

Scientific
Journal of
**Applied
Social and
Clinical
Science**

**THE APPLICATION
OF FREE JUSTICE IN
CRIMINAL LAW, FROM
THE PERSPECTIVE OF
THE PUBLIC DEFENSE
OFFICE**

Pollyana Piceli Rodrigues

Student of the Law Course at Faculdade
CNEC Varginha.

Varginha. Minas Gerais.

<https://orcid.org/0009-0009-7190-422X>

Terezinha Richartz

PhD in Social Sciences. Guiding Professor at:
Faculdade CNEC Varginha. Varginha. Minas
Gerais.

<http://lattes.cnpq.br/9610707436484070>

<https://orcid.org/0000-0002-8872-1210>

All content in this magazine is licensed under a Creative Commons Attribution License. Attribution-Non-Commercial-Non-Derivatives 4.0 International (CC BY-NC-ND 4.0).



Abstract: In view of the search for strengthening democracy and equity among citizens, the 1998 Federal Constitution established in its article 5, item: LXXIV, that the State has the obligation to provide full and free legal assistance to those who prove insufficient resources (BRASIL, 1998). Legal assistance is understood as the granting of free justice to the guarantee of legal assistance provided by the Public Defender's Office, respecting the principles of broad defense and adversarial proceedings, as well as bringing those most in need closer to access to justice. Through research into doctrines, laws, jurisprudence, and a case study in a specific Criminal Court in the Southern Region of Minas Gerais, it was found that there is a divergence of understandings regarding the granting of free justice to those assisted by the Public Defender's Office. - that these are people with insufficient resources - in criminal proceedings. In view of this divergence, this research exposed the arguments in favor of granting exemption from procedural costs, and the arguments that support the opposite understanding, concluding that the benefit must be guaranteed for those assisted by the Public Defender's Office after analyzing these reflections.

Keywords: Public defense. Exemption. Procedural Costs. Free Justice. Legal Assistance.

INTRODUCTION

According to research by the Brazilian Institute of Geography and Statistics (IBGE), in 2020, one in four Brazilians were in poverty, and around 12 million inhabitants lived in extreme poverty. (BRAZIL, 2021). Considering this research and several factors such as, for example, the Corona Virus pandemic that generated too much unemployment and a weakening of the economy, we can conclude that hyposufficiency is the harsh reality for a

significant portion of the population.

Given this scenario, the importance of the Public Defender's Office is unquestionable, as it is an institution that aims to protect the rights and guarantees of people who are in a situation of social vulnerability, through free legal assistance.

Furthermore, the Law also has as mechanisms that seek to facilitate access to justice the institute of free justice, which is the exemption from advance costs that a process may generate, and legal assistance that encompasses the previously mentioned institutes and the initiatives of the State that seek to narrow the gap between legal services and the needy population. (DIDIER JÚNIOR; OLIVEIRA, 2016, p. 24).

Despite the existence of these guarantees, there are still differences of opinion regarding the application of free justice (exemption from procedural costs) for those assisted by the Public Defender's Office who are low-income people, mainly in the context of Criminal Law. Therefore, the present work seeks to analyze these understandings, through research on the topic and the investigation of the processes of a specific Criminal Court in the South of Minas.

THE DEFINITIONS OF LEGAL ASSISTANCE, FREE OF COURSE OF JUSTICE, AND LEGAL ASSISTANCE

Firstly, it is necessary for this research to define the difference between free justice, legal assistance and legal assistance. Free justice is understood as the exemption from all expenses that a process may generate, whether legal or not. (PIERRI, 2021, p. 4)

When it comes to legal assistance, we can say that:

Legal assistance involves free sponsorship of the case by a lawyer. It is, therefore, a public munus, consisting of the defense of

the assisted person, in court, which must be offered by the State, but which can be performed by non-state entities, whether or not they have an agreement with the public authorities. It is important to add that, by legal assistance, we must understand any agent whose main purpose is to provide the service, or who does so frequently, by court order or through an agreement with the public authorities. (PIERRI, 2021, p. 5)

Therefore, legal assistance is the support of a defender for people who cannot afford the expenses of hiring a private lawyer.

Furthermore, another extremely relevant instrument is legal assistance, which covers the concepts mentioned above and adds legal services that bring the disabled person closer to access to justice. (PIERRI, 2021, p. 7)

These are 3 extremely relevant instruments that were created with the aim of providing equality between the parties, based on the principles of isonomy, the right of action and access to justice. (PIERRI, 2021, p. 9)

THE BENEFICIARY OF LEGAL AID

Based on these understandings, it is necessary to define who is the beneficiary of these guarantees, which is a difficulty faced by the Law, since there is no specific rule that determines who can or cannot benefit. It is by evaluating the gains, as well as the expenses that the person has, and to what extent they could bear the costs that a process generates. (PIERRI, 2021, p. 8)

The beneficiary can be characterized as an economic needy person, being someone who is unable to bear the costs of the process without prejudice to their livelihood and that of their family, or a legal needy person who falls within the criminal sphere, in which regardless of their class social, technical defense has to be present. (PIERRI, 2021, p. 8)

1 Information obtained from the Public Defender's Office that for screening purposes a socioeconomic survey questionnaire is carried out on a natural person. This document is only available to internal members on the institution's website.

2 BRAZIL. Superior Federal Court. Summary nº 523. Available at: <https://jurisprudencia.stf.jus.br/pages/search/seq-sumula523/false>. Accessed on: October 22, 2022.

When it comes to cases in the civil area, this assessment is made by completing a socio-economic survey of a natural person, in which whoever is requesting assistance will fill in their personal data, inform their income and their relatives who are part of their family nucleus, and finally, its assets constituted.¹

However, when it comes to cases in the criminal area, the impossibility guaranteed in article 261 of the Code of Criminal Procedure (BRASIL, 1941) that the process takes place without the defendant having a constituted technical defense, as well as respect for the principles of Contradictory and Broad Defense present in article 5, item: LV of the Federal Constitution (BRASIL, 1988), make legal assistance from the Public Defender's Office, or from an appointed lawyer, presumed in cases without a particular technical defense indicated by the defendant.

In other words, for there to be the possibility of a person being criminally prosecuted, they must have a technical defender, under penalty of nullity of the process. This is what STF Summary 523 states: "In criminal proceedings, the lack of defense constitutes absolute nullity, but its deficiency will only annul it if there is proof of harm to the defendant"²

Therefore, the person assisted by the Public Defender's Office in the civil sphere has to prove their hyposufficiency, while in the criminal sphere two situations occur: the person declares that they are unable to pay the costs of a lawyer, or they remain silent, without any Private lawyer speaks for her in the process, causing the case to be forwarded to the Public Defender's Office.

THE IMPORTANCE OF THE PUBLIC DEFENSE OFFICE FOR ACCESS TO JUSTICE FOR THOSE MOST IN NEED

The role of the Public Defender's Office in access to Justice and equality between litigants emerged in 1970, with the elaboration of the Florence Project, which aimed to strengthen the relationship between Justice and people lacking resources, through a diagnosis of the main obstacles that cause the separation of this relationship. (ASSIS, 2019, p. 188)

After the evaluation, it was concluded that the factors that made it difficult for those most in need to reach Justice would be the lack of resources to cover the cost that this generates, the difficulty in recognizing their own rights and the lack of willingness to demand them. them - especially for those who are in a state of extreme vulnerability - and finally, the effectiveness of diffuse rights in disputes related to the community. (ASSIS, 2019, p. 188)

Faced with this scenario, solutions were developed that could solve the problems found by the diagnosis, the first of which was the development of a system that could allow judicial protection for the most vulnerable. And for this, the salaried staff model system was created in which lawyers are hired by the State, receive a fixed salary and are responsible for providing legal assistance to those in need. (ASSIS, 2019, p. 188)

In Brazil, the idea of legal assistance was regulated after Decree Number: 2,457 of 1897, which included the designation of a responsible body to provide this assistance, but it was only after the creation of the Federal Constitution of 1988 that the concept of Public Defender's Office, together with its principles were established. (ASSIS, 2019, p. 188)

When talking about the Magna Carta, Assis says that:

The 1988 Federal Constitution represents

the culmination of the transition process from an authoritarian regime towards democracy. The legal-political model adopted by the Charter reflects a Social and Democratic State of Law, marked by an intense commitment to fundamental rights and the search for a more inclusive and plural society, with the dignity of the human person as a basic principle of the entire order. (BRAZIL. 2019, p. 197)

Therefore, given the fragility of democracy, the Constitution was created with the aim of enabling equity among citizens, having as its main inspiration the principle of human dignity. To provide this strengthening of equality, in its article 5, section LXXIV, it guarantees that: "LXXIV - the State will provide full and free legal assistance to those who prove insufficient resources." (BRAZIL, 1998).

Therefore, the existence of the Public Defender's Office is extremely important, as it is through it that legal assistance is guaranteed, that is, no defendant will find themselves helpless without a technical defense.

Furthermore, the section mentioned above raises an extremely pertinent question with this research. Does the legal assistance guaranteed by the constitution also include exemption from procedural costs for those assisted by the Public Defender's Office, in the event of a criminal conviction?

If, on the one hand, the concept of legal assistance defined in item 2 of this article includes free justice as a guarantee to the poor, on the other hand, this exemption can be considered incompatible with the Constitution, especially when the issue arises in a criminal case.

THE ARGUMENTS IN FAVOR OF EXEMPTION FROM PROCEDURAL COSTS

At the outset, it must be remembered that the Federal Constitution, in its article 5, item

XXXV, attributes the right to Access to Justice, and based on this fundamental benefit, a card of guarantees was created, including Free Justice, and Legal and Judicial assistance, which seek to equate citizens and bring them closer to their own rights. (COUCEIRO, 2019, p. 1)

The Public Defender's Office – whose institutional mission and organization are set out in article 134 et seq. of the Federal Constitution – provides Legal Assistance. However, its performance alone is not capable of providing the guarantee of full and free legal assistance, since its concept was expanded after the drafting of the 1988 Magna Carta, and as a consequence it also covered Free Justice. (COUCEIRO, 2019, p. 6)

To make clear the importance of granting Free Justice and consequently the exemption from procedural costs, it is necessary to follow the path that the enforcement of this payment sentence takes.

Firstly, it is worth noting that article 164 of the Criminal Executions Law (BRASIL, 1984) indicates that the final and unappealable sentence has the force of a judicial executive title, which the Public Prosecutor's Office will have the competence to execute. Given its inertia, within 90 days, the Public Treasury will have this competence, according to Information 927 of the Federal Supreme Court (BRASIL, 2018).

Considering the second hypothesis mentioned above, in the event of the convict's default, the Public Treasury will issue and register active debt (BRUNOW, 2011, p. 300). Frankly, a person who is unable to afford the costs of a lawyer, declared insufficient resources during the course of the proceedings, and is, in many cases, imprisoned or recently released, would be able to afford the costs of a debt that could have been avoided through the concession?

It was for no other reason that several

laws guaranteed the right of those in need to exercise their right to access full and, above all, free legal assistance.

The current Code of Civil Procedure makes reference to free justice - which has its own section in the aforementioned Code - and it is extremely pertinent to highlight that, in addition to also ensuring that free justice covers costs, fees and other amounts, the denial of free justice must be preceded by proof that the beneficiary is not entitled to the benefit. Transcribed:

Article 99. The request for free justice can be formulated in the initial petition, in the defense, in the petition for the inclusion of a third party in the process or in an appeal.

§ 2 The judge may only reject the request if there are elements in the case file that demonstrate the lack of legal prerequisites for granting gratuity, and must, before rejecting the request, determine separately the proof of fulfillment of the aforementioned prerequisites.

§ 3 The allegation of insufficiency deduced exclusively by a natural person is presumed to be true. (BRASIL, 2015, s. p.)

It is a fact that, although laws cover too many subjects, it is possible that there are gaps that have not been filled on topics within a certain sphere of Law. This is the case at hand, where we have a Law that discusses the free nature of processes in Civil Law, but which could be perfectly applied to Criminal Procedural Law through analogy. An analogy is understood as a logical activity of trying to apply and fill the gaps in one area of Law with legislation from another sphere, with the aim of achieving harmony and Justice. (PELUSO, 2016, p. 9)

Perhaps, what could cause a certain conflict, and even divergence in Criminal Law when it comes to analogy, is the existence of the principle of Legality. It is undeniable that the analogy could never be applied in cases

that would impose a more severe sentence on the defendant, in respect for the principle mentioned above, however, when it comes to rules that would benefit the defendant, the following understanding is common:

In turn, the prohibition of analogy in Criminal Law is exclusively restricted to analogy in *malan partem* (to the detriment of the defendant), as a general exclusionary norm, as it is the only one that conforms to the breach of the requirement of Justice and the imperative of legal and, therefore, of the teleology guaranteeing the principle of criminal legality; Such a systemic limit only aims to guarantee citizens that they will not be subject to a crime or penalty that is not provided for by the letter of the law, but not that they cannot be punished less or even exempted from the penalty if it is not provided for. literally the law. (PELUSO, 2016, p. 11)

Therefore, when a person in a situation of social vulnerability, and therefore unable to bear the legal costs, is a defendant in a criminal proceeding, it is perfectly possible to apply article 98 et seq. of the Code of Civil Procedure, which exempts the payment of costs.

In addition to the articles present in the Code of Civil Procedure, Joint Provision Number: 75/2018, which regulates the collection of procedural costs in Minas Gerais, states in its article 6th as follows:

Article 6. Court costs, court fees and procedural expenses are not payable:

V - by beneficiaries of free justice or under legal assistance, while the suspensive condition for payment to be enforced continues. (MINAS GERIAS, 2018)

As can be seen, the claim that the accused, a disabled person, be exempt from procedural costs is supported by more than one rule, and is protected by several principles, with the

3 BRAZIL. Special Organ. Incident of Declaration of unconstitutionality number: 1.0647.08.088304- 2/002. Court of justice. Rapporteur: Judge Paulo César Dias. Session of 09/21/2015. Available at: <https://bd.tjmg.jus.br/jspui/bitstream/tjmg/7610/1/BJE127.2015.pdf>. Accessed on: 24 Oct. 2022.

granting of the benefit of free justice being a measure of right.

THE ARGUMENTS AGAINST EXEMPTION FROM PROCEDURAL COSTS

On the other hand, there are some grounds that may justify the understanding that procedural costs must not be exempted. The most relevant of them, perhaps, is the declaration of unconstitutionality by the Special Body of the TJMG of article 10 of State Law nº 14,939/03. It must be noted that the aforementioned article, in its paragraph II, exempts the payment of costs to beneficiaries of legal assistance. It is transcribed: Article 10: The following are exempt from payment of costs: II - those who prove insufficient resources beneficiaries of the assistance judiciary. (MINAS GERAIS, 2003)

It turns out that, through an Unconstitutionality Claim Incident Number: 1.0647.08.088304- 2/002, it was decided by an unsuccessful vote that this article is unconstitutional, due to the divergence pointed out by Judge Paulo César Dias, using as justification the argument that the norm is unconstitutional due to the inability of the State administration to exempt a tax that the Court of Justice has jurisdiction to do so.³

Another point that deserves to be highlighted is that free justice cannot be confused with the constitutional guarantee of full legal assistance, and the reason is that the first can be denied by the judge if he understands that the defendant is able to bear the costs, while the second could never be prevented by the judge, as it is an ineligible right in criminal proceedings. Therefore, it is perfectly possible to grant legal assistance and reject free justice. (PIERRI, 2021, p. 7)

Furthermore, it must be noted that the

unlawful act is reprehensible conduct that causes harm to society. Damage is understood as the consecutive harmful cause of the conduct, and the person responsible for the practice has the duty to repair it, this being one of the oldest precepts of Criminal Law. (PIMENTAL, 2013 p. 94) Therefore, when a person commits a crime, due to their conduct, state institutions are called into action (Military, Civil and Penal Police, Judiciary and Public Prosecutor's Office), causing an expense for the State that needs be compensated by the convicted person.

RESULT OF THE RESEARCH CARRIED OUT

In view of the questions regarding the topic, and for the purpose of proving the divergences between understandings, a case study was carried out in which 10 cases were evaluated that took place in a certain Criminal Court in the South of Minas Gerais in which those assisted by the Public Defender's Office Public were ordered to pay court costs, and in view of this conviction, the Public Defender's Office appealed asking for exemption.

The selection of these cases occurred respecting two criteria, the first are cases in which the conviction was handed down in 2019, and the second are those in which the illicit act was the crime of theft, provided for in article 155 of the Penal Code (BRAZIL, 1940)

The reason for choosing these criteria was due to the fact that the crime of theft is not classified as heinous, and consequently, has less social reprehensibility than the crime of homicide or drug trafficking, for example. Therefore, this criminal type was chosen with the aim of being a "neutral" crime, which does not involve more complex questions about the damage that this conduct has the power to cause.

The year 2019 was chosen in order to avoid

possible influence, in the sentences handed down that ordered the payment of costs, from the unemployment crisis generated by the Covid-19 Pandemic in 2020.

Therefore, through a search carried out on the website of the Court of Justice of Minas Gerais of the judgments that decided in the second instance on the exemption from procedural costs, it was found that in 7 of the 10 cases the appeal carried out by the Public Defender's Office with the argument that the hyposufficiency is presumed due to the need for legal assistance, they were successful, while in 3 cases exemption was not granted.

CONCLUSION

It is understood that the Public Defender's Office has an extremely important role in relation to the indispensable guarantee of technical defense in criminal proceedings. It is through this that people with insufficient resources are able to obtain legal assistance even if they are unable to bear the expenses generated by hiring a private service to perform this role.

It was also found that legal assistance aims to bring people with insufficient resources closer to access to justice, and to this end, this institute includes the granting of free justice and legal assistance.

Free justice is granted to those most in need, and as a consequence exempts them from paying procedural costs. Legal assistance is granted in the Criminal Process to anyone who declares that they have insufficient resources or to those who do not have a technical defense set up.

Finally, given the reflections on the topic, it was found that the arguments in favor of exemptions are more based on principles and laws, while the arguments against are based on a specific norm that was considered unconstitutional, and a broader understanding of repairing the damage by the defendant.

Furthermore, the research carried out indicates that the concession is granted in the majority of cases. It can be concluded, therefore, that this is a right that must be respected and guaranteed.

REFERENCES

ASSIS, Victor Hugo Siqueira. Defensoria Pública: histórico, afirmação e novas perspectivas. **Revista da Defensoria Pública da União**, [S.I.]. n. 12, p. 185-209, 8 nov. 2019.

BRASIL. Presidente da República **Constituição da República Federativa do Brasil de 1988**. Brasília, DF, 1998. Disponível em: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Acesso em 31 maio. 2022.

BRASIL. INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA. **Mesmo com benefícios emergenciais, 1 em cada 4 brasileiros viviam em situação de pobreza em 2020**. 2021. Disponível em: <https://agenciadenoticias.ibge.gov.br/agencia-noticias/2012-agencia-de-noticias/noticias/32420-mesmo-com-beneficios-emergenciais-1-em-cada-4-brasileiros-vivia-em-situacao-de-pobreza-em-2020>. Acesso em: 12 abr.2022.

BRASIL. Lei nº 2.848, de 7 de dezembro de 1940. Institui o Código Penal. **Diário Oficial da União**, Brasília, DF, 24 outubro.2022

BRASIL. Lei nº 3.689, de 3 de outubro de 1941. Institui o Código de Processo Penal. **Diário Oficial da União**, Brasília, DF, 24 outubro.2022.

BRASIL. Lei nº 7.210, de 11 de julho de 1984. Institui a Lei de Execução Penal. **Diário Oficial da União**, Brasília, DF, 24 outubro.2022.

BRASIL. Lei nº 13.105, de 16 de março de 2015. Institui o Código de Processo Civil. **Diário Oficial da União**, Brasília, DF, 31 maio.2015.

BRASIL. Órgão Especial. **Incidente de Arguição de Inconstitucionalidade nº 1.0647.08.088304- 2/002**. Tribunal de Justiça. Relator: Desembargador Paulo César Dias. Sessão de 21/09/2015. Disponível em: < <https://bd.tjmg.jus.br/jspui/bitstream/tjmg/7610/1/BJE127.2015.pdf>>. Acesso em: 24 out. 2022.

BRASIL. Supremo Tribunal Federal. **Informativo nº 279**. 10 dez. 2018. Disponível em: < <https://arquivos-trilhante-sp.s3.amazonaws.com/documentos/informativos/informativo-0927-stf.pdf>> Acesso em 24 de out. 2022.

BRASIL. Supremo Tribunal Federal. **Súmula nº 523**. 1969. <https://jurisprudencia.stf.jus.br/pages/search/seq-sumula523/false>. Acesso em: 22 out. 2022.

BRUNOW, Eliete Josefa Gerondoli Campista. Processo Penal – A execução da Pena de Multa e a Cobrança das Custas do Processo na Ação Penal Pública. **Revista Revista Entre Aspas**. v. 1, p. 291-305, abr. 2011. Disponível em: <http://unicorp.tjba.jus.br/unicorp/wp-content/uploads/2019/12/volume-1-artigo-15-PROCESSO-PENAL-%E2%80%93-A-EXECUC%C3%87%C3%83O-DA-PENA-DE-MULTA.pdf>. Acesso em: 24 out. 2022.

COUSEIRO, Julio César da Silveira. Gratuidade da Justiça: Um Importante Instrumento de Acesso à Justiça. *Revista Eletrônica OAB/RJ*, Rio de Janeiro, v. 30, jul.dez, 2019.

DIDIER JÚNIOR, Fredie; OLIVEIRA, Rafael Alexandria de. **Benefício da justiça gratuita: de acordo com o novo CPC**. Salvador: JusPodivm 2016.

MINAS GERAIS. **Lei 14.939**. Capítulo III – Da Não- incidência e das Isenções. Article 10.. 2003. Disponível em: http://www.fazenda.mg.gov.br/empresas/legislacao_tributaria/leis/114939_2003.html. Acesso em 24 de out. 2022.

MINAS GERAIS. **Provimento Conjunto nº 75**. Capítulo II - Das Regras Específicas de Pagamento. Article 6.. 2018. Disponível em: <http://www8.tjmg.jus.br/institucional/at/pdf/vc00752018.pdf>. Acesso em 24 de out. 2022.

PELUSO, Vinicius de Toledo Piza. Analogia e Direito Penal. *Revista Brasileira de Ciências Criminais*, São Paulo, v. 118, p. 159-184, jan.fev, 2016.

PIERRI, j. Diferenças Entre Assistência Jurídica, Assistência Judiciária e Justiça Gratuita. *Revista Saber Digital*, [S. l.], v. 1, n. 01, p. 1-11, 2021. Disponível em: <https://revistas.faa.edu.br/SaberDigital/article/view/1027>. Acesso em: 31 maio. 2022.

PIMENTEL, Manoel Pedro. Delito e reparação do dano, no anteprojeto do Código Civil brasileiro. *Revista da Faculdade de Direito*, [S. l.], v. 67, p. 93-114, 1972. Disponível em: <https://www.revistas.usp.br/rfdusp/article/view/66645>. Acesso em: 24 out. 2022.