*Legal aid at the new brazilian civil procedure**

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Area of law: Civil law. Civil Procedure law.

ABSTRACT

This article aims to compare the legal treatment of legal aid in the courts in the current Brazilian civil procedure system and in the new Civil Procedure Code. The article points the existing tension between the rights of isonomic access to justice and the distrust of fraudulent pleads. It also highlights the innovation brought by the new CPC in expert examination funding, as well as describes and critically analyses the section dedicated to courts services gratuitousness in the Civil Procedure Code. In closing, it presents some strong opinions and analytical conclusions about the covered topics.

Keywords**:** Access to justice. Legal aid. Brazilian civil procedure. Legislative reforms. New Civil Procedure Code.

1 Theme relevance

This article aims to analyze an issue that, although not often debated in the current scope of the new Civil Procedure Code, introduces great practical relevance: legal aid.[1]

The gratuitous theme usually gives an opportunity to consider controversies and the diverse points of view of the coauthors of this paper exemplify this.

For Fernanda one of the authors, if on the one hand no one denies the disadvantaged litigant deserves the right to access justice with isonomy, on the other hand it is common to distrust legal aid claims made in court, as one assumes they are ill-intentioned.

Although there are current statements about the supposed abuse[2] in requesting gratuitousness in court, there is a lack of concrete data on its verification. There are no reliable studies able

1 As well exposed by Cassio Schubsky, "the jurisdictional tutelage of the right of the people devoid of material resources foment the fight against social inequality" (*Escola de justiça: história e memória do Departamento Jurídico XI de Agosto.* São Paulo: Imprensa Oficial do Estado de São Paulo, 2010. p. 12). Here is our tribute to this historian, who devotes big efforts and sincere dedication to this great project of registering the history of the DJ XI of August, school of justicewith great affection and to the still greater advantage of the co-authors of this article.

2 As an example of this type of assertive, we highlight the following passage of the articl**e**: "with regards to informal institutions, in so far as the lawyer's conduct, to occasionally stimulate an unsustainable claim, as the low resistance of the Brazilian population in general in make use of the prerogatives associated with the gratuity and assistance programs, join to a frame of abusiveness in the exercise of the right to access justice through gratuity.

to answer the following questions: Do most part of the litigants plead for legal aid? If so, how many have their requests complied with? How many of these attendances are correct? Without qualitative data it is difficult to conclude whether there is abuse, although each lawyer, in their own "case study", have their impressions about it.

For the co-author of this article (Dellore), although there are no reliable statistics about the theme, the benefits of legal aid are widely used by those who avail themselves of the judiciary system – especially natural person, often improperly; and the empirical analysis of those who work in the forum proves it.

In addition to being controversial, the theme is relevant and it is on the order of the day, having received special treatment in the new CPC, which brings sensitive regulatory changes.

However, despite the importance of the theme and future alterations, at least until the moment the doctrine has been devoted to it. In this sense, it is enough to verify that (i) we have no knowledge of volumes already published and specialized magazines, or specific articles on the subject[3] and (ii) none of the statements published on the NCPC - New Civil Procedure Code (either at the Permanent Forum of Civil Procedure[4]or the Center for advanced Studies Process[5]) specifically refer to the subject, although some mention the problem briefly. [6]

(GALESKI JUNIOR, Irineu; RIBEIRO, Marcia Carla Pereira. Direito e economia: uma abordagem sobre a assistência judiciária gratuita. Paper work published at the do XIX Encontro Nacional do Conpedi realized in Fortaleza – CE from June 09 to 12 of 2010. Disponível em: [www.conpedi.org.br/manaus/arquivos/anais/fortaleza/3596.pdf]. Accessed: 19.02.2014).

3 For example, several volumes of Revista de Processo were dedicated to analyze NCPC's alterations, but without articles about this subject.

4 Two meetings were held to discuss the Project of the new CPC: the Second Meeting of Young Procedure Experts . (days 08 e 09.11.2013 at Salvador – <http://atualidadesdodireito.com.br/dellore/2013/12/10/ncpc-carta-de-salvador/>) and the Permanent forum of Civil Procedure – FPPC (in 25 to 27.01.2014 at Rio de Janeiro - [http://atualidadesdodireito.com.br/dellore/2014/06/21/ncpc-carto-rio/]). With the contribution of procedural experts of the whole country, each one of them created more than one hundred interpretative enunciates about the new Code.

5 The Ceapro (Center of advanced studies of Procedure), association that congregates procedure experts from all around in Brazil, held meetings to vote enunciates related to the NCPC.

6 In the same sense, we highlight the following statements of the FPPC: (i) enunciate 71: art. 669. We may dismiss the mentioned guarantee referred to in the sole paragraph of art. 669, for the effect of the partition judgment, if the disadvantaged party is not able to offer it, applying similar intelligence to the contained in art. 301, 1º.(group: special proceeding); (ii) enunciate 81.

Thus, this brief text analyses the current system (starting from a terminological debate) and the alterations in the project,[7] and then compares the main distinction points between the current and projected rules, proceeding to a critical analysis of the modifications.

2 Concepts of legal aid, judiciary assistance, and integrate and gratuitous judicial assistance

The distinction among the three concepts is important to dissipate misunderstandings, since certain conceptual confusion is seen in doctrine and jurisprudence to be the prodigal regulatory panorama in dealing with indistinct institutes that reveal different realities (TARTUCE, 2010, p. 78).

From the chronology criteria, we shall start by Law 1060/1950, which regulates legal aid: this law arranges a structured system for the economically vulnerable party to earn the right to access justice, seeking to void the pecuniary obstacles that could compromise its performance in court (TARTUCE, 2010, p. 78).

The judiciary assistance consists in the patronage of the lawsuit by lawyers (MARCACINI, 2009, p. 41), whether they are state servers, members of an entity that have a convention with the state, private or even private entities acting *pro bono*.

It is common for the state institution to appear in the concepts, because its performance focuses in the model used predominantly in the country; as an example, consider the concept of Anselmo Prieto Alvarez, for whom judiciary assistance is the support that the State must offer to those who are "in a situation of misery, releasing them from paying the expenses and providing them with a defender in court" (ALVAREZ, 2014).

After the fulfillment of the socioeconomic triage by the provider of the judiciary assistance, which certifies the lack of

(art. 945, V): Because there is no prejudice to the contradictory, it is unnecessary to hear the appellant before the monocratic concedes the appeal, when the decision is appealed: (a) reject the complaint; (b) reject legal aid through preliminary verdict; or (c) alter through a preliminary verdict the value of the lawsuit. (Group: Order of Lawsuits Court, General Theory of Appeals, Appeal and Motion); (iii) enunciate 113 (art.98). At the labor court, the employer can be the beneficiary of legal aid, according to the art. 98 (Group: impact of the CPC in the labor procedure). As it can be noticed, even if those statements broach the theme of economic disadvantage, its focus is not properly the legal aid system.

7 We highlight, that the analyzed Project is the one appreciated by the House of Representatives in March of 2014. To access the text, consult <http://atualidadesdodireito.com.br/dellore/2014/06/16/comparativo-ncpc-jun14/>.

resources, the person receives legal information and relies on the services of accompaniment and manifestation in the lawsuit by public defenders (TARTUCE, 2010, p. 78), being contemplated with the release of the payments that would normally encumber in case he needed to pay for representation.

In league with the desired expansion of access to justice, the Federal Constitution began stating, since 1988, in article 5, LXXIV, that "the State shall provide integral and gratuitous judiciary assistance to those who prove insufficiency of resources".

The constitutional provision increases the spectrum of tools to people in need: integral and gratuitous judiciary assistance implies not only the possibility of interaction in court, but also provides consultations for the legal regularization of the individual and provides information (MARCACINI, 2009, p. 40) and documents, among other measures that may prove necessary (TARTUCE, 2010, p. 78).

About the importance of such guarantee, the questioning of Anselmo Prieto Alvarez deserves contemplation:

"In a country where we have as a rule the poverty of the population, we could affirm that the legal aid system, in its true meaning, is certainly as important as freedom of expression. What benefit would having asserted freedom bring if, in the case of its violation, the damaged, being underprivileged, could not do anything to repel it?" (ALVAREZ, 2014).

The legal aid system, in its turn, can be understood as an exemption from collecting the costs and expenses (of procedural nature or not) that prove necessary to the exercise of the procedure rights and faculty, inherent to the exercise of legal due process (MARCACINI, 2009, p. 140).

It is worth mentioning that, perhaps the gratuitousness has the aspect of an attractive gain, and José Renato Nalini ponders:

"To claim that gratuitous aid would stimulate the demand does not seem to be an appropriate analysis of the human personality. Men will not create conflicts for the simple fact that a legal solution will be free of costs. It may have initial recrudescence, because one of the points that contribute to the outline of contained litigiousness is, precisely, the need for expenditure. But, the fact of not charging for the jurisdictional service is separate from the multiplication of lawsuits, in the same way, the imaginary exemption of collecting costs for hospitalization is not, at least directly, cause of an epidemic." (NALINI, 2009, p. 61)

Thus, in synthesis: (i) judicial assistance is a technical judicial orientation to the underprivileged, at court or out of it; (ii)

judiciary assistance is the postulation in court (therefore, introduced in the judicial assistance) and (iii) legal aid is the exemption of collecting costs and expenses (be the cause of the service provider of the judicial assistance – public defender, or be the cause the private lawyer).

3 Legal aid in law 1.060/1950

In 05.02.1950 the judiciary assistance law was published to make uniform, in the infra constitutional plan,[8] the general rules for the recognition of the legal aid incidence in the jurisdictional scope, including elements with the extension of procedural exemptions and the prerogatives of the service providers (ALVAREZ, 2014).

As mentioned before, the law gave opportunity for several mistakes to be made when it used the expressions "judiciary assistance" and "legal aid" as if they had the same meaning.[9]

The law initiates the normative affirming its applicability not only for citizens, but also for foreigners residing in the country[10], which further exposes the exemptions inherent to gratuity.[11]

According to law 1060/1950, to be awarded with the exemptions there contemplated, it is enough for the lawyer to claim, in the complaint, that the party cannot afford the legal costs without affecting his own subsistence.[12]

It was not always like this: before the law was edited, it was required, for the obtainment of the benefit, that the individual

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8 Hamilton Kenji Kuniochi stresses that the § 35 of the art. 141 of the 1946 Constitution pointed out that the treatment of the grant of judiciary assistance by the government would be object of effective contained norm (*Assistência jurídica aos necessitados: concepção contemporânea e análise de efetividade.* Dissertação de mestrado, São Paulo, USP, 2013, p. 35. Available at: <www.teses.usp.br/teses/disponiveis/2/2137/tde-09012014-113135/>. Access in: 17.04.2014).

9 Marcacini exemplifies the art. 3°, however affirms that "the judiciary assistance comprehends the following exceptions", is actually speaking of legal aid; many other rules incur in the same confusion (MARCACINI, Augusto Tavares Rosa. *Assistência jurídica, assistência judiciária e justiça gratuita* cit., p. 39).

10 The prediction repelled demands until then in force art. 70 of the CPC from 1939 about reciprocity treatment and existence of the Brazilian child (KUNIOCHI, Hamilton Kenji. *Assistência jurídica aos necessitados: concepção contemporânea e análise de efetividade* cit., p. 37)

11 Art. 3º of law 1.060/1950.

12 Art. 4º of law 1.060/1950: "the party will enjoy the benefits of judiciary assistance, through a simple affirmation, in the complaint itself, that is not in condition to pay the costs of the lawsuit and the attorney´s fees, without his own prejudice or his family´s".

declared the income and the salaries received, as well as their own duties and their family's duties.[13] The party had to include a certificate with the complaint, issued by the police or by the city hall, reporting that the solicitor is needy and unable to pay the costs of the lawsuit (old article 4, § 1º).[14]

Law 7510/1986, "oriented by the ideals of the de-bureaucratization" (MARCACINI, 2009, p. 102), reformed article n4 to simplify the situation of the needy person, so that the affirmation, at the complaint, of the litigant not having any means to pay the legal costs and attorney´s fees without his own or his family's prejudice is enough.

It is worth remembering that the device is inserted in a context that supplies the legal sponsorship at court: in practice, in places where the public defender acts, the destitute party goes through a socioeconomic triage to gauge his disadvantage. If such occurrence is certified, the defender will assist in court or will send him to a convention organism (convention with OAB – Brazil Bar Association – and law schools are very important in this scenario).

Law 1060/1950, being the only normative source that regulates the theme of gratuitousness in Brazilian law, suffered several changes over the years, but still has precepts that are currently out of context (KUNIOCHI, 2013, p. 37).

4 Legal Aid at the NCPC

The Code contemplates gratuitousness on several occasions; with the limitation of time and space, the focus in this article will be only the main dictations about the theme.

In broaching the expenses and fines, the first reference to the theme in the Code appears; article 82[15] mentions the obligation of the parties to provide the payment of the required

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13 Preceding art. 4° of the law 1060/1950: "the party, that intends to make use of the benefits of judiciary assistance, will request to the competent judge to concede it, mentioning, in the petition, the income or salary they receive and their own incumbency and their family´s.

14 Preceding art 4º, § 1º "The petition will be instructed by a certificate claiming the one that is requiring it is needy, not able to pay the law suit costs. This document will be issued, free of stamp and emoluments, through the police authority or the Mayor of the city, and the probative work contract which proves wages are equal or inferior to the double of the legal minimum regional is dismissed".

15 New CPC: "art. 82. Except the provisions concerning legal aid, it is the charge of the parties to provide the expenses of the acts put into practice or request in the lawsuit, anticipating the payment, since the beginning to the decision or, in execution, until the absolute satisfaction of the recognized right in the title".

acts or consummated in the suit, except the dictations regarding legal aid. At this point, there has been no change made with the current regime.[16]

Regarding the technical expertise, there are a few new dictations. In terms of article 95[17], 3:

When payment of a technical expertise is responsibility of the beneficiary of the legal aid, it can be defrayed with resources allocated from the budget of the public entity, and accomplished by the court server or by an arranged public organ. In the case of private realization, the amount to be paid will be set according to the price list of the respective court (or in the event of its omission, the National Counsel of Justice), and paid with the resources allocated to the union budget of the State or Federal District.

It is clarified by §4° of such rule that, in case of §3°, the jurisdictional organism, after the ruling of the last decision, will officiate the National Treasury to promote, against whom has been ordered to pay the costs of the case, the execution of the paid amount with the technical private expertise or the utilization of a public server or from the structure of the public organism; however, if the responsible for the payment of the expenses is the beneficiary of the legal aid, the dictate in article 98, §2.° shall be observed.[18]

Finally, the §5° [19] from article 95 affirms it is forbidden to use the resources of the funds of the Public Defender.

The major innovation of the New CPC in relation to the theme, is the creation of a whole new section (in n. IV) designated to gratuitousness[20]. Nevertheless, the article inaugurates the section

16 Pursuant to art.19 of the 1973 CPC, except the provisions concerning to the legal aid, the parties should provide the expenses of the acts put into practice or request in the lawsuit, anticipating the payment since the beginning to the last sentence; and also, in execution, until the absolute satisfaction of the right declared in the decision.

17 This is the caput of such provision: "each party will pay in advance the remuneration of the technical assistance indicated; the expert´s remuneration will be paid by the party which required the expertise, or will be divided when the expertise was determined ex officio or required for both parties".

18 Such provision adjust that "the grant of the gratuity does not repel the responsibility of the beneficiary by the court costs and attorney´s fees deriving of party´s damages".

19 To the application of the § 3º, is forbidden the utilization the costs of the funds resources from the public defenders".

20 Among the art. 98 and 102 of the new Code there are several provisions that work the subject in details.

that mentions "under the law"; as the Code proposes the overturning of several rules of the law 1060/1950,[21] the regulation will be basically the same as what is provisioned in the code – without impairment to any future law to be further edited.

The Code still broaches some themes related to the disadvantage of the litigants in others situations, which deserves a brief approach only to inform the reader.

In a pioneer way, the new CPC inserted a title[22] to embrace the Public Defender in three articles.[23] The defender also appears in the context of the possessory cases,[24] the subpoena being obligatory in collective land litigation.[25]

5 The comparison between the systems

In the preceding topics, it was presented an overview of the current rules and designed system (using as a foundation the text approved by the House of Representatives). At this moment,

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21 New CPC Project – PL 8.046/2010. Art. 1.086. Were revoked: (…) III – the arts. 2º, 3º, 4º, *caput* and §§ 1º to 3º, 6º, 7º, 11, 12 e 17 from law 1.060, of 05.02.1950.

22 Title VII – Of the Public Defender.

23 "Art. 185. The Public Defender will serve the judicial orientation, the promotion of the human rights and the defense of the individual and collective rights of the needy, in all courts, in an integral and gratuitous way.
Art. 186. The Public Defender will have the benefit of the double time in deadline to all the procedure manifestations.
§ 1º the deadline begins with the personal summons of the public defender, as published in art. 184, § 1º.
§ 2º In a request of the Public Defender, the judge will determine the personal summons of the sponsored party when the procedural act depends on the providence or information that only be given or provided by him.
§ 3º the provisions in the caput apply to the officers of the judicial practice of the law schools recognized by the law and the entities that provide legal aid as a result of agreements with the Public Defender.
§ 4º Do not apply the benefit of the double counting when the law establishes, expressly, special deadline for the Public Defender.
Art. 187. The member of the Public Defender will be civil and regressive liability when act with intentional fault or fraud in the performance of his duties.

24 "Art. 579. In the collective dispute for the a real estate possession, when the despoliation or the perturbation affirmed in the complaint occur over a year and a day, the judge, before appreciating the request to concede a preliminary decision, must designate a mediation hearing, to be realized in up tothirty days, that will observe §§ 2º e 4º."

25 "Art. 579, § 2º The public ministry will be summoned to attend the hearing; the Public Defender will always be summoned when there is a party that is a legal aid beneficiary.

we offer a comparison among the main differences between the systems, as from issues commonly observed in forensic quotidian.

5.1 Request and grant

Law 1060/1950 dictates only the requirement by the author in the complaint.[26]

However, forensic praxis recognizes the possibility of such lawsuit to be formulated, by both parties, at any moment.[27]

In the NCPC proposal, article 98 highlights the right to legal aid, whether to natural or juridical person.

Art. 99 brings the wide possibility of the application of gratuitousness, emphasizing it to be possible: (i) in the complaint; (ii) in the answer; (iii) in the petition of third entry (iv) in the appeal. As it can be noticed, confirming the jurisprudence tendency, the text of the new Code recognizes the discussion of the gratuitousness at any time during the lawsuit.

It must be understood of such list as an example. The party may, initially, not need the gratuitousness, but then be affected by significant economic insecurity still at lower court before appeal; this is exactly what is dictated at the end of this article.[28]

As it can be noticed, the dictation of NCPC is wider and more complete than the current one; such situation is convenient to avoid some jurisdictional understandings – a minority, fortunately – with the purpose if forbidding the grant of legal aid at subsequent moments after the complaint.

Concerning the grant of gratuitousness, the law remains without establishing objective criteria, in this case, the judge shall be responsible for the decision, according to the individual lawsuit.

In law 1060/1950, art. n4 expects the granting of gratuity if the party is not in "condition to pay for the procedural costs and attorney´s honorary, without his own or his family's prejudice ". The rule is complemented with §1°, which adduces the presumption of poverty of the party under penalty of fine.[29]

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26 "Art. 4° The party will have the benefits of judiciary assistance, through a simple affirmation, in the same act of the complaint (...)."

27 It is possible to lead gratuity in the same court; in this hypothesis, the gratuity will be applied only from the moment that it is granted and not retroactively.

28 "(...) Is supervening the first manifestation of the party in the same court, the request may be formulated by a simple petition, in the same lawsuit, and will not affect its course."

29 "§ 1.° One is assumed poor, until proven otherwise, those who claim this condition in the tenor of this law, under penalty of payment of up to ten times the legal costs."

Undoubtedly there is a great subjectivity in the concept, which causes extremely diverse decisions in the forensic quotidian, according to the understanding of each magistrate.[30] In the same sense comes the NCPC, which does not have any criteria to grant the legal aid.

For the co-author of this article (Fernanda Tartuce), the legislator acted and will act well when making such a choice of rules; after all, as Augusto Rosa Marcacini stresses:

The concept of needy is not determined through rigid rules, mathematics, or using determined numerical limits. Those who are entitled are people that cannot afford the required expenses to participate in the case, as far as, accounting for his earnings and his expenses for his own sustenance and that of his family, there is not enough money left. The right to the benefit comes from the financial unavailability of the individual." (MARCACINI, 2009, p. 90).

In reverse, for co-author (Dellore), although there should be some scope for the judge's ruling in the concrete case, it would be convenient for there to be some minimally objective criteria in order to avoid the huge disparities that can be found in the forum.

Analogously to §1 of the. 4th art of law 1060/1950, art. 99, § 2nd of the NCPC also mentions the presumption of poverty in relation to the affirmation of economic disadvantage[31] by the natural person, being easy to conclude that there is not such presumption as to the juridical person.[32]

The news predicted for the projected legislation is the impossibility of rejection in the gratuitousness plan. The prevision comes in art. 99, §1°, in the following terms:

The judge may only reject the request if the there are elements in the case that make evident the lack of legal requirements to grant gratuitousness; in that case, before rejecting the application, the judge must determine the party to prove the fulfillment of the requirements for the grant of gratuity.

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30 Or even in each branch of the judiciary. For an example, it is noticeable that there is a greater difficulty to grant legal aid in the scope of the State Court of Rio de Janeiro than in the State Court of Sao Paulo – a phenomenon which some attribute to the costs in Rio de Janeiro, being fully reversed to the vaults of the Court.

31 The allegation of insufficiency deduced by a natural person is presumed true.

32 This is the common position of the STJ in light of the current system, according to entry 481: It is entitled to receive the benefit of legal aid the juridical person with or without profit that demonstrate the inability to pay for legal costs.

Therefore, even If the magistrate concludes the absence of the requirements for the granting of gratuity, he must determine the emendation of the request to that, according to the evidence of produced by the solicitor,[33] so that he may form his opinion on the subject.

The news are positive in the sense of avoiding immediate rejection of the gratuity and allowing the suit of the underprivileged litigant to carry on regularly, without being impacted by the assumption of bad intentions. However, it is still contradictory to the previsions at §2°h(when speaking of the presumption regarding a natural person), because in this case the presumption will be removed by the "sensibility" of the magistrate in relation to what the lawsuit contains.

It remains to be verified how the application of this device will be when the validity of this new law states; since now it is possible to consider that each magistrate will take a certain course, depending on their belief, some will be applying with more emphasis the presumption of §2° and others will be determining more often the evidence by the party of the gratuity request.[34]

Finally, a situation that will surely be object of intense debate is the prediction that, by the new legislation, the granting of "partial gratuity", which may happen in two different ways?

i) recognition of the gratuity for some of the acts of the lawsuit or only the reduction of part of the expenses[35] and

ii) payment in installments, "If it is the case".[36]

The legislation does not include criteria about when this is to be applied, and does not present safe parameters to the application of any of the hypothesis,[37] regarding the percentage

[33] But the legislation do not specify which would be those proves of necessity of gratuity. It seems that may be – in an exemplificative roll: bank statement, pay stub, income tax return and/or accounts demonstrating the required expenses.

[34] Regarding the theme "proof of necessity", diverge one more time the authors of the article: (i) Fernanda Tartuce understand that the rule must concede the gratuity, with the firm prevalence of the poverty presumption and (ii) Luiz Dellore, from the interpretation of the art. 5°, LXXIV, of the CF (juridical assistance will be given to those that "prove the insufficiency of resources") claims that the author must, as a rule, prove the necessity.

[35] Art. 98, § 5°: " The gratuity may be grant in relation to one or all the procedural acts, or consist in a percentage reduction of the legal costs that the beneficiary have to pay in advance in the course of the procedure".

[36] Art. 98, § 6º: Accordant to the lawsuit, the jurisdictional organism may concede the right to the installment pay of the legal costs that the beneficiary have to pay in advance in the course of the procedure".

[37] When to limit gratuity certain acts? When to "give discounts" regarding certain acts? When is it "the case" to pay the costs in installments?

or number of installments. There is no doubt that those questions will be the object of rich divergence until the definition of a minimal delimitation by the Superior Court of justice – which may take years.

5.2 Impugnation of the granted gratuity

In the running systematic, as well as in the new one, there is no a direct appeal to the higher court against the decision that concede gratuity. This is a solution entirely consentaneous with the legislation´s prevision, which has as its premise that gratuity must be given considering the assumption of necessity.

Thus, as much in law 1060/1950 as in the new CPC, we are faced with a situation that, once gratuity is granted, it is up to the contradictory party to discuss the subject in the presence of the magistrate that granted the benefit, by presenting an impugnation.

Under law 1060/1950, the issue is regulated in articles 6 and 7: once gratuity is granted by the judge, the *ex adverso* should present "impugnation of legal aid", which will not suspend the course of the lawsuit and will be sued separately from the main lawsuit".[38]

In this act, the party that is impugning must prove "the inexistence or the disappearance of the essential requirements to concede it".[39] There is no term arranged by law – exactly because the burden of demonstrating the absence of advantage of the beneficiary party is from the one that impugns.[40]

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[38] Art. 6º, last part, of law 1060/1950. "The request, when formulated in the course of the lawsuit, will not suspend it, and the judge may, in the face of the proof, concede or reject right away the plan of the assistance benefit. The petition, in this case, will be carried out in a separate lawsuit, annexing the respective petition to the others from the main lawsuit, after resolving the incident.

[39] Art. 7° of the law 1060/1950: "The contradictory party will be able, at any time in the dispute, to request the assistance benefits to be revoked, if it can prove the inexistence or disappearance of the essential requirements to its granting. Single paragraph. Such requirement will not suspend the course of action and will be carried out by the form established in the end of the art. 6° of this law."

Art. 7º da Lei 1.060/1950: "A parte contrária poderá, em qualquer fase da lide, requerer a revogação dos benefícios de assistência, desde que prove a inexistência ou o desaparecimento dos requisitos essenciais à sua concessão. Parágrafo único. Tal requerimento não suspenderá o curso da ação e se processará pela forma estabelecida no final do art. 6º desta Lei".

[40] According to the co-author (Luiz Dellore), this is not easy to prove; in the forensic routine, most of the impugnations are not concede precisely due to

In most of times, the impugnation is presented by the defendant with the presentation of the answer, and, If plaintiff is who impugn, together with the reply.

In the scope of the new CPC, there are important modifications, even if the paper work receives the same name.

The "Impugnation of the legal aid" is seen in art. 100, as follows:

Once conceded the request, the contradictory party will present impugnation in the answer, in the reply, in the counter-arguments of appeal, or in the case of a supervening request or formulated by a third party, through a simple petition, to be presented in fifteen days, in the same paperwork in the lawsuit, without suspension of its course.

As it can be notice, there is no more mention of prosecuting in a separate lawsuit, which brings us to the conclusion (in line with the new CPC system) of it being prosecuted in the same lawsuit; as it can be noticed, there is a simplification in the course of the lawsuit.

In addition, the impugnation is not going to be presented in a separate petition, but in a topic to be inserted in the same petition, which will have the party´s manifestation according to the terms of the lawsuit; this can occur in the following moments:

i) answer, If the gratuity is granted to the plaintiff after the appreciation of the request formulated in the complaint;

ii) reply, If the legal aid is granted to the defendant after the appreciation of the request formulated in the answer;

iii) counter-arguments, If the legal aid is granted when the request is formulated during the appeal or

iv) simple petition (but, we emphasize, in the same lawsuit), if the request for gratuity is granted in a different moment from the previous three, and, thus, the petition will consist exclusively of this theme or regarding the gratuity and any other request that the party formulated in the lawsuit.

Thus, unlike the current system, there is nothing to talk about "impugnation of the legal aid" as one distinct petition to

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the burden of proof being with the one who impugns, being enough that the defendant attaches a bank statement and income tax return (or proves that he or she does not deliver this declaration). To the co-author (Fernanda Tartuce), if it is difficult for the defendant to prove the wealth of someone, what will they say then to the author to prove their poverty? Negative evidence, not by chance, was denominated by the ancient scholars as "diabolic evidence" (...) Many of the disadvantaged do not even have documents (*social security number or the equivalent), what to say then of having proof of their patrimony? Even If they have it, the Federal Revenue has not been providing the tax-free declaration since 2009.

be prosecuted as a separate petition in the lawsuit. It is, as can be noticed, an important innovation in the new CPC.

Concerning the proof of poverty, there is no legal rule determining the onus to be from the one that impugn, as the regulation of law 1060/1950 states. The legislator could have been clear in this point to avoid debates.

From the interpretation of the §2°r of art. 99.[41] If the beneficiary is a natural person, the burden is on the one that impugn, considering the presumed veracity of the gratuity request. Regardless, by analogy to the §1° of the same article 99,[42] in case of doubt it is possible to infer that the judge may determine that the one the impugn presents documents capable of proving his economically disadvantaged situation. But, we reiterate, considering the extensive regulation of the subject in the NCPC, it would have been possible – and desirable – for the legislator to manifest expressly.

An innovation that can bring some doubt is in regards to deadline: it not being an answer, reply or counter-argument (hypothesis in which there already is a deadline stipulated by the Code), the legislator claims that the deadline is of 15 days. However, when is the initial term of this deadline? Furthermore, what if the contradictory party only finds outs that the party is not entitled to gratuity after the deadline of the answer or the reply? Such situations, will certainly be object of discussions when the NCPC is in place.

It seems that the most appropriate interpretation of this deadline is to use it as the initial moment of knowledge of the beneficiary´s situation of not being in economic disadvantaged knowledge; certainly, this is the situation, where there is no clear way to mark the initial term.

However, if this interpretation is not accepted, the exercise of the procedural law to impugn gratuity will be limited. Thus, if the impugnation is presented through a simple petition, the one that impugns must be clear on the moment they learned of the undue grant in order to avoid the lack of appreciation of the impugnation due to an inopportune supposition.

Summarizing, an evolution can be notice in the form of impugnation in the scope of the new CPC – except regarding the deadline to impugn.

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41 Already analyzed in topic 5.1 above.

42 In addition, considering a new systematic interpretation, also aims that the NCPC adopts the theory of load dynamic of the burden of proof (NCPC, art. 380, § 1º), will can, in the concrete case, the magistrate specify who will have to prove.

5.3 Applicable appeal against the decision for impugnation

Finally, we are left with the comparative analysis regarding the applicable appeal to attack the decision that considers legal aid impugnation.

It should be pointed out that the matter is controversial in the scope of the current legislation and that NCPC gives an undoubtedly more technical solution and one capable to avoid what, as it seems to us, is an equivocation of the jurisprudence.

Under law 1060/1950 and the current CPC, the co-author of this article (Luiz Dellore) has furthered the analysis of the applicable appeal, in a study published in the past decade.[43] This is not the moment, certainly, for an analysis that exhausts the subject; thus, it will be present just as a necessary overview to comprehend the subject.

In accordance with the previous topic, in the light of law 1060/1950, once gratuity is conceded and the impugnation to legal aid offered by the contradictory party, this incident will be prosecuted in a separate petition in the lawsuit (attached to the main one).

The decision related to such incident is, undoubtedly, interlocutory. So, strictly speaking, the applicable appeal would be an interlocutory appeal (motion)); however, this is not the understanding that prevails.

The courts, in its majority r, understand that the art. 17 of the law 1060/1950[44] is effective and therefore, the decision given in the incident, depends on the appeal. The first judgment of the STJ in this sense is from 1991, which the memorandum book was elaborated as follows:

Legal aid. Revoking request denied. Appropriate appeal. Law 1060/1950, art. 17 prosecute in a separate petition the request of repeal of judiciary assistance conceded to the plaintiff – Law 1060/1950, art. 7º -, for the verdict of the lower court the appropriate resource is the appeal – art. 17 a motion will be only admitted, in the general systematic of appeals, of the given plan decision in course of the same lawsuit - Art. 5º, *caput*. Special appeal known and provided" (REsp 7.641/SP, 4ª T., j. 01.10.1991, rel. Min. Athos Carneiro, *DJ* 11.11.1991, p. 16150)

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43 Do recurso cabível das decisões referentes à gratuidade da justiça (Lei 1.060/1950). In: NERY JR., Nelson; ARRUDA ALVIM WAMBIER, Teresa (orgs.). *Aspectos polêmicos e atuais dos recursos cíveis*. São Paulo: Ed. RT, 2006. vol. 9, p. 316-346.

44 The appeal will be appropriate for the decisions given in consequence of this law application; the appeal will be received only in devolution effect when the ruling concedes the request.

Since this judgment, the STJ have concluded: If the decision was given in the same lawsuit, the use a motion is appropriate; if the *decision* was pronounced in a separate lawsuit (frim the impugnation), it is appropriate to use the appeal.

This understanding brings many difficulties to the party, because in many analog situations referring to other incidents (such as in the impugnation to the value of the claim or in the exception of the relative incompetence), the appropriate appeal is the motion.

It is worth mentioning that the alteration of the draft of the judiciary assistance law[45], dating from the 1990s and was elaborated by Augusto Tavares Rosa Marcacini and Walter Piva Rodrigues, expressly established the use of the motion[46] against the legal aid´s decision.

In more than good time, the new CPC proposes the overcoming of this anachronistic understanding.

The issue is regulated, in a simple and objective way, in the art. 101 of the new Code: "against the decision that grants gratuity or the one that welcomes the request of its revocation, a motion will be suitable, except when the issue is resolved in the sentencing, against which an appeal is the suitable course of action.[47]

The rule removes, thus, any debate relating to the subject, making it clear when to use the appeal in relation of the situations that could arise in relation to gratuity:

i) If the judge rejects the gratuity pleaded by any of the parties, the appropriate appeal will be the instrument motion;

ii) If the legal aid impugnation request is accepted (formulated at any time , as seen in the previous section, so long as still in first instance) the appropriate appeal will be interlocutory appeal (motion);

iii) If the magistrate decides on the gratuity (to accept or not, being related to the impugnation or not) in the core of the judgment, considering the principle of usingonly one type of appeal against the same decision, the resource to be used will be appeal.

In this particular case, there is no doubt as to the clear evolution in the new system in relation to the rule in law 1060/ 1950.

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45 Cf. in *Revista AASP* 59/15.

46 As shown in art.18 of such sketch of the project: Of the decision that rejects right away the benefit, or the one that resolves the incident, it is appropriate to use a motion.

47 As can be notice, the writing is similar to the proposal of the sketch of the project mentioned in the previous note.

Conclusions

From the points discussed in this brief article, it is possible to highlight the following:

a) From a technical point of view, there is a distinction among legal aid, judiciary assistance and judicial assistance, however many times the legislation, the doctrine and jurisprudence do not regard to this relevant differentiation;

b) In the new CPC scope, the legislator was more technical in opting for nominating the lack of collecting of costs as "legal aid";

c) Concerning the request for legal aid, the new CPC provides the possibility of its formulation at any time;

d) In relation to the grant, the new CPC (i) allows its granting if the party is economically disadvantaged (without specifying, objectively, what that means); ii) predicts the presumption of gratuity to the natural person, in spite of (iii) allowing the magistrate to asks for clarification before rejecting the request;

e) As to contesting gratuity, the new system innovates in no longer requiring the autonomous impugnation, but its allegation in the core of the lawsuit which will be presented containing this topic – and will not be prosecuted separately;

f) Regarding the manner of contesting the impugned decision, the new CPC evolves in comparison to the current system, when it emphasizes the use of the instrument motion– except if the question related to gratuity is decide in the same sentence.

From this synthesis, we can conclude the following:

i) the current system, dated of 1950, has been in need of updating for some time;

ii) the new CPC brings important modifications compared to the current existent rules;

iii) the new system brings some situations in which there is a big possibility for different decisions by the magistrates, which surely will result a series of debates and divergent judicial understandings (for example and specially, regarding the installment plan of the costs and judicial fees and "if is the case" the initial term of the deadline is 15 days to present the impugnation of the conceded gratuity).

v) Despite the lack of attention of the doctrine to the theme until this moment, it is a point which the new CPC innovates, deserving attention from judges and lawyers;

vi) however, there is no prevision in the new legislation about the objective criteria for conceding legal aid, regarding

the financial conditions of the party – conflicting subject which creates many differences in the forensic routine, including the subscribers of this article.

There will be no shortage of barriers and obstacles in the path of those who need judiciary assistance in Brazil; we shall keep going, however, studying the subject in favor of the refinement of the access to justice - after all:

Putting individual and collective rights into effect, through legal aid, supplants the limits of the formal law, of the juridical framework that proclaims equality by law and the protection of the state for the needy. The cold letter of the law warms up with the heat of real life".[48]

References

ALVAREZ, Anselmo Prieto. Uma moderna concepção de assistência jurídica gratuita. Disponível em: [www.pge.sp.gov.br/centrodeestudos/revistaspge/revista53/moderna.htm]. Acesso em: 20 jun. 2014.

SCHUBSKY, Cássio (org.). **Escola de Justiça: história e memória do Departamento Jurídico XI de Agosto**. São Paulo: Imprensa Oficial do Estado de São Paulo, 2010.

DELLORE, Luiz. Do recurso cabível das decisões referentes àsgratuidade da justiça (Lei 1.060/1950). In: NERY JR., Nelson; ARRUDA ALVIM WAMBIER, Teresa (orgs.). **Aspectos polêmicos e atuais dos recursos cíveis**. São Paulo: Ed. RT, 2006. vol. 9.

GALESKI JUNIOR, Irineu; RIBEIRO, Marcia Carla Pereira. Direito e economia: uma abordagem sobre a assistência judiciária gratuita. Trabalho publicado nos Anais do XIX Encontro Nacional do Conpedi realizado em Fortaleza – CE de 09 a 12 de Junho de 2010. Disponível em: [www.conpedi. org.br/manaus/arquivos/anais/fortaleza/3596.pdf]. Acesso em: 19 fev. 2014.

KUNIOCHI, Hamilton Kenji. **Assistência jurídica aos necessitados: concepção contemporânea e análise de efetividade**. Dissertação de mestrado, São Paulo, USP, 2013. Disponível em: [www.teses.usp. br/teses/disponiveis/2/2137/tde-09012014-113135/]. Acesso em: 17 abr. 2014.

MARCACINI, Augusto Tavares Rosa. **Assistência Jurídica, assistência judiciária e justiça gratuita**. São Paulo, 2009 (edição eletrônica).

NALINI, José Renato. **O juiz e o acesso à justiça**. 2. ed. São Paulo: Ed. RT, 2000. p. 61.

[48] SCHUBSKY, Cássio (org.). *Escola de justiça: história e memória do Departamento Jurídico XI de Agosto* cit., p. 12.

RODRIGUES, Valter Piva e MARCACINI, Augusto Tavares Rosa. Proposta de alteração da Lei de Assistência Judiciária. **Revista do Advogado**. n. 59. p. 15. São Paulo: AASP, 2000.

TARTUCE, Fernanda. Assistência judiciária, gratuidade e Lei 11.441/2007. In: MATHIAS COLTRO, Antônio Carlos; DELGADO, Mário Luiz (orgs.). **Separação, divórcio, partilha e inventário extrajudiciais**. São Paulo: Método, 2007. vol. 1.

_____. Assistência judiciária gratuita: suficiência da afirmação de pobreza-acórdão comentado. **Revista do Direito Brasileiro**. vol. 46. p. 74-82. São Paulo: Lex, 2010.