legal



counsel assumes a pivotal role in safeguarding the rights and interests of all parties involved. Legislation in both regions underscores the crucial role of defense counsel in guaranteeing a fair trial and shielding against legal infringements.

Official state criminal justice authorities bear the duty to uncover guilt and shield innocence, striving to maintain a delicate balance between public and private interests. This procedural framework is widely acknowledged as optimal, fostering effective justice and highlighting the contemporary relevance of studying legal advocacy in modern criminal law.

2. THE ARTICLE AIMS

The article aims to elucidate the legal institution of legal defense and the pivotal role of attorneys-at-law during both the pre-trial investigation and courtroom phases of criminal proceedings. It focuses on delineating the legal status of attorneys-at-law and their procedural activities aimed at safeguarding human rights, freedoms, and interests. Furthermore, the article examines the attorney's active participation in criminal trials, where they function as integral procedural participants with rights equivalent to those of the public prosecutor.

3. THE THEORETICAL ASPECTS

The theoretical aspects of the article include scientific research with both theoretical and practical content published in monographs, scientific articles, and speeches on the issues of ensuring human protection from criminal offenses. The main legal structures of protection were identified by scholars from Brazil and Europe, who provided general elements of legal protection.

It is important to pay attention to the works of such prominent scientists as F. Capez, Y.C. Coêlho, D. Cunha Júnior, A. Estefam, E.A. Freitas, L.F. Souza, R. Greco, G.F. Guimarães, L.F. Kazmierczak, P. Lenza, Fernando De Brito Alves, A.A. Machado, Jairo N. Lima, T.B. Oliveira, E. Pachelli ta D. Fischer [2; 3; 4; 5; 6; 7; 8; 9; 10; 11; 12]. Their research and works



are the basis for analyzing and developing effective mechanisms of legal defense in criminal proceedings.

An exploration of scholarly perspectives underscores that the primary aim of legal defense is to safeguard the legal status of all participants in legal proceedings. Within the realm of criminal proceedings, the prosecution initiates legal action, casting the defendant as either a suspect or an accused individual.

Historically, dating back to 1879 in England, victims have had the right to retain legal counsel to protect their interests, ensuring the safeguarding of their rights within the judicial process. Conversely, accused individuals without legal representation faced less favorable conditions, prompting courts to grant their defense requests. However, achieving comprehensive procedural reforms to enhance the legal standing of the accused throughout trials has proven challenging, as victims traditionally received protection from public prosecutors armed with extensive prosecutorial powers.

Empirical evidence illustrates that a significant majority—up to 90%—of defendants experience profound fear of potential punishments and endure the stress of criminal prosecution during trials. The procedural intricacies and the presence of unauthorized individuals often exert a profound psychological toll on defendants, potentially compromising their self-control and leading them to reference irrelevant circumstances.

Furthermore, more than half of defendants — over 50% — lack clear awareness of their legal circumstances, often stemming from insufficient understanding of legal statutes and provisions. Practical analyses reveal that despite being granted legal status and procedural rights, defendants frequently encounter difficulties in effectively countering prosecutorial efforts. Paradoxically, those who are more innocent may find it even more challenging to mount a robust defense against prosecution.

This nuanced examination highlights the ongoing complexities within criminal justice systems, underscoring the imperative for continual evaluation and enhancement of legal protections to ensure fairness and equity for all participants in legal proceedings.

The evolution of criminal law across various jurisdictions underscores the dynamic



interplay between legislative frameworks and judicial interpretations. This handbook provides a comprehensive analysis of the fundamental principles and contemporary issues that shape criminal law today. Through comparative perspectives, it elucidates the distinct approaches taken by different legal systems in addressing common challenges, such as the protection of individual rights and the administration of justice [13].

In certain instances, the accused may find themselves unable to furnish the court with pertinent explanations regarding the circumstances of the alleged criminal offense or articulate necessary objections crucial for the resolution of the criminal case.

4. PRESENTATION OF GENERAL MATERIAL

Theoretical principles in criminal procedure, alongside practical mechanisms for safeguarding human rights, raise questions about how procedural protection should be ensured.

On one hand, scholarly literature debates the state's role in providing defense. Current criminal procedure laws in Brazil and Europe mandate the provision of defense for individuals with disabilities, minors, and those facing criminal charges punishable by life imprisonment.

On the other hand, the state assumes the role of prosecutor, bringing charges against the accused, and thereby acts as an adversary rather than a defender. Legal statutes specify that the protection of the rights, freedoms, and interests of suspects and accused individuals should be entrusted not to society at large but to trained legal professionals—licensed attorneys who have passed rigorous examinations qualifying them to defend suspects.

Society bears the responsibility for upholding the law, ensuring that no innocent person faces unjust prosecution and conviction, as each wrongful conviction tarnishes the societal and state reputation. The robust enforcement of laws promotes social order, and the equitable punishment of the guilty is crucial for the safety of every citizen. Thus, society must institute measures to empower a duly authorized representative to provide defense, oversee impartial pre-trial investigations, and conduct fair, objective trials with



the involvement of defense counsel and attorneys. The primary goal of legal representation is to uncover the truth.

In safeguarding the rights of the accused, defense counsel inherently protects the individual, thereby serving the broader interests of society. Nonetheless, conflicts can arise between societal and individual interests. Brazil's criminal procedure objectives reflect this dual focus: to ensure societal protection through the punishment of the guilty, while simultaneously affording the innocent robust defense and potentially terminating criminal proceedings against them. Therefore, a lawyer, in fulfilling their duties, defends the accused, while also advancing the imperative of societal interest. Critics argue that defense counsel serves as a guardians of public interest and aids the court in establishing the veracity of facts pertinent to criminal proceedings.

The English legal system is characterized by its unique blend of common law traditions and statutory frameworks. It emphasizes the role of judicial precedents in shaping the law, while also incorporating statutory reforms to address contemporary legal issues. This comprehensive analysis provides insight into the operational dynamics of the English courts, the roles of legal professionals, and the procedural aspects that underpin the administration of justice [14].

The role of defense counsel in the legal framework begins with their involvement in the investigation stage. Here, they provide defense to the suspect from the moment of initial suspicion, through the first interrogation, and up to the court's decision on preventive measures like detention.

During court hearings, defense lawyers actively represent the interests of the accused, countering the prosecution and utilizing legal strategies for the defense. Should a lawyer act improperly, the judge retains the authority to investigate and potentially remove them from the case, ensuring adherence to legal standards.

A defense attorney functions as a representative throughout criminal trials. Key features of the legal framework governing the Brazilian Bar include:

Independence: Defense attorneys are not state employees, allowing them to autonomously assess actions and evidence concerning the accused's guilt. They



vigorously defend the interests of their clients, challenging the prosecution and presenting factual data crucial to determining guilt.

Organizational Structure: The Bar operates as an autonomous entity separate from law enforcement agencies, ensuring it can effectively counter bureaucratic procedures. During trials, defense attorneys maintain direct communication with their clients to strategize defense approaches, assess charges, and evaluate evidence. They also engage with prosecutors, public officials, and the presiding judge. Furthermore, they consult with victims to discuss civil claims and seek resolutions or mitigations.

This organizational structure underscores the crucial role of defense attorneys in upholding fair legal proceedings and protecting the rights of the accused within the Brazilian criminal justice system.

The independence of a lawyer from both the prosecutor and the court is crucial to their role as public advocates rather than agents of the state. However, practical challenges arise that merit theoretical scrutiny, particularly concerning the lawyer's dependence on the accused for compensation during trial proceedings.

In this context, the lawyer's professional obligations sometimes necessitate aligning with the accused's position, regardless of the evidence presented, the severity of the charges, or other aspects of the case. This dynamic raises ethical and procedural considerations, as the lawyer's duty to vigorously defend their client may conflict with broader notions of justice and public interest.

Theoretical discussions on this topic often explore the balance between zealous advocacy and ethical responsibilities within legal practice. It underscores the complexity of the lawyer's role in safeguarding the rights of the accused while upholding the integrity of the legal process.

Comparative criminal procedure examines the diverse methodologies and historical contexts that different legal systems employ in addressing criminal justice. This work explores the procedural mechanisms and case studies from various jurisdictions, offering a comprehensive overview of how criminal processes are managed worldwide. By analyzing these differences, the book highlights the influences of cultural and legal



traditions on procedural practices [15].

The current Brazilian criminal procedure law mandates that a lawyer cannot refuse to provide defense based on moral objections; they must represent their client in all circumstances. Only the accused has the right to dismiss their defense counsel.

Reflecting on this issue, it becomes evident that legislation could benefit from introducing a rule stipulating fair compensation for lawyers, who serve as representatives of society. Payment should be calculated based on time spent, with a minimum rate established for their participation in court hearings. Upon completion of their duties, judges should issue certificates confirming their involvement, enabling state financial authorities to promptly process payment.

Such measures would not only ensure equitable compensation for legal professionals but also reinforce the integrity and accessibility of legal defense within the criminal justice system.

The Italian legal system is a unique blend of civil law traditions and modern legislative frameworks. This comprehensive introduction explores its historical development, key institutions, and procedural specifics. It provides readers with an in-depth understanding of how Italian law operates, from constitutional principles to everyday legal practices [16].

The role of the lawyer in criminal proceedings, particularly in Brazil, underscores their duty to ensure an objective trial and establish the truth, independent of material interests in case outcomes. Crucially, lawyers function as guardians against undue pressure and non-procedural actions by law enforcement, authorized to lodge complaints and petitions to hold wrongdoers accountable.

Central to the legal profession is its independence, essential for maintaining trial objectivity. Dependency on the court would compromise this objectivity, nullifying the fairness of proceedings—a fundamental aspect upheld by international human rights standards and protections for defenders.

In European legal systems, the diversity of professional roles in legal representation is notable, encompassing *avocats*, *barristers*, *avvocati*, *abogados*, and other specialized



categories like procurers and solicitors. These roles vary in their privileges and functions, with a trend towards expanding the rights of representatives to perform tasks traditionally exclusive to lawyers. For instance, in countries like France and England, solicitors have gained rights to courtroom representation, once reserved solely for attorneys, reflecting evolving functional responsibilities within legal professions across Europe.

Moreover, European legal systems are harmonizing roles and responsibilities across various categories of legal professionals, bridging procedural gaps to enhance the efficiency and effectiveness of legal institutions in court proceedings. This standardization facilitates smoother interaction among legal representatives and lawyers, contributing to more streamlined and equitable legal processes continent-wide.

5. CONCLUSION

In conclusion, the theory and practice of criminal procedure in Brazil highlight the crucial role of legal and procedural mechanisms in safeguarding individuals from unjust criminal prosecution. Central to this protection is the institution of the Bar, which actively represents and defends the interests of parties throughout trial proceedings.

Analyzing the procedural activities of lawyers reveals distinctive structural features in the organization of the Bar. Advocates function as representatives of the accused, providing legal counsel on the classification of offenses and steadfastly advocating for their interests, even if they diverge from the client's position during trial.

Historically, two primary organizational models of the Bar have evolved: the Anglo-French and the Austrian-German systems. The Anglo-French model emphasizes legal representation separate from judicial processes, where attorneys offer legal advice and participate in court hearings, while document execution and court decisions fall within the purview of solicitors. This model also encourages engagement in scientific discourse and public advocacy.

Conversely, the Austrian-German system integrates lawyers into all facets of judicial proceedings, from conducting investigative actions to presenting evidence in court. In



Brazil, the framework largely mirrors the Austrian-German model rooted in Portuguese legal traditions, where lawyers receive compensation for their involvement across various procedural stages. However, Brazilian legal practices also reflect influences from the American system, where lawyers actively represent parties in court proceedings.

In several European nations like France, England, and Spain, the Bar operates as an independent institution with financial autonomy from state authorities. Emphasizing the principle of providing free legal services, these jurisdictions underscore the Bar's role in ensuring a fair defense against criminal charges. This independence and active engagement in court proceedings significantly contribute to the equitable administration of justice and the protection of human rights.

In summary, the Bar within Brazilian criminal procedure is pivotal in upholding human rights through its adherence to legal and procedural norms. Variations in the organization of the legal profession across different legal traditions influence the role and effectiveness of the Bar, underscoring its critical impact on the fairness of judicial processes and the defense of individual liberties.

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