

Legal Aid for victims in criminal proceedings in Portugal

The following short paper 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, and under what circumstances the victim has a right to financial legal aid.

1. 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 minor or lacks mental capacity she can be represented by her closest family members. Similarly, a company can be victim of a crime.

A criminal procedure is about identifying the actor responsible for the commission of a crime. The victim *per se* is not at the centre of the proceedings. However, this doesn't mean that her interests cannot be taken into account in a criminal procedure. In order to enforce her rights the victim has various possibilities, which depend on her desire to take a less or more active part during the proceedings.

The rights of victims to legal assistance and to legal aid are recognised and protected by the Portuguese Constitution.

Article 20 on access to justice in general reads:

"Article 20

(Access to law and effective judicial protection)

1. Everyone is guaranteed access to the law and the courts in order to defend his rights and interests that are protected by law, and **justice may not be denied to anyone due to lack of sufficient financial means.**

2. Subject to the terms of the law, **everyone has the right to legal information and advice, to legal counsel and to be accompanied by a lawyer before any authority.**

[...]"

Furthermore the Constitution has a specific provision concerning the role of victims in criminal proceedings – article 32, par. 7, reads:

"Article 32

(Safeguards in criminal procedure)

[...]

7. Victims have the right to intervene in the proceedings, as laid down by law."

These rights are configured in their precise terms by laws and regulations that give execution to the constitutional mandate (in particular the Code of Criminal Procedure; the Regulation on Procedural Costs – Law Decree 34/2008, of 26 February; the Law on Access to Law and to Courts – Law 34/2004, of July 29; the Law Decree 71/2005, of March 17,

implementing Directive 2003/8/CE on improving access to justice in cross-border cases). There are also special regulations for the victims of violent crimes and of domestic violence (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).

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

There are three possibilities of intervention in criminal proceedings for the victim: she can participate as a mere *testemunha* (witness) or *queixosa* (complainant), as a *demandante civil* (civil claimant) or *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 also 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 be noted that when intervening in criminal proceedings the victim is always entitled to the right to legal assistance.

a. Complainant and witness

First of all, a victim can be a mere *testemunha* (witness) or complainant. For example, a victim who was subject to an armed robbery can 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 "*vitima-testemunha*" (victim-witness) is passive. Even so, the victim has several rights: i) she can ask for compensation for travelling expenses; ii) she can ask for protection, in case she fears the author of the crime could offend her because she is testifying; iii) if the court is not located in her area of residence, she can ask to testify by video conference at the court of her district during the trial; iv) she can benefit from victim support services (both social and psychological support); v) she can request to be informed about whether or not the crime suspect was indicted; vi) she can be accompanied

by a lawyer during any procedural act, and if she lacks financial means, she can request financial legal aid from the social security service. However the lawyer can only accompany and advise the witness, he cannot take an active role or intervene during the proceedings or trial. In certain cases, in which the start of criminal proceedings depends on the victim reporting the crime and asking for criminal proceedings to be instituted, she is called a complainant. 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.

a. Civil claimant

The second possibility is for the victim to participate in criminal proceedings as a *civil claimant*. If a victim is seeking damages, she can (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 of their existence.

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 of crime is accused after at the end of the investigation stage (the moment after which the deadline to lodge a claim for civil damages begins to run) the authorities will inform her.

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

In 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 (not necessarily the lawyer's fees).

The civil claimant has the same rights as a witness or complainant. The civil claimant is also entitled to the right to have access to a lawyer. If the claim for civil damages exceeds €5'000,00, 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 "*vítima-parte civil*" 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.

b. Assistant

A third possibility for a victim who wants to have a more active role in the proceedings is to act as *assistente*, 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 proceedings. 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 an assistant, it is necessary to pay a court fee in advance (currently €102) and to mandate a lawyer. As mentioned previously, here again the victim can ask for financial legal aid in case of insufficient financial means.

Further to the general rights of victims mentioned above, the assistant has a broad range of rights (information, intervention, hearing, appeal).

For example, she has to be consulted and give her approval if for example the Public Prosecutor decides, despite the existence of sufficient evidence against the suspect of crime, not to bring charges against him but merely orders 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 on all decisions throughout criminal proceedings from the moment in which she was accepted to act as such and is heard before decisions are made.

The assistant also has the right to challenge decisions that are unfavourable to her (i.e. decisions to close the case or to acquit the defendant). For example, if the Public Prosecutor doesn't file any charges against the suspect of crime, the assistant can request for the judge of investigation to indict the defendant. At the trial hearing the assistant's lawyer is present and may provide evidence, interrogate and present the court opening and closing arguments. Furthermore the assistant can appeal an acquittal decision.

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

As mentioned before, 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 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 have 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). 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 financial means.

Only in the case where a victim cannot afford the lawyer's fees and the judicial fees, can she request legal aid from the state. Should the request for legal aid be granted, the Bar Association (*Ordem dos Advogados*) appoints the lawyer, upon request by the court, Prosecutor or Police.

The Ministry of Justice pays the lawyer. 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 lawyers can also be working as private lawyers. Every *advogado officioso* is paid the same amount of fees, irrespective of what his fees as a private lawyer are. If the victim needs a court-appointed lawyer, she cannot choose her own lawyer. The lawyer is appointed randomly by the Bar Association by means of a computer programme designed for legal aid purposes.

A victim can also request legal aid during the stage of execution of the judgment in order to have the court fees and the fees for the execution agent (*agente de execucao*) paid. This *agente de execucao* is also appointed by the state.

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

A victim has a right to financial legal aid when she has the right to be represented by a lawyer and when she can prove that she has no financial means to support herself during a trial. Since the financial means of the state to cover such requests for legal aid are scarce, financial legal aid can only be granted in situations of real financial necessity 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.

The merits of the case or the type of crime are not considered when deciding upon the request for legal aid.

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 fortune, salary and expenses of the victim and her family members, the conclusion can be reached that objectively speaking the victim is incapable of bearing even a fraction of the judicial fees. The relevant income is the household income, not only that of the victim herself.

According to the Law about Legal Aid a victim whose relevant household income is equal or less than $\frac{3}{4}$ of the IAS (€419,22) is considered incapable of supporting any legal fees. 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 supporting the fixed fees for legal consultation (€30,00) and therefore has no right to financial legal aid for legal consultation, but only the right to pay the court costs in instalments. 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.

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

i. When

The request should be filed before the first intervention of the victim. 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 knowledge of the insufficient financial means.

The procedure itself however is limited to 30 days from the day the form was filed to the day when the Social Security Service takes its decision. If the Social Security services do not respond to the request before 30 days from the request, it will be considered as granted. Should the Social Security Service decide to deny the applicant's request, they must communicate this intention and give the applicant 10 days to make a statement on rejection. If he does not act in these 10 days, the decision becomes definitive.

The request can be filed personally, by fax, mail or email, with email using the designated digital form that can be found online.

ii. Evidence

The victim must fill in a specific form and attach all the required documents. Depending on the victim's situation regarding her marital status, the family members sharing her household and her situation of employment, different documents will be needed. These documents usually include a document of identification and residence permit, certificates proving her 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 confirming documents.

iii. Competent Authority

The request for financial legal aid is to be made to the Social Security Service of the victim's district of residence or origin. If the Social Security Service decides to grant 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 can request financial legal aid. Third-country nationals without a valid residence permit in the EU will only be granted legal aid if their home countries ensure legal aid for 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 lawyer.

v. Appeal

The applicant can appeal against the definitive decision within 15 days upon notification of the rejection decision. The appeal is to be addressed in writing to the Social Security Service who dealt with the request for legal aid in the first place. Having received the Appeal, the Social Security Service has 10 days to either revoke the decision of the request for financial legal aid, or, in case it opts to maintain the decision, send the definitive decision to the competent court.

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 judicial fees, or payment of justice fees and or state-

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

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

5. Advantages of the legal aid system for victims in practice

- Victims may have a very active and even decisive role in criminal proceedings;
- Victims may always be accompanied by a lawyer, irrespectively of their role in the proceedings
- If victims have no financial means, they are entitled to have a state-appointed lawyer paid by the state and exemption of court fees (or at least benefit from payment in instalments)

6. Problems of the legal assistance and legal aid system for victims in practice

- Lack of information on the right to have access to a lawyer and to have legal aid to cover these costs
- If the victim has already made a complaint and afterwards needs a lawyer, is the request still timely? Should there be changes in the “timely” requirement?
- Very low income threshold for being eligible for legal aid
- High cost of court fees and no reimbursement by the state (eventually defendant if the victim “wins”...)
- No freedom to choose lawyer on legal aid
- Should there be a category of victims exempt of paying court fees (or at least initial court fees) – for example based on the regulations for victims of violent crimes?
- Should there be mandatory defence for vulnerable victims? Paid by the State?

7. Problems of the system for foreign victims

- Interpretation and translation
 - 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’ statements)
 - No right to interpreter/translator for conversations with the lawyer

- No guarantee that the state-appointed lawyer can communicate in the victim's language;
- No legal aid for a foreign lawyer, even when the victim lives abroad;
- Financial means test is many times incompatible with the living cost of other countries

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 the role and status of the victims in criminal proceedings and its legal configuration should be rethought and there changes to the law (especially regulating the victim's status clearly), always without jeopardizing the balance with the rights of the defence, should be undertaken.