

LEGAL AID FOR VICTIMS IN CRIMINAL PROCEEDINGS IN PORTUGAL¹

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The following article gives an overview of legal aid for victims in criminal cases in Portugal. It addresses the issues of a victim's access to a lawyer, when and how the right is granted (right to legal assistance), and under what circumstances the victim has a right to financial legal aid (right to financial legal aid).

Before addressing financial legal aid, the article will outline the victim's right to legal assistance, as the latter defines the scope of the former. If a victim has the right to legal assistance in a certain procedural setting, she will also be entitled to financial legal aid for that procedure, if she meets the legally established eligibility criteria.

1. The Constitutional Framework of the right to legal assistance and to legal aid

In the Portuguese legal system the victim's role and right to legal assistance are recognised and protected by the Portuguese Constitution (CRP).

Firstly in a general manner the Constitution grants every citizen the right of access to justice stating "*justice may not be denied to anyone due to lack of sufficient financial means*"².

Secondly the right of access to justice in Portugal includes a far reaching constitutionally granted right to legal assistance, according to which "*everyone has the right to legal information and advice, to legal counsel and to be accompanied by a lawyer before any authority*"³. This means that citizens participating in any proceedings, including victims of a crime, have the right to have a lawyer present with them.

2. The role of the victim in criminal proceedings in Portugal

A victim is any person who, as a result of a crime, was directly harmed or affected in their physical integrity, honour, health or property. If the victim has passed away, is a minor or lacks mental capacity she can be represented by her closest family members. Similarly, a company can be victim of a crime.

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² Art. 20 (1) CRP. An English translation of the Portuguese Constitution is available on <http://www.en.parlamento.pt/Legislation/CRP/Constitution7th.pdf>.

³ Art. 20 (2) CRP.

A criminal procedure is mainly about identifying the actor responsible for the commission of a crime. The victim *per se* is therefore not at the centre of the proceedings. However, this doesn't mean that her interests cannot be taken into account in a criminal procedure. The importance of the participation of the victim in the criminal proceedings has long been recognised and is even constitutionally protected⁴. The Constitution grants the victim a right to intervene in criminal proceedings, but leaves its definition to the law. The law accordingly establishes the rights of victims to intervene in criminal proceedings, to legal assistance and to financial legal aid. The most relevant legislative instruments in this regard are the Code of Criminal Procedure⁵ (CPP), the Regulation on Procedural Costs⁶ (RCP) and the Law on Access to Law and to Courts⁷. There are also special regulations for the victims of violent crimes and of domestic violence, which will not be addressed in this article⁸.

3. When does a victim have the right to have access to a lawyer in criminal cases in Portugal?

In order to enforce her rights in criminal proceedings the victim has various possibilities, which depend on her desire to take a less or more active role.

One can distinguish three different forms of intervention in criminal proceedings for the victim: *i*) as a mere *testemunha* (witness) or *queixosa* (complainant); *ii*) as a *demandante civil* (civil claimant) or as an *iii*) *assistente* (assistant, i.e. collaborator of the Public Prosecutor).

The Code of Criminal Procedure lays down the defendant's statute (i.e. his rights and duties within the criminal proceedings), but not the one of the victim as such in general. Nevertheless there are specific rules concerning the status of the assistant, the civil claimant, the complainant and, ultimately, the witness, which are spread throughout the Code. It should be noted that victims of domestic violence have their status and rights defined by special legislation, which currently leads to a different treatment between these victims and victims of other crimes.

It should further be noted that when intervening in criminal proceedings the victim is always entitled to the right to legal assistance, irrespective of the form of intervention.

⁴ Art. 32 (7) CRP.

⁵ A partial English translation is available on http://www.gddc.pt/codigos/code_criminal_procedure.html.

⁶ Law Decree 34/2008, of February 26.

⁷ Law 34/2004, of July 29.

⁸ Law 104/2009, of September 14, on compensation to victims of violent crimes; Law 112/2009, of September 16, on prevention of domestic violence and protection and assistance to its victims; Law Decree 120/2010, of October 27, on the Commission on the Protection of Crime Victims.

a. The intervention as a complainant and witness

Firstly, a victim can be a mere *testemunha* (witness) and/or complainant. For example, a victim who was subject to an armed robbery may intervene during the phase of investigation and at a later stage during the trial, in order to convey her view of the facts of the crime. In this case, the intervention of the “*vítima-testemunha*” (victim-witness) is passive. Even so, the victim has several rights: *i*) she may ask for compensation for travelling expenses⁹; *ii*) she may ask for protection, in case she fears the author of the crime could harm her because she is testifying¹⁰; *iii*) if the court is not located in her area of residence, she may ask to testify by video conference at the court of her residence during the trial¹¹; *iv*) she may benefit from victim support services (both social and psychological support); *v*) she may request to be informed about whether or not the crime suspect was indicted¹²; *vi*) she may be accompanied by a lawyer during any procedural act¹³ and, if she lacks financial means, she may request financial legal aid from the social security services. However the lawyer can only accompany and advise the witness, he cannot take an active role nor intervene during the proceedings or the trial hearing¹⁴. In certain cases, in which the start of criminal proceedings depends on the victim reporting the crime and asking for criminal proceedings to be instituted¹⁵, the “victim-witness” is called a complainant (*queixoso*). The complainant doesn’t automatically have an active role in the procedure. If the victim remains as a simple complainant she will have the same degree of participation in proceedings as a mere witness. In addition to this she has the right to withdraw the complaint at any stage of the proceedings until the verdict in first instance is read and thereby terminate prosecution¹⁶. This usually does not apply in most serious cases (for example murder).

b. The intervention as civil claimant

Secondly the victim may participate in criminal proceedings as a *civil claimant*¹⁷. If a victim is seeking damages, she may (and usually she must) claim them directly in the criminal proceedings.

Authorities are obliged to inform any victims who suffered damages of their right to claim civil damages as soon as they are aware that there has been a victim who might have suffered damages¹⁸. The victim should then inform the authorities of her intention of claiming civil damages. In this way the victim can ensure that, in case the suspect is accused at the end of the investigation stage (the moment after which the deadline to lodge a claim for civil damages

⁹ Art. 317 (4) CPP.

¹⁰ Art. 139 (2) and (3) CPP; art. 352 (1) (a) CPP; Law 93/99, of July 14th (the translation into English of an outdated version is available on <http://www.gddc.pt/legislacao-lingua-estrangeira/english.html>).

¹¹ Art. 318 CPP.

¹² Art 77 (2) CPP *in fine* and 277 (3) *in fine*.

¹³ Art. 132 (4) and (5) CPP.

¹⁴ Art. 132 (4) CPP.

¹⁵ Art. 113 ff of the Criminal Code; art. 49 of the CPP.

¹⁶ Art. 116 (2) of the Criminal Code.

¹⁷ Art. 71 CPP

¹⁸ Art. 75 CPP.

begins to run) the authorities will inform her that an indictment has been brought against the defendant.

The civil claimant is exempt of the payment of court costs, if the claim is lower than €2040,00¹⁹. If the claim is higher than €2040,00 the civil claimant is not required to pay the court fee in advance²⁰. However, if he loses the case, he will be required to pay the court fee after the final judgment, which can be appealed, within ten days. The judge sets the court fee in view of the complexity of the case.

If the defendant is convicted to pay the civil claim, the amount will also include the expenses incurred in by the civil claimant concerning court costs (but not necessarily the lawyer's fees and, if so, only a small part).

The civil claimant has the same rights as a witness or complainant and he is also entitled to the right to have access to a lawyer²¹. If the claim for civil damages exceeds €5000,00, representation by a lawyer is even mandatory. Should the civil claimant lack financial means she can request financial legal aid from the social security services.

The intervention of the civil claimant and his lawyer does not interfere with the criminal cause of the proceedings. To give an example, if the judge finds the accused to be innocent of committing the crime, the civil claimant does not have the right to appeal the decision. She can only dispute the facts as far as they are also connected to civil liability of the defendant.

c. The intervention as an assistant

Thirdly the victim who wants to have a more active role in the proceedings may choose act as *assistente*²², a form of collaborator of the Public Prosecutor. As an assistant the victim may take part in the proceedings by providing evidence and making interventions in various key-moments of the proceedings²³. The victim may be both civil claimant and *assistente* at the same time, intervening in the criminal and civil part of the criminal proceedings.

In order to be admitted to intervene as an assistant, it is necessary for the victim to pay a court fee in advance (currently €102,00) and to mandate a lawyer²⁴. As mentioned previously, here again the victim may ask for financial legal aid in case of insufficient financial means.

Further to the general rights of victims mentioned above, the assistant has a broader array of rights (information, intervention, hearing, appeal). For example, the assistant has to be consulted and give his approval if the Public Prosecutor decides, despite the existence of

¹⁹ Art. 4. (1) (n) RCP; 1 UC = 102 Euros, 20 UC = 2040 Euros.

²⁰ Art. 15 (1) (d) RCP.

²¹ Art. 76 CPP

²² Art. 68 CPP

²³ V.g. art. 69 CPP.

²⁴ Art. 70 CPP

sufficient evidence against the suspect of crime, not to bring charges against him but merely to order him to comply with certain obligations (such as ask the victim for forgiveness, indemnify the victim for the damages suffered, carry out a civil service, or pay a fixed amount to an institution of solidarity).

The assistant is informed of all decisions throughout criminal proceedings from the moment in which she was accepted to act as such and is heard before any decisions are made.

The assistant also has the right to challenge decisions that are unfavourable to him (i.e. decisions to close the case or to acquit the defendant, or denying production of evidence)²⁵. For example, if the Public Prosecutor doesn't file any charges against the suspect, the assistant may request for the judge of investigation to indict the defendant. At the trial hearing the assistant's lawyer is present and may submit or request evidence, interrogate witnesses and make opening and closing arguments in front of the court. Furthermore the assistant may appeal an acquittal decision and, in certain cases, request a jury trial.

4. How is the right of access to a lawyer granted?

As mentioned above, when intervening in criminal proceedings the victim is always entitled to the right to legal assistance. Nevertheless not every victim of a crime has the right to have a lawyer assigned and paid for by the state.

If a victim has financial means to support herself, she must choose her own lawyer and let herself be accompanied or represented by him/her.

In cases of mandatory representation the court will notify the victim that she has to mandate a lawyer and ask her to appear with a lawyer. If the victim does not mandate a lawyer she will not be admitted to act as an assistant or as a civil claimant (in the latter case only if there is a claim above €5.000,00). In this respect the situation of the victim is different from that of the defendant, as the defendant who does not appoint a lawyer in cases of mandatory representation is assigned a lawyer by the state automatically, irrespective of having sufficient financial means to entertain a private lawyer, and will only pay his fees in case there has been a conviction²⁶.

Only in the event where a victim cannot afford the lawyer's fees and the judicial fees she may request legal aid from the state.²⁷ Should the request for legal aid be granted, the Portuguese Bar Association (*Ordem dos Advogados Portugueses*) will appoint a lawyer²⁸, upon request by

²⁵ Art. 401 (1) (b) CPP.

²⁶ And the fees are set according to the official table for publicly appointed lawyer, being much lower than the fees charged in the private market.

²⁷ More details about the procedure of request for legal aid will be explained in the next section.

²⁸ Art. 25 Law 34/2004, of July 29.

the court, Prosecutor or Police. In this event the Ministry of Justice will pay for the lawyer's fees.

The lawyer is a so-called *advogado officioso*, a lawyer who volunteered to be appointed by the *Ordem dos Advogados* in cases where plaintiffs, victims or defendants do not have financial means to pay for legal assistance. These are lawyers who also work as private lawyers. Every *advogado officioso* is paid the same amount of fees, irrespective of how high his fees as a private lawyer are. If the victim needs a court-appointed lawyer, she is not allowed to choose her own lawyer²⁹. The Bar Association by means of a computer programme designed for legal aid purposes appoints the lawyer randomly.

A victim may also request legal aid during the stage of execution of the judgment (in order to execute the civil damages granted by the court) in order to have the court fees and the fees for the execution agent (*agente de execução*) paid for. This *agente de execução* is also appointed by the state³⁰.

5. When does a victim have the right to financial legal aid in criminal cases in Portugal?³¹

The Portuguese legal system has strictly *means-test* based financial legal aid system. Accordingly the merits of the case or the type of crime are not considered when deciding upon a victim's request for legal aid. A victim therefore has the right to financial legal aid whenever she has the right to be represented by a lawyer as described above and in addition she is able to prove that she has no financial means to bear the costs of the proceedings. The criteria for defining "financial inability" are defined in Law 34/2004, of July 29, and in a Decree³². Since the financial ability of the state to cover such requests for legal aid is limited, financial legal aid may only be granted in situations of real financial need of the victim. Mere financial difficulties do not suffice. Therefore financial legal aid is only granted to those for whom it would be impossible to seek justice without legal aid from the state.

a. When is the victim considered not to have sufficient financial means?

A victim is considered to have insufficient financial means when, after having examined the wealth, salary and expenses of the victim and her family members, the conclusion can be reached that objectively speaking the victim is incapable of bearing the costs of the proceedings³³. The relevant income is the household income, not only that of the victim herself.

²⁹ This is also the case for the defendant.

³⁰ Art. 35 Law 34/2004, of July 29.

³¹ This right is also granted to non-profit organizations.

³² Portaria 1085-A/2004, of August 31 (amended by Portaria 288/2005, of March 21 and by Law 47/2007, of August 28).

³³ Art. 8 (1), Law 34/2004, of July 29.

According to Law 34/2004 a victim whose relevant household income is equal or less than $\frac{3}{4}$ of the IAS (€419,22) is considered incapable of bearing any procedural costs³⁴. In practice, a family household of two persons earning up to a net income of €11300,00 yearly is eligible for full legal aid.

If the victims' household's income is between $\frac{3}{4}$ and 2,5 times the IAS (€419,22 to €1048,05) she will be considered capable of bearing the fixed fees for legal consultation (€30,00) and therefore has no right to full financial legal aid for legal consultation and will only have the right to pay the court costs in instalments³⁵. In practice, a family household of two persons earning a net income between €11.300,00 and €28.710,00 yearly is eligible for partial legal aid.

The calculation of the income for legal aid purposes is based on a formula set on Decree 1085-A/2004. Nevertheless in exceptional circumstances, if the calculation on the basis of that formula results in a decision not to grant financial legal aid and the denial would lead to a flagrant denial of access to justice, the higher officer of the social security services may grant legal aid by means of a especially well reasoned decision³⁶.

b. How are the proceedings for obtaining financial legal aid?

i. When

The request for obtaining financial legal aid should be filed before the first intervention of the victim in the proceedings. Should financial necessity occur at a later stage during the proceedings, a request can still be filed before the first intervention of the victim in the case after having knowledge of the insufficiency of financial means³⁷. The request can be filed using the digital form that can be found online³⁸ personally, by fax, mail or email.

The duration of the procedure is limited to 30 days from the day the form was filed to the day when the social security services make a decision. If the social security services do not respond to the request until 30 days from it being filed, legal aid will be considered as having been granted. Should the social security services decide to deny the applicant's request, they must communicate this intention prior to decision and give the applicant 10 days to make a statement. If the applicant does not respond, the decision to deny financial legal aid becomes definitive.

ii. Evidence

The victim must fill in the specific form and attach all the required documents. Depending on the victim's situation regarding her marital status, the family members sharing her household

³⁴ Art. 8-A (1) (a), Law 34/2004, of July 29.

³⁵ Art. 8-A (1) (b) Law 34/2004, of July 29.

³⁶ Art. 8-A (8) Law 34/2004, of July 29.

³⁷ Art. 18 Law 34/2004, of July 29.

³⁸ <http://www4.seg-social.pt/formularios>.

and her situation of employment, different documents will be needed. These documents usually include a document of identification and residence permit, certificates proving the victim's financial situation, such as tax declarations, salary sheets, relevant documents regarding property of real estate, cars, shares etc. and in case of dependence on social support, the relevant documents.

iii. Competent Authority

The request for financial legal aid is to be made to the social security services of the victim's district of residence (*Centro Distrital de Segurança Social*), or any service in case the victim does not have a residence in Portugal³⁹. If the social security services decide to grant financial legal aid, they will contact the competent court informing them that the victim has been granted legal aid, as well as the *Ordem dos Advogados*, which will appoint a lawyer.

iv. Who can make the request?

Any citizen of Portugal and the EU, or any third-country national with a valid residence permit within the EU may request financial legal aid.⁴⁰ Third-country nationals without a valid residence permit in the EU will only be eligible for legal aid if their home countries ensure legal aid to Portuguese citizens in the equivalent situation. The request is free of charge and can be made by the victim, by the Public Prosecutor in the interest of the victim, or by his or her lawyer⁴¹.

v. Appeal

The applicant may appeal against the definitive denial decision of the social security services within 15 days upon notification of decision. The appeal is to be addressed in writing to the social security services that dealt with the request for legal aid in the first place. Having received the appeal, the social security services have 10 days to either revoke the denial or, in case they decide to maintain the decision, forward it together with the appeal to the competent court⁴².

c. What kinds of costs are included in financial legal aid?

The costs included in financial legal aid are legal advice and legal assistance. This includes consulting a lawyer, to learn which law is applicable and how to proceed in the particular case. Further it includes the appointment of a lawyer, the payment of his/her legal fees, total or partial exemption from the court costs, or payment of court fees and/or state-appointed lawyer

³⁹ Art. 20 Law 34/2004, of July 29.

⁴⁰ Art. 7 Law 34/2004, of July 29.

⁴¹ Art. 19 Law 34/2004, of July 29.

⁴² Art. 27 and 28 Law 34/2004, of July 29.

fees in instalments, and appointment of an agent of execution, a public agent supporting the victim when it comes to the execution of the sentence⁴³.

The fees of a privately mandated lawyer are never covered by legal aid.

d. Advantages and problems of the legal assistance and legal aid system for victims in practice

Observing the Portuguese legal system one can outline its advantages for victims in practice. It is our view that the main advantage of this system for victims is that it allows for them to assume a very active and often decisive role in criminal proceedings, by intervening as an assistant. This intervention not only allows for the victim to positively influence the outcome of investigations and trials, but it also helps the victim to make her interests and needs be taken into account during the different stages of proceedings.

Further to this, it is also very important to stress that, even when victims have a more passive role in the proceedings, a lawyer may always accompany them. This ensures that the victim's rights are fully exercised and respected and also gives the victim a feeling of protection.

Finally, if the victim has no financial means, she is entitled to have a state-appointed lawyer paid for by the state and to exemption of court fees (or at least to benefit from payment in instalments). This right to financial legal aid ensures that the victim's right to intervene in criminal proceedings is not only a theoretical one, or a right granted to those who can afford a lawyer and bear the court costs, but is effective in practice and granted to every citizen irrespective of his financial capacity.

Looking at these advantages we can conclude that the general model of legal assistance and legal aid mandated by our Constitution and established in our laws is a satisfactory one from the victim's perspective. The leading idea is a good one. Nevertheless when looking closer at the specific provisions and at the functioning of the system we will find some issues that need to be improved.

The main problem in practice in our view seems to be the lack of information on the right to have access to a lawyer and to have legal aid to cover these costs. Although there is a general provision in the CPP on the duty to inform those who might have suffered damages derived from criminal action, which usually includes those who fall in the broader concept of "victim", this information does not include information on all of the victims' rights. Despite this limitation, the fact that the victim is informed of her right to claim damages and of her right to have a lawyer appointed by the state for that purpose and to legal aid to pay for the respective costs may end up in end up helping the victims, as they will end up contacting a lawyer who will inform and advise them, also on their rights. The absence of an explicit provision on the rights and duties of the victims is even more striking when one compares the general legal framework

⁴³ Art. 6, 14 and 16 Law 34/2004, of July 29.

of the CPP to that created for victims of domestic violence⁴⁴. These victims are entitled to a special statute in which the right to information on rights – among others – is explicitly enshrined. In our view there is no justification to the different treatment of victims in this regard and the legislator should amend the CPP in order to include a “statute of the victim”.

Another problem is related to the very low income threshold established by Decree for being eligible for legal aid. According to this threshold nearly only indigent victims (or those who do not declare their income to the tax authorities...) are eligible for full legal aid. This may lead to many victims not exercising their right of access to justice, as they would have to bear (even if only in instalments) the costs of the proceedings and many of them are not willing to bear those costs, as they feel it as a secondary victimization. Many lower middle class victims are, in fact, not able to have access to justice, as they have to choose where they will spend their low income (being the choice many times between the legal costs and their children’s nourishment and education, the decision is obviously not for legal costs). Furthermore victims feel that, if they have to pay court costs in instalments, they should at least be able to choose their lawyer freely and have his fees also covered by legal aid, which is not possible. The fact that the court costs and lawyer’s fees are not reimbursed by the state if the victim “wins” the case also discourages victims to act. Sometimes the defendant should repay some of the costs to the victim, but in practice this often does not happen because defendants have no possessions.

It is difficult to overcome the budgetary legal aid limitations and to grant every victim whatsoever the right to full legal aid. Nevertheless it is our view that there should be a debate about the possible creation of a category of victims that would be exempt of paying court fees (or at least initial court fees) as well as the lawyer’s fees. It is difficult to decide who could be included in this category, but the debate could start by looking at the victims of violent crimes and eventually vulnerable victims (children, elderly, etc.).

We also consider that there should be a debate on the need of mandatory defence for certain vulnerable victims (children, victims of organized crime, elderly, foreigners who do not speak Portuguese, etc.). The Portuguese legal system has a system of mandatory defence for defendants that is, in part, justified by special personal characteristics of the person (visual, hearing or speaking impairment, illiteracy, inability to speak or understand the Portuguese language, age under 21, absence or diminution of criminal capacity). The need for special protection of victims who also possess these characteristics should be the object of an open debate, linked to the above-mentioned issue of the exemption of costs for these particularly vulnerable victims.

Finally there is a general problem, which has to do with the level of the fees paid to publicly appointed lawyers. These fees are much lower than the ones in the private market. This can lead to a situation where only the lawyers that are not able to find clients in the private market will volunteer for legal aid. Furthermore lawyers who are poorly paid may have neither time nor

⁴⁴ Law 112/2009, of September 16, on prevention of domestic violence and protection and assistance to its victims.

motivation to study and prepare their cases properly. Ultimately this can lead to a decrease of the quality of the assistance provided in the legal aid scheme.

The particular position of foreign victims should also be considered, as their position is much weaker than national victims, due to the fact that they are unable to communicate in Portuguese and sometimes do not reside in Portugal. On the topic of interpretation and translation, one should underline that currently there is no translation/interpretation of acts of proceedings, nor of essential decisions, nor of the full trial hearing (only interpretation of the victim's and foreign persons' statements⁴⁵). In addition to this the foreign witness has no right to an interpreter/translator for conversations with her lawyer⁴⁶ and there is no guarantee that the state-appointed lawyer can communicate in the victim's language. From another perspective, if the foreign victim lives abroad, legal aid will not cover the costs of a foreign lawyer, even if his intervention in liaison with the Portuguese lawyer is necessary⁴⁷. Finally the problem of the very low threshold of our financial means test mentioned above is even more serious for victims from countries with a higher living standard, as they will usually be ineligible for legal aid, despite the fact that according to their financial situation in their home country they are unable to cover the costs of proceedings in Portugal⁴⁸.

Some of these problems may be solved by implementing Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. But ultimately we are of the opinion that the role and status of the victims in criminal proceedings and its legal configuration should be the object of a broader debate and should be rethought beyond the changes imposed by the Directive. The debate and reflection should enable the legislator to propose a well-thought amendment of the law, in particular regulating the victim's status clearly in the CPP, evidently without jeopardizing the necessary balance with the rights of the defence.

⁴⁵ In this respect – interpretation of the trial hearing – the defendant's position is equally weak.

⁴⁶ The defendant has this right since 2007.

⁴⁷ The defendant does not have this right either.

⁴⁸ The defendant has the same problem, but it is slightly different, as the defendant will have a lawyer appointed by the state anyway, even if he has no financial legal aid, and will pay his fees in the end of the case, according to the table of fees for publicly appointed lawyers, only there is a conviction.

