

The long-term balance between autonomy and performance in the public sector<sup>1</sup> Inovação e desempenho em organizações de justiça

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# ABSTRACT

The relationship between autonomy and performance is still fuzzy in the Public Administration literature. There is still no consensus on the limits of these concepts and their measures, and consequently on the direction of the relationship between them. Much of the literature observes the relationship between autonomy and performance from a transversal perspective. However, when observed longitudinally this relationship might vary. This study aims to test the long-term impact of autonomy on performance of the Brazilian Federal Public Defender's Office - PDO. More specifically, the research question is formulated as follow: how is the relationship between autonomy and performance in the long run? The results show that there was an important increase in the budget available for the PDO from 2014 onwards, which was the first year that the PDO was able to negotiate its budget proposal directly with Congress. Over the same period, the workforce maintained the growth trend. However, the increase in the PDO's output did not occur in the same proportion as the increase in the input. There was even a drop in the level of output in the period after the granting of autonomy. The number of citizens assisted by PDO increased year by year until the promulgation of the Constitutional Amendment that granted greater levels of autonomy for the PDO. This trend was interrupted in 2013 and, after 2015, the performance level decreased. Similarly, the cost of legal assistance also increased after the granting of autonomy, indicating a reduction in the efficiency of the PDO.

Keywords: Autonomy; Performance; Public Sector; Public Defender's Offices

# Introduction

Studies of Rainer &Steinbauer (1999) and Fukuyama (2013) suggest that the relationship between autonomy and performance of public agencies takes the form of a parabola with the concavity facing downwards. At one end, complete subordination means that the bureaucracy has no room for discretion or independent judgment and is completely bound by the detailed rules imposed by politicians (the principal). At the other end, complete autonomy means that the bureaucracy (agent) escapes political control and starts to define its own priorities, procedures and objectives (Fukuyama, 2013). In these cases, agents will tend to maximize their own utility, overriding the interests of the principal, thus delivering a sub-optimal performance (Jensen & Meckling, 1976).

Much of the literature observes the relationship between autonomy and performance from a transversal perspective. However, when observed longitudinally this relationship might vary. This study aims to test the long-term impact of autonomy on performance. More specifically, the research question is formulated as follow: how is the relationship between autonomy and performance in the long run?

This study looked at the long-term performance of the Brazilian Federal Public Defender's Office – PDO. This is a type of public organizations responsible for promoting access to justice

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for the socially and economically vulnerable population. The Brazilian Federal PDO underwent a recent process of autonomy enlargement. In 2013, the 74° Constitutional Amendment was enacted to grant the PDO functional and administrative autonomy and the ability to deliberate on its budget proposal directly with Congress. In the following year, the 80° Constitutional Amendment guaranteed political autonomy to the PDO by allowing it to send bills directly to Congress.

The autonomy of this type of agency is an important mechanism to protect human rights against possible arbitrariness of governments and against discriminatory practices in the application of the law. The study of the autonomy of PDOs is important, as this type of organization litigates against the government in cases of failures in public policies aimed at vulnerable populations. In this sense, governments have incentives aimed at abusing control mechanisms over PDOs, and hampering resources availability for these agencies properly fulfill their mission. However, a high degree of autonomy, without the existence of adequate accountability mechanisms might have harmful effects as bureaucracy would tend to deliver sub-optimal performance while seek to serve its own interests (Fukuyama, 2013; Tomic, 2018).

The study of public agencies autonomy has been largely based on formal aspects, that is, relying on the legal institutes regarding the structure and competences of agencies. In this sense, it is possible to observe the status of the head of the organization, the status of the members of the board of directors, the general framework of the agency's relations with government and parliament, financial and organizational independence and the extent of the agency's competences for the implementation of its policies (Gilardi, 2002; Maggetti, 2007; Buta, 2021). Therefore, in this study, autonomy is defined by its formal aspects, that is, as prescribed in the statutes of the agencies, mainly observing provisions related to functional, administrative and budgetary autonomy, as well as the hierarchical unbinding in relation to the executive branch. In turn, performance encompasses aspects related to the output, that is, the products of internal activities (Talbot, 2010), for instance the number of beneficiaries of the services provided by the agency; and to the efficiency, comprising the relationship between inputs and outputs, for instance a cost ratio of the services provided.

The results indicate that there was a significant increase in the amount of budgetary and personnel resources made available to the PDO after the enactment of the Constitutional Amendment that raised the levels of autonomy. However, this increase in inputs was not accompanied by outputs. That is, in the same period, there was a reduction in the number of citizens assisted by the PDO. There are also indications that the bureaucracy focused on corporate benefits in the period that followed the gains in autonomy.

# The relationship between Autonomy and Performance

The relationship between autonomy and performance is still fuzzy in the Public Administration literature. On the one hand, there are studies that indicate a direct relationship, in which the increase in autonomy levels goes hand in hand with the increase in performance levels (Silver, 1993; Braadbaart, Van Eybergen, & Hof, 2007; d'Almeida & Klingner, 2008; Exworthy, Frosini, & Jones, 2011; Anand, Exworthy, Frosini, & Jones, 2012; Nielsen, 2013). Greater autonomy would endow the agency with the ability to act proactively in the face of environmental changes, as well as allowing access to resources necessary for problem solving (Silver, 1993) and the development of organizational and entrepreneurial capacities (d'Almeida & Klingner, 2008).

On the other hand, there are studies that indicate an inverse relationship between autonomy and performance (Kim & Cho, 2014; Buta, Gomes, & Lima, 2020), or even null relationships





(Yamamoto, 2006; Verhoest & Wynen, 2018; Han & Hong, 2019). In these cases, the fragility of result control systems and accountability mechanisms tend to lead to bureaucratic deviation and jeopardize the performance (Kim & Cho, 2014; Han & Hong, 2019).

This discrepancy may be due to several factors, such as differences in measurement methods, or for reasons of research design. It is possible that the relationship between autonomy and performance takes a curvilinear shape (Rainey & Steinbauer, 1999; Fukuyama, 2013). That is, the relationship between these two variables would result in a parabola with concavity facing downwards, as shown in Figure 1.





Source: Fukuyama (2013) with changes.

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Much of the literature observes the relationship between autonomy and performance from a transversal perspective. However, when observed over time, the relationship between autonomy and performance tends to vary. For instance, an increase in the autonomy of Canadian agencies after a statutory change led to an increase in performance (observed by financial measures, average costs of results and labor productivity). Performance gains persisted for an extended time, but reached a plateau after a while, indicating an adaptation to the new legal framework of greater autonomy (Vining, Laurin, & Weimer, 2015).

In turn, Buta et al. (2020), when building a performance index for PDOs containing aspects that include efficiency and effectiveness, suggested that there was a change in the performance levels of the Brazilian Federal PDO after a statutory amendment that gave greater autonomy to that agency. This indication, however, was not tested. In that case, the effect seem to be inverse, that is, an increase in the autonomy of that body would be related to a loss of performance (Buta, Gomes, & Lima, 2020). It is worth mentioning that, in the case of PDOs, effective accountability mechanisms tend to be more important for good performance than the autonomy of this type of agency (Buta, Teixeira, & Fernandes, 2022).





A statutory change that brings greater autonomy may lead to an increase or decrease on the performance levels depending on the agency's initial level of autonomy. On the one hand, if the initial level of autonomy is low, granting greater autonomy will tend to increase performance, since the agency will have the discretion to anticipate environmental changes, technically define the best ways to implement its policies and to manage its resources. On the other hand, if the initial level of autonomy is high, granting more autonomy could imply the loss of accountability mechanisms and the excessive discretion of the bureaucracy, which could cause bureaucratic drift (van Thiel & Yesilkagit, 2011), as presented in Figure 2.

Figure 2. Expected relationships between variations in autonomy and performance.



Therefore, we argue that the Brazilian Federal PDO already had enough autonomy to optimize performance when the Constitutional Amendment was promulgated. So the increase in autonomy level tends to hamper the performance by diverting part of the resources to meet the bureaucracy's corporate interests.

# Method

This research is a case study on the Brazilian Federal PDO, an agency that recently underwent a process of gaining functional, administrative and political autonomy due to constitutional changes. PDOs are public organizations responsible for promoting access to justice for the socially and economically vulnerable population. These agencies are equipped with lawyers paid by the state for the provision of free legal assistance services (Smulovitz, 2014). The activities of such agencies are knowledge-intensive and highly relational, comprehending legal guidance; defense of individual and collective rights in the judicial and administrative spheres; disseminating knowledge about the rights of vulnerable citizens; and conflict reconciliation (Buta & Silva Filho, 2016).

This bureaucratic design for the public policy on legal aid to vulnerable citizens is used mainly in Latin America. Other designs for this policy involve the obligation of lawyers to defend, at no cost, those who cannot hire a lawyer due to their socioeconomic status, as determined by the courts; as well as the provision of legal assistance by professional associations of lawyers or by the organization of independent paid legal services (Smulovitz, 2014).

In Latin America, PDOs have spread since the fall of authoritarian regimes in the last century. In that period, there was a transition from an inquisitorial justice system to an adversarial justice





system (King, 2017). This new system has PDOs as a key component, thus reinforcing the right to adversarial proceeding and the right to full defense, and consequently the balance between the prosecution and the defense (King, 2017).

Although it tends to balance the prosecution and defense, this system does not always tend to be trusted by the citizens, since the defenders are employees of the state, which also supports the agency in charge of the prosecution (Smulovitz, 2014). It is also noteworthy that the PDOs litigate directly against the state in cases of deviations in public policies aimed at socially and economically vulnerable citizens. In this sense, the autonomy of those entities tends to be an important instrument to maintain social well-being, the stability of the democratic regime, to protect human rights against possible arbitrariness of governments and against discriminatory practices in the application of the law (Madeira, 2014).

With that in mind, the Organization of the American States (OAS) advised member states that official PDOs should have an adequate budget and independence, as well as functional, financial and/or budgetary, and technical autonomy (OAS Resolutions n° 2656/2011, n° 2714/2012, n° 2801/2013, and n° 2821/2014). Although Latin American countries have pursued such advice, irregular levels of capacity and performance in their PDOs have been reported (e.g., Smulovitz, 2014; Fondevilla & Reyes, 2016; Bersch, Praça, & Taylor, 2017; King, 2017; Ávila & Fix-Fierro, 2018).

# Data Collection and Analysis

For the purposes of this study, autonomy was observed based on formal aspects, specifically the enactment of Constitutional Amendments 74/2013 and 80/2014, which modified the institutional framework of the Brazilian federal PDO. From that point, the PDO broke free from the structure of the Executive Branch, becoming an independent agency, capable of forwarding bills and budget proposals directly to the Legislature, as well as guaranteeing functional and administrative independence, which allowed the agency the discretion to freely design and implement its policies and define its administrative procedures.

In turn, performance was observed through two variables. The first one covers the main output of the PDO, that is, the number of users of the services provided by the agency. The second variable is related to efficiency, comprising the relationship between input (budget) and output (assisted citizens).

This study is essentially qualitative, but with quantitative and qualitative empirical data. The research was carried out in two stages. In the first, four variables were observed over time:

1) Assisted citizens, which represents the main output of the PDO, that is, the total number of people who received legal assistance each year;

2) Public defenders, an input variable, which deals with the number of public defenders at the end of each year, workforce directly involved with the provision of legal assistance;

3) Budget, refers to the budget amount authorized for the PDO each year, also an input variable; 4) Cost per assisted citizen, brings the ratio between assisted citizens and the budget, expressing an idea of efficiency.

These data were obtained directly from the PDO, Data refer to the period from 2009 to 2019, and were obtained directly from the agency, through management reports and transparency website, and via requests for access to information. Graphical analyzes and descriptive statistics were performed.

The second stage of the research involved document analysis, in the search for smoking guns after the enactment of the constitutional amendment that guaranteed the autonomy of the PDO. Bills, normative resolutions and ordinances issued by the POD in 2014, 2015 and 2016 were





observed in the search for strategic decisions related to significant changes in the provision of legal assistance services, or eventual benefits for bureaucracy.

#### **Results and Discussion**

Until the year 2013, the Federal PDO was linked to the Ministry of Justice, when, through the Constitutional Amendment 74, it gained functional and administrative autonomy, in addition to the capacity to forward its budget proposal directly to the Congress. One year later, the Constitutional Amendment N° 80 expanded the autonomy of the PDO, establishing the functional autonomy as an institutional principle and granting the defender-general the power to forward bills related to its structure and operation to the Congress.

The autonomy granted to that agency is quite broad. Currently, that PDO is not linked to any of the Republic's branches, being accountable directly to the Legislature. In addition, only career public defenders can compose the board of directors and occupy the position of defender general. There is a two-year term for the positions of defender-general and member of the board of directors, with no possibility of removal from the position during that period. The PDO also has its own means for obtaining resources, in addition to the constitutional competence to forward its budget proposal directly to the Legislature. It is also noteworthy that the Brazilian Federal PDO can initiate bills that deal with its structure and operation.

Nevertheless, there is evidence that the performance levels of that agency reduced after the autonomy was granted (Buta, Gomes, & Lima, 2020). There was an increase in the availability of resources for the PDO in the period after the granting of autonomy, but a drop in the level of performance in the same period. This can be observed in Figure 1, that brings a longitudinal perspective (2009 - 2019).

Figure 1 presents four plots on the evolution of the performance and capacity of the Brazilian federal PDO from 2009 to 2019. The northeast batch shows the number of citizens assisted, which peaked in 2014. The northwest shows the evolution in the number of public defenders, which has increased every two years. The southeast batch shows the budget amount, in millions of Brazilian reais, authorized for the PDO each year, corrected by the broad consumer price index (IPCA), Brazilian official inflation index. It is possible to see acceleration in the growth of the budget amount after the year 2013. In 2016, a constitutional amendment was enacted to contain public spending in Brazil (Constitutional Amendment N°. 95/2016). For this reason, the approved budget remained practically constant from 2017 onwards. The south-west batch shows the ratio between the approved budget and the number of citizens assisted, giving an idea of efficiency. There is a significant increase in the cost of each assisted citizen after the year 2013.



DGP



GPJüs





Source: Brazilian Federal Public Defender's Office.

From the data in Figure 1, it is clear that there was an important increase in the budget available for the PDO from 2014 onwards, which was the first year that the PDO was able to send and negotiate its budget proposal directly with Congress. It is possible that this amount is considerably greater, as it may have incorporated expenses previously borne by the Ministry of Justice. It can also be noticed that the workforce, measured by the number of public defenders, maintained the growth trend.

However, the increase in the PDO's performance did not occur in the same proportion. In fact, there was even a drop in the level of performance in the period after the granting of autonomy, in line with what was proposed based on Fukuyama (2013). Figure 1 clearly shows that there was a tendency to increase the number of assisted citizens until 2013. That is, the performance measured by the main output of the PDO had been increasing year by year until the promulgation of the Constitutional Amendment granting greater levels of autonomy. This trend was interrupted in 2013, and after 2015, the performance level even decreased. In the same vein, the cost of legal assistance also increased after the granting of autonomy, indicating a reduction in the efficiency of the PDO.

In short, although the PDO began to enjoy greater autonomy and greater availability of budgetary and personnel resources, this did not translate into improved performance. In fact, the situation of greater autonomy has been neglecting the accountability mechanisms necessary to keep the agency in line with the interests of the principal (Buta, Guimaraes, & Akutsu, 2020). This generate opportunistic behavior by public defenders, leading to bureaucratic drift (van Thiel & Yesilkagit, 2011; Fukuyama, 2013).

The reasons for the drop in efficiency levels can be related to the granting of benefits to bureaucracy. In January 2014, the PDO issued the Normative Resolution No. 77/2014





regulating the granting of food aid to employees. This Resolution allowed for the subsequent increase in food aid, instituted through Ordinance No. 392/2014, which doubled in value, and established pre-school assistance for employees' children. In the same year, Normative Resolution No. 100/2014 established housing assistance for public defenders. The latter, however, generated media repercussions due to the high amounts of aid and was overruled by the Congress. During this period, bills were also sent to the Congress with the objective of increasing wages for the various PDO employees, as well as creating new posts. The only successful bill (No.7924/2014) has raised the salaries of public defenders by about thirty percent.

Regarding performance, the most relevant evidence of a strategic action aimed at increasing performance took place just three years after the granting of autonomy. In 2015, Ordinance No. 231 created ten new branches in the interior of the country. Even so, this action did not present an effective result in the overall performance, since the number of people served after this period decreased.

A possible explanation for this was the enactment of the Resolution No. 134, of 2016, that reduced the monthly income limit for a person to be considered eligible for assistance by the PDO. This agency is dedicated to serving vulnerable people. To define who these people are, the PDO itself sets limits on family income, above which citizens are no longer eligible to receive legal assistance. Previously, people with a family income of up to three thousand reais per month could be users of the PDO services. The aforementioned Resolution set this limit at two thousand reais per month, which represents a reduction in the potential users of the PDO by more than 60 million people.

The results is in agreement with what was found by Buta et al. (2022), that the availability of abundant resources is not necessarily crucial for the performance of PDOs. In addition, autonomy is important for the PDO to be able to fulfill its mission, this is not the main cause for performance of this type of organization, but the institution of effective mechanisms of accountability (Buta, Teixeira, & Fernandes, 2022).

As observed by Buta (2021), the autonomy level of the Brazilian Federal PDO is quite broad, much higher than similar Latin American agencies. However, the granting of autonomy was not accompanied by the creation of accountability mechanisms, as observed in a previous study (Buta, Guimaraes, & Akutsu, 2020). In short, the Brazilian case is extreme, but it serves to show that the relationship between autonomy and the performance of public organizations tends not to be so obvious, even for an agency that, due to the nature of its activities, deserves to be endowed with some level of autonomy so that it can operate without political interference. This also puts doubt in the effectiveness of the OAS recommendations that the PDOs should be independent.

It is worth mentioning that an appropriate degree of autonomy does not mean that bureaucrats are isolated from society, or that they can make decisions that are not in line with the demands of citizens. In cases where autonomy levels are high, the effects can be perverse, as bureaucracy escapes political control and begins to define its own procedures and objectives (Fukuyama, 2013).

# **Concluding remarks**

To test the long-term impact of the autonomy on the performance of the Brazilian Federal PDO, we observed the performance of the agency over eleven years, from 2009 to 2019. In the middle of that period, the enactment of two constitutional amendments granted functional, administrative and political autonomy to that agency. The results show that, over the period observed, the capacities of the PDO expanded, as the agency began to enjoy greater autonomy 8





and availability of budgetary and personnel resources. However, performance reduced, both when measured by output (number of citizens assisted) and when measured by efficiency (cost of assistance to each citizen).

Although autonomy is an important factor for PDOs to carry out their mission, as they are agencies that directly litigate against the State in cases of deviations in the provision of services to vulnerable citizens, excess autonomy can be detrimental to the performance of these agencies and, consequently, for society. In this regard, the OAS recommendations that PDOs should be independent should be interpreted sparingly. Furthermore, the granting of autonomy and the availability of resources do not necessarily lead to higher performance, if there are no accountability mechanisms capable of guaranteeing that the bureaucracy acts in accordance with the interests of the principal.

This study has limitations, since a single case was evaluated. Future studies should bring up counterfactual cases, thus making it possible to verify whether variations in performance levels are in fact due to the expansion of autonomy.

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