



**BRIEFING PAPER ON BARRIERS
FACED BY DEFENDANTS WITH
INTELLECTUAL AND/OR
PSYCHOSOCIAL DISABILITIES IN
THE CRIMINAL JUSTICE SYSTEM
IN PORTUGAL**

MAY 2023

This briefing paper was developed by FENACERCI within the project “Enabling inclusion and access to justice for defendants with intellectual and psycho-social disabilities” (ENABLE - 101056701 - JUST-2021-JACC).

The project seeks to promote access to justice and fairer criminal proceedings for defendants with intellectual and psycho-social disabilities in 8 EU countries (Romania, Bulgaria, Czechia, Slovenia, Slovakia, Spain, Portugal and Lithuania), and it is implemented by the following consortium of 9 experienced NGOs:

- Validity Foundation – Project coordinator, Hungary
- Centrul de Resurse Juridice, Romania
- Fenacerci – Federação Nacional de Cooperativas de Solidariedade Social, Portugal
- Fórum pro lidská práva, Czechia
- The International Commission of Jurists – European Institutions
- KERA Foundation, Bulgaria
- PIC – Pravni center za varstvo človekovih pravic in okolja, Slovenia
- Confederación Plena Inclusión España, Spain
- Mental Health Perspectives, Lithuania



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EXECUTIVE SUMMARY

EXECUTIVE SUMMARY

“While access to justice is fundamental for the enjoyment and fulfilment of all human rights, many barriers prevent persons with disabilities from accessing justice on an equal basis with others. Such barriers include restrictions on the exercise of legal capacity; lack of physical access to justice facilities, such as courts and police stations; lack of accessible transportation to and from these facilities; obstacles in accessing legal assistance and representation; lack of information in accessible formats; paternalistic or negative attitudes questioning the abilities of persons with disabilities to participate during all phases of the administration of justice; and lack of training for professionals working in the field of justice. In the justice system, persons with disabilities are often considered to be unworthy of, unable to benefit from or even likely to be harmed by due process protection provided to all other citizens. Even fundamental rights, such as the right to remain silent and the presumption of innocence, may be denied either directly in law or policy or indirectly in custom and practice. The risks are extreme – e.g. false confessions, erroneous verdicts and unlawful deprivation of liberty.”[1]

The aim of this national briefing paper is to allow an assessment in Portugal of:



How and what barriers defendants with intellectual and psychosocial disabilities face in the criminal justice system in accessing information, support and procedural accommodations that prevent them from participating, and



To what extent and what ways is there law, policy and/or practice (including promising practices) that enable defendants with intellectual and/or psychosocial disabilities to overcome these barriers, particularly through provision of procedural accommodations?

This report will inform reform and development of a disability bench book and protocol to improve accessibility of criminal proceedings.

[1] 2020, International Principles and Guidelines on Access to Justice for Persons with Disabilities, p. 6, available at:

https://www.ohchr.org/sites/default/files/Documents/Issues/Disability/SR_Disability/GoodPractices/Access-to-Justice-EN.pdf

EXECUTIVE SUMMARY

Main findings regarding barriers, challenges and best practices

- **Despite the recommendation made by the UN Committee on the Rights of Persons with Disabilities that Portugal, in 2016, "take all necessary measures to combat the discrimination faced by persons with disabilities in accessing justice by ensuring the provision of full procedural accommodation and of funding for training judicial personnel on the Convention"** this area has not been prioritised in the domestic disability policies.
- **The Portuguese legal framework does not mention any situation of request and offer of procedural accommodations applicable for persons with disabilities, nor specifically for accused or defendants with intellectual and/or psychosocial disabilities** (e.g. to facilitate effective communication to ensure understanding of their rights). Hence, in practice, the request for procedural accommodations is rare or non-existent.
- **The law does not foresee the possibility of an intermediary or facilitator** in cases involving persons with intellectual and/or psychosocial disabilities. This legal gap can **compromise the right to participation** of defendants with disabilities.
- The **lack of training programs regarding disability issues** based on the human rights model of disability is identified as a barrier. The development and investment in training are seen as one way to promote a more accessible justice system for persons with disabilities.
- **Lack of physical access to justice facilities** (e.g. courts, police stations) is also one significant barrier to access to justice.
- Best practices identified included networking among **different institutions**, exchanging knowledge, and **preventing crisis and disruption behaviour in mental health; interventions based on the ecological model** (Hawe, 2017; Ornelas et al., 2019) **were highlighted**, focusing on strengthening social support networks must become mainstream, replacing the still dominant medical model based on a diagnosis.


EXECUTIVE SUMMARY

Main recommendations

- To **prioritise in the national political agenda the access to justice for persons with disabilities and the provision of procedural accommodations.**
- To **review the current legislation and introduce information on procedural accommodations – including the possibility of an intermediary or facilitator -** applicable for persons with disabilities, including those accused of being defendants.
- To **make legal practitioners aware that they should use simple, easy-to-understand and accessible language.** Written information should also be available in alternative formats.
- **To hear, consult and involve persons with disabilities and their representative organisations** in the debate on how to improve the justice system making it more accessible for them, and how to promote their human rights.
- To guarantee that persons submitted to compulsory hospitalisation **have a voice** and **effective access to a lawyer** that can advocate for their human rights.
- To develop a consistent and coordinated **training plan regarding disability issues targeting the different judicial personnel.** Persons with disabilities should also participate in training actions as they are the main experts in disability issues.
- To **prioritise the removal of architectural barriers** through the allocation of adequate financial resources and **improve web accessibility** of the websites in the justice field.
- To create **adequate support services** (e.g. multidisciplinary teams) **within the criminal justice system** to ensure the provision of procedural accommodation for persons with disabilities.

EXECUTIVE SUMMARY

- To **guarantee that the persons considered exempt from criminal liability** (“unimputable”) who are subject to security measures **have access to adequate responses**, not staying in prisons because there are no vacancies in other facilities. **To debate and eventually abolish the legal framework regarding the exemption from criminal liability.**
- To **identify and disseminate best practices** regarding the **identification of disability, and develop training actions** focusing on the human rights model of disability and which adjustments should be made so that people with disabilities can participate on an equal basis.



IT IS SOCIETY THAT
"DISABLES" PERSONS
WITH DISABILITIES
FROM EXERCISING
THEIR HUMAN RIGHTS
AS CITIZENS.

UNITED NATIONS, 2008

01

INTRODUCTION



**"STATES PARTIES
SHALL ENSURE
EFFECTIVE ACCESS
TO JUSTICE FOR
PERSONS WITH
DISABILITIES ON AN
EQUAL BASIS WITH
OTHERS"[2]**

[2] United Nations. (2006, December 13). Article 13 Convention on the Rights of Persons with Disabilities

INTRODUCTION

Access to justice for persons with disabilities is recognised in Article 13⁹ of the Convention on the Rights of Persons with Disabilities (CRPD), which establishes that: “States Parties shall **ensure effective access to justice for persons with disabilities on an equal basis with others**, including through the provision of procedural and age-appropriate accommodations, to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages”, and “to help to ensure effective access to justice for persons with disabilities, States Parties shall **promote appropriate training for those working in the field of administration of justice**, including police and prison staff ”.

According to the United Nations International Principles and Guidelines on Access to Justice for Persons with Disabilities (2020), **procedural accommodations** include: “all necessary and appropriate modifications and adjustments in the context of access to justice, where needed in a particular case, to ensure the participation of persons with disabilities on an equal basis with others. **Unlike reasonable accommodations**[3], procedural accommodations are not limited by the concept of “disproportionate or undue burden” (p. 9).

The practical implementation of Article 13⁹, and specifically the access to justice for defendants with intellectual and or psychosocial disabilities, is an issue which has not been much investigated, at least in some European countries. This project aims at filling this gap by analysing the barriers (and best practices) to participation in the criminal justice process, focusing specifically on persons with intellectual and/or psychosocial disabilities).

According to the CRPD, disability is an evolving concept and “results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”. In other words, the CRPD adopts a social and human rights model which proposes a new conceptualisation of disability: “It is society that “disables” persons with disabilities from

[3] “Necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms” (Article 2, United Nations, 2006)

INTRODUCTION

exercising their human rights as citizens” (United Nations, 2008) if the necessary adaptations to the social participation of these persons are not provided.

The general purpose of this briefing is to present the results of research on the barriers defendants with intellectual and psychosocial disabilities face in the criminal justice system in accessing information, support and procedural accommodations that prevent them from participating. The briefing will also assess to what extent law, policy and/or practice (including promising practices) enable defendants with intellectual and/or psychosocial disabilities to overcome these barriers, mainly through the provision of procedural accommodations.

The general purpose of this briefing is to present the results of research on the barriers defendants with intellectual and psychosocial disabilities face in the criminal justice system in accessing information, support and procedural accommodations that prevent them from participating. The briefing will also assess to what extent law, policy and/or practice (including promising practices) enable defendants with intellectual and/or psychosocial disabilities to overcome these barriers, mainly through the provision of procedural accommodations.

The research guidelines are based on the international normative framework as set out in the relevant and intersecting articles of the **CRPD: article 12** (Equal recognition before the law) and **article 13** (Access to justice); **the International Principles on Access to Justice for Persons with Disabilities** (UN, 2020): **Principle 1** (All persons with disabilities have legal capacity and, therefore, no one shall be denied access to justice on the basis of disability); **Principle 3** (Persons with disabilities, including children with disabilities, have the right to appropriate procedural accommodations); **Principle 4** (Persons with disabilities have the right to access legal notices and information in a timely and accessible manner on an equal basis with others); **Principle 5** (Persons with disabilities are entitled to all substantive and procedural safeguards recognised in international law on an equal basis with others, and States must provide the necessary accommodations to guarantee due process); **Principle 6** (Persons with disabilities have the right to free or affordable legal assistance); **Principle 10** (All those working in the justice system must be provided with awareness-raising and training programs addressing the rights of persons with disabilities, in particular in the context of access to justice);

INTRODUCTION

European Convention on Human Rights: article 5 (Right to liberty and security), article 6 (Right to a fair trial), article 13 (Right to an effective remedy) and article 14 (Prohibition of discrimination); and EU acquis on procedural rights: **right to interpretation and translation in criminal proceedings**[4]; **right to information in criminal proceedings**[5]; **right of access to a lawyer in criminal proceedings**[6]; strengthening of certain aspects of the **presumption of innocence and the right to be present at the trial** in criminal proceedings[7]; **legal aid** for suspects and accused persons in criminal proceedings[8]; and **procedural safeguards for vulnerable persons suspected or accused** in criminal proceedings[9].

In what follows, we present the goals and methodology of the study, then we summarise the main findings of the fieldwork - desk research and semi-structured interviews - and we end up with the main conclusions and recommendations regarding access to justice for defendants with intellectual and/or psychosocial disabilities in Portugal.

[4] Directive 2010/64/EU of the European Parliament and of the Council – Articles 1, 2, 4 and 5;

[5] Directive 2012/13/EU of the European Parliament and of the Council– On the right to information in criminal proceedings – Articles 3, 4, 6 and 7;

[6] Directive 2013/48/EU of the European Parliament and of the Council – On the right to access to a lawyer in criminal proceedings, including EAW and on the right to have a third party informed about deprivation of liberty and communicate with third persons – Articles 3, 4, 11 and 13

[7] Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings – Article 6 – 8 and Recital 42;

[8] Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings – Articles 4 and 9;

[9] Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings – Section 2 and 3.

02

GOALS AND
METHODOLOGY

GOALS AND METHODOLOGY

To improve knowledge on experiences and participation barriers faced by defendants and accused with intellectual and/or psychosocial disabilities in the criminal justice system (pre-trial and trial phase, i.e., from investigation/ arrest to sentence).

The specific goals of this project phase were:



Map the national legal and political framework

(laws, policies, strategies, orientations, or others) about access to justice to defendants with disabilities, mainly focusing on the provision of reasonable and procedural accommodations.



Examine the experience of different stakeholders

- defendants with intellectual and psychosocial disabilities, criminal justice professionals, support services professionals, Non- Governmental Organisations and Human Rights Institutions – about the access to justice of defendants with disabilities, **identifying barriers, challenges and areas of improvement** they envision in it.



To collect recommendations

- from the different stakeholders - on how to promote the inclusion and access to justice for defendants with intellectual and psychosocial disabilities, specifically **identifying the main support and procedural accommodations needed**.

GOALS AND METHODOLOGY

To achieve these goals, the methodological approach combined desk research and fieldwork. The **desk research** involved identifying and analysing relevant policy documentation (e.g., national legislation, policy, strategies, reports, statistics) regarding the provision of reasonable and procedural accommodations in the justice system for persons with disabilities.

Additionally, for the fieldwork, **semi-structured interviews (N= 14)** were carried out with key stakeholders: **defendants with intellectual and/or psychosocial disabilities (N=4); Criminal justice professionals (N=8); Support services professionals (N=2).**

The interviews were conducted between 26 January and 3 March 2023. It was given priority to interviewees with experience/contact with the criminal justice system in the last three years. We used a non-probability purposeful sampling technique to identify and recruit the participants of this project.

The identification of the interviewees was possible with the help of the national partners of the project. The data was analysed using content analysis.

In the next section, we summarise the key findings of the desk research and interviews.

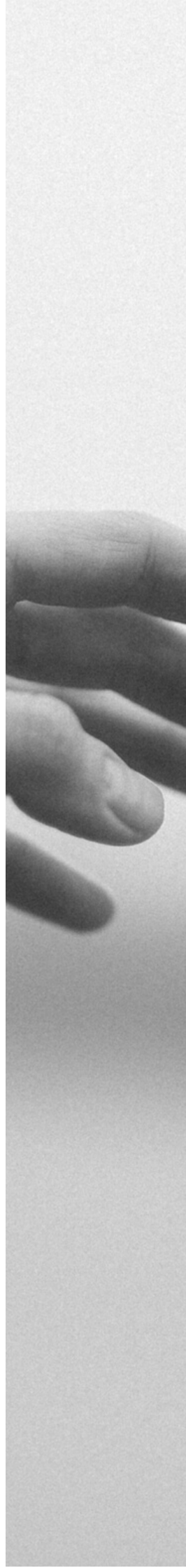


03

DEFENDANTS WITH
DISABILITIES ACCESS
TO JUSTICE

POLITICAL AND LEGAL FRAMEWORK

- 01** Transposition of the international legal framework
- 02** Overview of the national legal framework regarding access to justice
- 03** Training and awareness for criminal justice professionals
- 04** Statistics and data on access to justice
- 05** Main findings



DEFENDANTS WITH DISABILITIES ACCESS TO JUSTICE

“

JUSTICE SYSTEMS
REFLECT THE VALUES
OF THE SOCIETIES IN
WHICH THEY ARE
EMBEDDED.

ACCESS TO JUSTICE

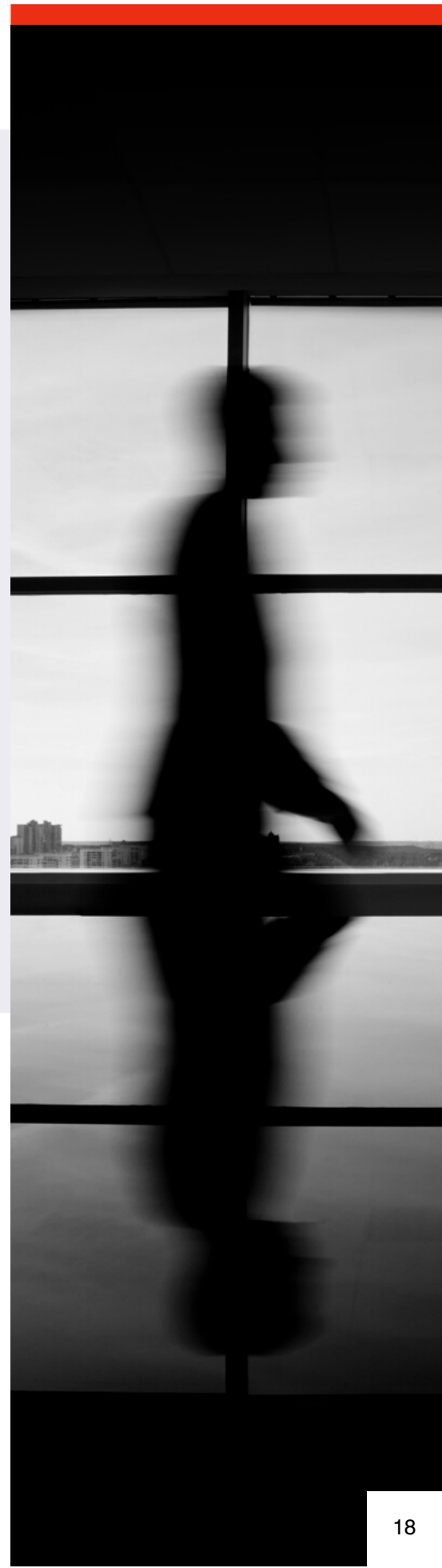
The main goal of the desk research was to shed light into the legal and political framework about access to justice to defendants with disabilities.

DEFENDANTS WITH DISABILITIES ACCESS TO JUSTICE

POLITICAL AND LEGAL FRAMEWORK

The results of this analysis are presented in four sub-sections:

- a) identification of the main international legal policies and orientations regarding access to justice adopted in Bulgaria;
- b) brief overview of most relevant domestic laws, policies or strategies which regulate the access to justice of persons with disabilities;
- c) how training and awareness raising for those working in the field of administration of justice is being promoted, and finally,
- d) we will present available official data related to the access to justice for persons with disabilities.



POLITICAL AND LEGAL FRAMEWORK

01 Transposition of the international legal framework

Portugal ratified the **United Nations Convention on the Rights of Persons with Disabilities** and its Optional Protocol in 2009 without any declarations, reservations or objections. Regarding access to justice (article 13), the UN Committee on the rights of persons with disabilities, in its Concluding Observations on the initial report of Portugal, in 2016, expressed concern “about the limited access to justice for persons with disabilities and the lack of procedural accommodation for them”[10]. The Committee recommended that the country “take all necessary measures to combat the discrimination faced by persons with disabilities in accessing justice by ensuring the provision of full procedural accommodation and funding for training judicial personnel on the Convention”[11]. However, to date, **Portugal has not adopted any specific measures to ensure access to justice for persons with disabilities and the provision of procedural accommodations.**

Additionally, another area of concern of the UN Committee on the rights of persons with disabilities was related to **equal recognition before the law** (article 12): “There is a large number of persons with disabilities subjected to total or partial guardianship and, as such, deprived of certain rights, for instance, the rights to vote, to marry, to found a family, and to manage assets and properties”[12]. As recommended, **Portugal repealed the full and partial guardianship systems** foreseen in the Civil Code since 1966. The Civil Code was amended (article 138), and a new legal framework was created[13], harmonised with article 12 of the CRPD, which recognises all people, regardless of the complexity of their support needs, the right to “equality before the law, on equal terms with all other citizens, in all areas of their life”. This law entered into force on February 2019.

Portugal also ratified, in 1989, the **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**. In the Concluding observations (2013) the Committee against Torture (CAT) expressed concerns about “**the insufficient**

[10] United Nations (2016, p.5). Concluding observations on the initial report of Portugal. Available at <https://gddc.ministeriopublico.pt/sites/default/files/comitedeficiencia-1relatorio-observacoesfinais.pdf>

[11] Ibidem

[12] Ibidem, p.4

[13] Law nº 49/2018 “Regime do Maior Acompanhado”. Available at <https://dre.pt/dre/detalhe/lei/49-2018-116043536>

POLITICAL AND LEGAL FRAMEWORK

01 Transposition of the international legal framework

capacity of in-patient psychiatric wards to accommodate prisoners with serious mental illnesses”[14]. Therefore, **several recommendations** were made to improve detention conditions in places of deprivation of liberty, such as “increasing the capacity of in-patient psychiatric wards and providing full access to mental health-care services within all prison facilities”. In 2019, the mentioned problems remained unsolved, as the Committee expressed that “**the deficiencies in the mental health-care services remain serious problems in the prison system**”[15].

The Committee recognised efforts to address previously identified problems regarding psychiatric forensic units. Yet, it also made recommendations to “ensure that involuntary psychiatric hospitalisation is strictly necessary and proportionate and is applied as a measure of last resort and under the effective supervision and independent monitoring of judicial organs”, to “guarantee legal safeguards for persons hospitalised involuntarily in psychiatric institutions”, and to “ensure that mental health services in the community are sufficient and adequately funded”[16].

In 2018, the Subcommittee on Prevention of Torture carried out its first regular visit to Portugal (1 to 10 May 2018). The report also mentioned problems regarding **involuntary psychiatric hospitalisation**: “In the cases reviewed by the delegation, there appeared to be **no detailed medical justification for hospitalisation**. The form used consisted of a series of questions with checkboxes to determine whether the person posed a danger to society or themselves. The judge made decisions based on this form without any additional evaluation of the person's situation. **The patients interviewed by the delegation reported that they had appeared before the judge only to receive the decision regarding their hospitalisation after it had already been taken**”[17].

[14] United Nations. (2013, December 23). Concluding observations on the combined fifth and sixth periodic reports of Portugal. <https://digitallibrary.un.org/record/772080>

[15] United Nations (2019b, p.5). Available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2FPRT%2FCO%2F7&Lang=en

[16] Ibidem, p.7

[17] United Nations (2019a, p.18). Available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FOP%2FPRT%2F1&Lang=en

POLITICAL AND LEGAL FRAMEWORK

01 Transposition of the international legal framework

The report adds that "people with long-running psychiatric diagnoses are psychosocially disabled and tend to be overmedicated. **This group seems to be practically forgotten, and they are not rehabilitated in the way they should be**"[18].

The subcommittee recommended that Portugal must ensure that: "**detailed medical justification is provided for** individual risk assessment that forms the basis of admission to psychiatric care under court order, and **the person concerned can appear before the judge before such a decision is taken**"[19], community-based services should be reinforced, and that health professionals should receive adequate training.

Further, the reports of the visits to Portugal of the European Committee for Prevention of Torture and Inhuman or Degrading Treatment or Punishment also recommend that "all prisoners [at Lisbon Central Prison] **who have a serious mental disorder that requires intensive mental health care, should be transferred to a mental health facility**"[20].

Additionally, "when prison officers are required to intervene in security-related incidents, they should be **specifically selected and trained to interact with mentally ill patients** and always work under the control and supervision of the health care staff. This requires that nursing staff be present in the accommodation wards"[21].

Regarding the **EU Directives on the rights of defendants/accused, in connection to the articles listed in the introduction**, the following directives were analysed:

- **Right to interpretation and translation** (Directive 2010/64/EU): **Portugal has not considered the transposition of this directive to be necessary**. According to article 92 of the Portuguese Code of Criminal Procedure[22], when the person who intervenes in the the process does not understand the Portuguese language has the right to an interpreter.

[18] Ibidem

[19] Ibidem

[20] CPT (2018, p.38). Available at <https://rm.coe.int/168078e1c8>

[21] CPT (2020, p. 50). Available at <https://rm.coe.int/1680a05953>

[22] Decree-law nº 78/87. Available at <https://dre.pt/dre/detalhe/decreto-lei/78-1987-662562>

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- Additionally, if the person has a hearing impairment also has the right to a Sign Language Interpreter. If the person does not speak but knows to write, the questions are formulated orally and answered in writing. Otherwise, and whenever required, a suitable interpreter is appointed[23]. However, “the Court of Justice of the European Union (CJEU), in its judgment of 01.08.2022 in case C-242/22 PPU, has already ruled on the (non)conformity of Portuguese national law regarding the assistance by an interpreter in criminal proceedings and the translation of certain procedural documents with the provisions”[24] (Fair trials, 2022).
- **Right to information in criminal proceedings** (Directive 2012/13/EU): **Portugal has not considered the transposition of this directive to be necessary.** Article 61 of the Portuguese Code of Criminal Procedure describes all the rights and duties of the defendants. Yet, article 3^o of the Directive 2012/13/EU imposes an obligation on Member States to ensure that suspects and accused persons are informed of their rights “**orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons**” (number 2). The Portuguese Code of Criminal Procedure is unclear about the right to receive this information in **simple and accessible language**, as recommended.
- **The right to access a lawyer in criminal proceedings** (Directive 2013/48/EU): **Portugal has not considered the transposition of this directive to be necessary.** The Portuguese Constitution[25] guarantees this right, and the Portuguese Code of Criminal Procedure[26] (article 61^o, f) and article 64^o, c) which specifies that the defender's assistance is mandatory in any procedural act, whenever the defendant “has any visual, hearing or speaking impairment or is illiterate, cannot speak or understand the Portuguese language, is less than 21 years old, or where the issue of his excluded or diminished criminal liability has been raised”. The Directive specifies that the right to access a lawyer should not be waived if a vulnerable person cannot understand and follow the proceedings.

[23] Ibidem, Article 93.^o

[24] Fair Trials (2022). Available at <https://www.fairtrials.org/articles/legal-analysis/cjeu-judgment-rights-of-suspected-and-accused-people-in-portugal-case-no-c-242-22-ppu/>

[25] Constitution of the Portuguese Republic (articles 20 and 32, n^o3). Available at <https://www.parlamento.pt/Legislacao/Paginas/ConstituicaoRepublicaPortuguesa.aspx>

[26] Portuguese Code of Criminal Procedure (Decree Law 78/87). Available at <https://dre.pt/dre/detalhe/decreto-lei/78-1987-662562>

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01 Transposition of the international legal framework

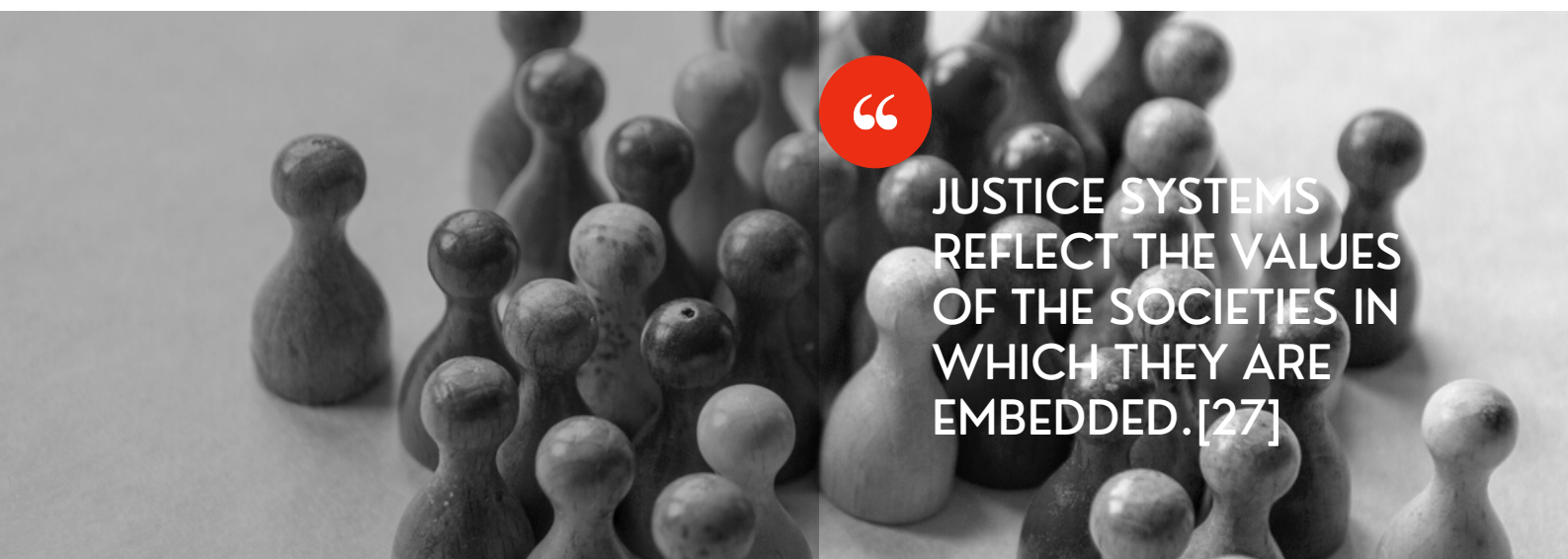
- Strengthening certain aspects of the **presumption of innocence and the right to be present at the trial** in criminal proceedings (Directive (EU) 2016/343): a transposition was not adopted yet in Portugal.
- **Legal aid for suspects and accused persons** in criminal proceedings and for requested persons in European arrest warrant proceedings (Directive 2016/1919): transposition adopted by Law No. 65/2003, of 23 August 2003; and Law No. 34/2004, of 29 July 2004; Law No. 47/2007, of 28 August 2007; Law No. 35/2015, of 4 May 2015. In Portugal, all the natural and legal persons who do not have the economic conditions to afford law and courts have the right to legal advice or legal aid.

POLITICAL AND LEGAL FRAMEWORK

02 Overview of the national legal framework regarding access to justice

General Disability and Mental Health legislation

The Constitution of the Portuguese Republic recognises that all citizens are equal before the law[27]. However, there are some restrictions to some rights and freedoms of persons with disabilities and mental health problems. Regarding **legal capacity**, the **scheme of the adult accompanied**[28] establishes that **if the person is unable to exercise their personal rights** (e.g., to marry, have children or to adopt, to care for and educate children or adoptees, to choose a profession, to move abroad or inside the country, to establish a home and residence, to establish relationships with those whom they understand, to make a will) **fully and consciously, or to fulfil their duties - for reasons of health, disability or behaviour - , it is possible to request the necessary accompanying measures from the Court**. Accompanying measures, which should be restricted to what is needed, can be requested by the Public Prosecutor's Office, regardless of authorisation, by the person themselves, or, with the person's approval, by the spouse or other relative. Although this new law is considered in line with article 12 of the CRPD, monitoring its implementations (e.g. nº of court sentences which restrict all personal rights or just some) is essential.



[27] Constitution of the Portuguese Republic (article 13º). Available at

<https://www.parlamento.pt/Legislacao/Paginas/ConstituicaoRepublicaPortuguesa.aspx2020>

[28] Law nº 49/2018 “Regime do Maior Acompanhado”. Available at <https://dre.pt/dre/detalhe/lei/49-2018-116043536>

POLITICAL AND LEGAL FRAMEWORK

02 Overview of the national legal framework regarding access to justice

Regarding **insanity defence**, article 20 of the Portuguese Penal Code[29] states that is **considered exempt from criminal liability (“unimputable”)** "anyone who, due to a psychic anomaly, is incapable, at the time of the commission of the act, of assessing the illegality of the act or of determining themselves following that assessment". Additionally, it also can be considered that the person has diminished responsibility.

To evaluate a defendant’s sanity, the judge, the Public Prosecutor, or the defence can ask for **psychiatric expertise**, which in Portugal generally is provided by the “Instituto Nacional de Medicina Legal e Ciências Forenses” a State laboratory that operates within the scope of the administration of justice (Criminal Procedural Code, article 159º). If the medical expert evaluates the person as being exempt from criminal liability (“unimputable”) **and not dangerous**, in the sense that it is unlikely that the person will commit a crime again, **the criminal proceeding is dropped**. On the other hand, **if the person is considered exempt from criminal liability (“unimputable”) but dangerous** (if there is reason to fear that they will commit additional acts of the same kind), in this situation, **the person is subject to a security measure, which can be effective** (e.g. hospitalisation in an adequate facility)[30] or suspended (e.g. to take the medication, and then the court controls the situation). According to Article 92º, "the hospital admission may not exceed the maximum limit of the penalty corresponding to the type of crime committed". **However, the security measures can be revised and exceed the maximum prison time (25 years). The law does not mention procedural accommodations in this context.**

Data about the number of the persons considered exempt from criminal liability (“unimputable”) in Portugal is presented in Table 1. In December 2021, they represented 3,3% (N=378) of the total number of prisoners in December 2021 (N=11 588). According to law nº 70/2019, the measures involving deprivation of liberty should be carried out preferentially in mental health units outside the prison and, whenever justified, in prisons or units specially designed to provide mental health care.

In Portugal, there are two units dedicated to receiving persons considered exempt from criminal liability (“unimputable”) : 1) **Clínica de Psiquiatria e Saúde Mental do**

[29] Portuguese Penal Code (Decree-Law No. 48/1995, article 20, nº1) Available at <https://dre.pt/dre/legislacao-consolidada/decreto-lei/1995-34437675>

[30] Idibem, article 91, nº1

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Estabelecimento Prisional de Santa Cruz do Bispo, in Matosinhos; 2) **Serviço de Psiquiatria do Hospital Prisional S. João de Deus**, in Caxias (Oeiras)[31]. The Portuguese press has reported the gradual increase of the persons considered exempt from criminal liability (“unimputable”) with security measures (e.g. Expresso, 2022). One of the measures of the Portuguese Plan of Recovery and Resilience is the Requalification of the facilities for Forensic Psychiatry until 2025, included in the Reform of Mental Health[32].

According to the Mental Health Law (Law No. 36/1998), **compulsory treatment** includes cases where the patient, unaware of his pathological state, refuses to accept treatment and, by his behaviour, constitutes a danger to himself or third parties. **The decision to hospitalise against the person's will is only possible with a court decision based on a psychiatrist's evaluation.** The process can be **regular**[33] or **urgent**[34]. In July 2022, the Portuguese Government submitted Law Proposal No. 24/XV/1.^a to revise the Mental Health Law and related legislation. This Proposal was generally approved (in October 2022).

Portugal approved a National Strategy for the Inclusion of Persons with Disabilities 2021-2025[35]. Despite including some measures in the scope of the prevention of **violence against persons with disabilities** (e.g. Methodological Guides that allow prevention, signalling and intervention in situations of risk or violence against people with disabilities (of any age) intended for law enforcement and civil protection agents, magistrates, education and health professionals and technicians of non-profit organisations), the Strategy **does not mention specific measures regarding the access to justice and provision of procedural accommodations for defendants with disabilities.**

[31] Order n.º.1564/2023. Available at Portuguese Penal Code (Decree-Law No. 48/1995, article 20º, n.º1) Available at <https://dre.pt/dre/legislacao-consolidada/decreto-lei/1995-34437675>

[32] Idibem, article 91º, n.º1

[33] The regular process involves: (1) request to the court; 2) notification; 3) psychiatric evaluation by two doctors; 4) joint court session; 5) the decision of the court (CEJ, 2020).

https://cej.justica.gov.pt/LinkClick.aspx?fileticket=cNMKbhn_g6o%3D&portalid=30

[34] The person is taken to a psychiatric emergency facility. The judicial decision of internment has to be taken within 48 hours since deprivation of liberty. In this case a second psychiatric evaluation is mandatory. The other steps are similar to the regular process.

[35] Council of Ministers Resolution No. 119/2021. Available at <https://dre.pt/dre/detalhe/resolucao-conselho-ministros/119-2021-170514954>

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Procedural accommodations

Principle 3 of the International Principles on Access to Justice for Persons with Disabilities establishes that persons with disabilities, including children with disabilities, **have the right to appropriate procedural accommodations**, which should a) facilitate effective communication to ensure understanding of their rights, case materials and participation in proceedings (e.g., a guarantee of interpretation in Sign language, the use of augmentative and alternative modes of communication, transport and communication, the use of intermediaries); b) provides full access to the physical environment (including access to the judicial building, adjustments to the physical layout of the room); c) Adjustment to procedural rules (e.g., may include use of audio-video records, video-links, adjustments on questioning); e) Appropriate to Gender and whether the person is deprived of liberty. As already mentioned, these are necessary modifications in the context of access to justice to ensure the participation of persons with disabilities on an equal basis with others.

Next, we will briefly describe the situation regarding the provision of procedural accommodations in the context of access to justice for persons with disabilities in Portugal.

The constitution of a defendant is carried out through communication (oral or in writing) by a judicial authority or a criminal police body[36]. It is the **same procedure for persons with and without disabilities**. The **defendant has procedural rights and duties**[37] and has the right to be informed about them. Among the **defendant's rights** are the rights of presence (in procedural acts that directly concern you), hearing, silence (which cannot be interpreted as a presumption of guilt), assistance by an advocate, intervention and appeal. About the **defendant's duties**, it is worth mentioning the duties of appearing in court and of answering truthfully about his identity, among others. The **national law does not guarantee information about rights and duties in simple and accessible language**.

The Portuguese law does not foresee any intermediary and/or facilitator that can accompany the defendants with disabilities and facilitate communication, support understanding of procedures, and support the defence of rights claims, as recommended

[36] Article 58.º, nº 2 of the Code of Criminal Procedure. Available at <https://dre.pt/dre/legislacao-consolidada/decreto-lei/1987-34570075>

[37] Article 61º of the Code of Criminal Procedure.

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by the UN (United Nations, 2020). **This legal gap can compromise the right to participation of defendants with disabilities.** Similarly, the national law does not explicitly allow persons with disabilities to be accompanied by family, friends or others to provide emotional and moral support at all stages of the process if they so choose. Yet, **in practice**, as we found out through the interviews carried out, **the presence of family or others to provide support (and facilitate communication) is allowed** to play an essential role as informal facilitators.

Regarding **requests for and offers of accommodations, the Portuguese legal framework only foresees the demand of procedural accommodations for minors** (which in Portugal are children under 16, Criminal Code, Art. 19^o[38], **and do not mention any situation of request and offer of accommodations applicable for persons with disabilities.** In this sense, children with disabilities, like all other children (12-16 years) accused of crimes, have the right to be accompanied and communication assistance, that is, giving them clear information about the proceedings.

The Portuguese Code of Criminal Procedure establishes that the language of the procedural acts must be Portuguese[39]. Thus, to ensure the **right to interpretation**, an interpreter is designated if the person does not master the Portuguese language[40]. In the case of persons with hearing impairments, a **Sign Language Interpreter is also provided.** If the person has a speech disability but knows to write, the questions are formulated orally and answered in writing. Otherwise, and whenever required, a suitable interpreter is appointed. Consequently, informational and communication accessibility(e.g., sign language, braille) is guaranteed for persons with hearing and speech impairments.

However, the **law is silent on providing information in an easy-to-understand language to persons with intellectual and/or psychosocial disabilities and written documents in accessible formats** (e.g. Braille, easy-read language).

[38] According to the Procedural Penal Code, Article 61^o, i) minors have the right to be accompanied, during the procedural steps that they attend, by the holders of parental responsibility or others.

[39] Article 92^o, a) of the Code of Criminal Procedure.

[40] Article 21^o, n^o 2 of the Code of Criminal Procedure.

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02 Overview of the national legal framework regarding access to justice

Regarding the website's accessibility in the field of justice, the information provided by the Portuguese Observatory of Web Accessibility[41] shows that the public services in this area (considering 43 websites) have an average score (of 6,5) and none have usability and accessibility stamps (bronze, silver, gold), which aim at promoting best practices in this field.

As mentioned above, no specific procedures exist to provide communication support to persons with intellectual and/ or psychosocial disabilities. This means that, in court, **a person with intellectual and/or psychosocial disabilities stands alone, before the judge, without any communication support to understand the meaning of the questions addressed to them.** The law does not foresee any **procedural adjustments for hearings**[42]. However, some of the mentioned adaptations are available for minors. Although the law does not mention modifications to the method of questioning in appropriate circumstances, the judges and prosecutors interviewed in this project noted that, in practice, there is an effort to use plain language, that is, adapt the language to the defendant's profile, always favouring a simple and accessible language. Yet, these decisions are taken individually, according to the common sense of each justice professional, without defined procedures or guidelines.

To guarantee that the **right to be present at trial** is fulfilled, it is also important to monitor the physical accessibility of courts and other services in the justice field. Since 2006, Portugal has approved the accessibility regime for buildings and establishments that receive the public[43]. The Ministry of Justice released the Strategic Plan for Requalification and Modernization of the Courts Network 2018-2028, which includes information about physical barriers in courts (only the first instance). It concluded that 55 buildings have no accessibility conditions for people with reduced mobility, and in 74 buildings, these conditions are insufficient[44].

[41] More information available at <https://observatorio.acessibilidade.gov.pt/>

[42] For instance, adaptation of the venue, appropriate waiting spaces; removal of cloaks and wigs; adjustments to the pace of proceedings.

[43] Decree-Law No. 163/2006 available at <https://dre.pt/dre/detalhe/decreto-lei/163-2006-538624>

[44] Ministério da Justiça (2018). Plano Estratégico Plurianual de Requalificação e Modernização da Rede de Tribunais 2018 – 2028. <https://www.portugal.gov.pt/download-ficheiros/ficheiro.aspx?v=%3d%3dBAAAAB%2bLCAAAAAAABAAzNbOwBABees2OBAAAAA%3d%3d>

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02 Overview of the national legal framework regarding access to justice

In the case of criminal proceedings, the hearing of defendants must be face-to-face in court according to the Code of Criminal Procedure[45]. However, in specific cases, when duly specified, witnesses or experts can testify through suitable means of remote communication, namely teleconference, video call or other equivalent[46].

Rights Monitoring

In Portugal, the National Mechanism for Monitoring the Implementation of the Convention on the Rights of Persons with Disabilities was established through Law nº 71/2019. Although the legal framework ensures the provision of financial and administrative support to the Mechanism through the Parliament's annual budget - whose objective is the promotion, protection and monitoring of the CRPD - this entity has been struggling with a lack of financial and human resources[47]. To date, as far as we know, no recommendations or reports have been developed by the National Mechanism for Monitoring the Implementation of the Convention on the Rights of Persons with Disabilities regarding article 13.

Portugal currently has three equality bodies – the Commission for Citizenship and Gender Equality, the Commission for Equality in Labour and Employment, and the High Commission for Migration[48]. However, no training regarding access to justice for persons with disabilities or decisions or reports on procedural accommodations were found within the work developed by these entities.

[45] Article nº 194 of the Code of Criminal Procedure

[46] Article nº 318 of the Code of Criminal Procedure

[47] Diário de Notícias (March, 2019). Portugal pode perder mecanismo que monitoriza direitos das pessoas com deficiência. <https://www.dn.pt/pais/portugal-pode-perder-mecanismo-que-monitoriza-direitos-das-pessoas-com-deficiencia-10724404.html>

[48] EQUINET. (2023). European Directory of Equality Bodies. <https://equineteurope.org/european-directory-of-equality-bodies/>

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03 Training and awareness for criminal justice professionals

In 2019, after the law regarding legal capacity entered into force, there have been some training actions about disability rights promoted by the Centre of Judicial Studies[49].

Additionally, as the Mental Health Law is also being reformulated, this is a topic that has been on the agenda, and some training actions are also being promoted by the same entity[50].

However, in the desk research conducted, we didn't find specific training regarding access to justice for persons with disabilities, particularly defendants with intellectual or psychosocial disabilities, nor debating on the provision of procedural accommodations.

[49] For instance: "Rights of the Persons with Disabilities" (April 2019; May 2017; December 2017; May 2016) <https://elearning.cej.mj.pt/course/view.php?id=839>

[50] For instance: "Mental illness: from imputability to resocialisation" (April 2023) (CEJ, 2023) <https://elearning.cej.mj.pt/course/view.php?id=1309>

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04 Statistics and data on access to justice

In Portugal, we have no official statistics about the number of defendants with disabilities or prisoners with disabilities (only information about sex, age, and migrants)[51]. However, the figures about **persons considered exempt from criminal liability** (“unimputable”) are available, and show an **increase of 42%** between 2016 (N=266) and 2021 (N=378) (see Table 1 in Annex 2).

The statistics about **compulsory treatment are also publicly available**. As shown in Table 2 (see Annex 3), the number of cases entering courts is increasing. There were **935 new cases between July and September 2022**, the highest number in the last eight years, only surpassed by the 1 567 new cases entering courts in the third trimester of 2014.

A recent report published by the WHO/Europe related to prison health, mentions that the rate of psychiatrists working in prisons in Portugal is higher than the average in the European Region. However, the same report also highlights that suicide rates in prison are relatively high compared to the general population[52].

[51] WHO (2023). “Status report on prison health in the WHO European Region” (p. 374). Available at <https://www.who.int/europe/publications/i/item/9789289058674>

[52] WHO (2023). “Status report on prison health in the WHO European Region” (p. 374). Available at <https://www.who.int/europe/publications/i/item/9789289058674>

POLITICAL AND LEGAL FRAMEWORK

05 Main findings

- Despite the recommendation made by the UN Committee on the rights of persons with disabilities that Portugal, in 2016, "**take all necessary measures to combat the discrimination** faced by persons with disabilities in accessing justice by **ensuring the provision of full procedural accommodation and of funding for training judicial personnel** on the Convention"[53] **this area has not been prioritised in the domestic disability policies** (e.g. National Strategy for the Inclusion of Persons with Disabilities 2021-2025 without measures regarding procedural accommodations).
- The **Portuguese legal framework does not mention any situation of request and offer of accommodations applicable for persons with disabilities**, nor specifically for accused or defendants with intellectual and/or psychosocial disabilities (e.g. to facilitate effective communication to ensure understanding of their rights).
- The **law does not foresee the possibility of an intermediary or facilitator** in cases involving persons with intellectual and/or psychosocial disabilities with difficulties expressing themselves or with diminished capacity for comprehension. This legal **gap can compromise the right to participation** of defendants with disabilities.
- The **law does not explicitly allow persons with disabilities to be accompanied by family, friends or others** to provide emotional and moral support at all stages of the process if they so choose.
- Regarding the **right to information** in criminal proceedings, the law does not formally and explicitly guarantee that persons with intellectual and/or psychosocial disabilities must be informed in a **simple, easy-to-understand, and accessible language** or to **receive written information in accessible formats** (e.g. braille, easy read language).
- Justice buildings face **architectural barriers** which must be eliminated, preventing persons with disabilities from entering the courts.


[53] United Nations (2016, May 13). Concluding observations on the initial report of Portugal (p. 5). Available at <https://gddc.ministeriopublico.pt/sites/default/files/comitedeficiencia-1relatorio-observacoesfinais.pdf>

POLITICAL AND LEGAL FRAMEWORK

05 Main findings

- **Website accessibility** in the field of justice must be improved.
- **Training regarding procedural accommodations and access to justice** for defendants with disabilities is **practically non-existent**.
- The **lack of voice of the patients submitted to compulsory hospitalisations and the scarcity of community-based responses** were identified as problematic areas by the Subcommittee on Prevention of Torture[54].
- **Lack of vacancies to persons considered exempt from criminal liability** (“unimputable”) **subject to security measures**, being, in some cases, **treated as regular inmates**.
- **Rights monitoring bodies are not providing any reports or information on complaints about access to justice for persons with disabilities**. This issue needs more public and political attention.

[54] CPT. (2018). Report to the Portuguese Government on the visit to Portugal carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 September to 7 October 2016. <https://rm.coe.int/168078e1c8>

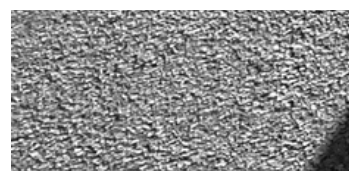


"PERSONS WITH DISABILITIES ARE INDIVIDUALS WITH PHYSICAL, PSYCHOLOGICAL, INTELLECTUAL OR SENSORY DEFICIENCY WHICH MIGHT WHILE IN CONTACT WITH THE OUTSIDE ENVIRONMENT HINDER THEIR FULL AND EFFECTIVE PARTICIPATION IN THE SOCIAL LIFE."

DEFENDANTS WITH DISABILITIES
ACCESS TO JUSTICE



EXPERIENCES
ABOUT THE ACCESS
TO JUSTICE OF
DEFENDANTS WITH
DISABILITIES





**DEFENDANTS WITH DISABILITIES
ACCESS TO JUSTICE**

- 01** Defendants' with disabilities experiences
 - 02** Criminal justice professionals' experiences
 - 03** NGOs, human rights institutions, and support service professionals' experiences
 - 04** Brief analysis of patterns
- 

EXPERIENCES ABOUT THE ACCESS TO JUSTICE OF DEFENDANTS WITH DISABILITIES

To examine, in Portugal, the experience of different stakeholders about the access to justice of defendants with intellectual and/ or psychosocial disabilities - identifying barriers, challenges and areas of improvement they envision in it -14 semi-structured interviews were conducted (for detailed information, see Annex 1) with persons with intellectual or psychosocial disabilities (N=4, including two women), lawyers (N=2), judges (N=2), prosecutors (N=3), police (N=1), support service professionals (N=2).

All the defendants experienced deprivation of liberty: three were defendants with disabilities (one was in prison, one was committed in a psychiatric hospital, and the other did community work), and one woman with a psychosocial disability was submitted to compulsory treatment, not being a defendant.

Next, we will present the main findings of these semi-structured interviews.



EXPERIENCES ABOUT THE ACCESS TO JUSTICE OF DEFENDANTS WITH DISABILITIES

01 Defendants' with disabilities experiences

Experiences, challenges and areas of improvement identified

Legal aid and provision of procedural accommodations

Right to information

Informing about the defendants' rights and duties do not appear to be a circumstance that the interviewees recall vividly. They believed, however, that the lawyer was the key actor who made this information clear:

"The criminal investigation unit interrogated me (...) all the people were there. I didn't have my lawyer present, I didn't ask either [after he was assigned a public defender].

Was it the lawyer who told you your rights? Yes, rights and duties."

[08_man with disability]

One of the defendants interviewed mentioned explicitly that the police didn't pass on any information about his rights when he was made a defendant.

Person of trust and/or intermediary or facilitator

In practice, the experience of the persons interviewed was that, if asked and being properly explained and justified, **a person of trust or intermediary/facilitator was allowed to accompany the defendants with disabilities** in several instances of the process to give them all the necessary support, especially in terms of communication and understanding of procedures. Without this support, communication with defendants with disabilities would be compromised, mainly with those with intellectual disabilities. However, in court, they couldn't sit next to the defendant.

"It was the social worker who helped me and who was there with me in court.

And I wasn't badly treated there." [09_woman with disability]

[social support technician asking] The first day we went to the lawyer, we justified why I was there with you, didn't we? Yes. - It was related to your disability. - Yes.

EXPERIENCES ABOUT THE ACCESS TO JUSTICE OF DEFENDANTS WITH DISABILITIES

01 Defendants' with disabilities experiences

*"Nobody stopped being there with him or being able to help? – No."
[02_man with disability]*

However, in one situation related to compulsory treatment, the parents who went to the court to support their daughter were prevented from entering the courtroom. The hearing was held behind closed doors:

"My parents were there, in the court, to accompany me. However, they weren't allowed to enter the courtroom ... I went by ambulance ... I was forced to go to court as if I had been arrested, committed a crime, as if I was a prisoner, really. (...) They did not listen to my parents, nor did they know what happened inside the courtroom. (...) they didn't enter. Nobody called them." [05_woman with mental illness]

The interviewee considered this situation very disrespectful. However, no one explained to her that the hearing was behind closed doors.

Legal aid and right to access to a lawyer

A public defender supported all the interviewees because they didn't have money to pay a private lawyer. However, one person interviewed didn't remember to have spoken with the lawyer during the process, although she asked several times (unsuccessfully) to speak to him when she was in a psychiatric unit.

The lawyer was considered a key actor for defendants, ensuring them access to information and helping them to understand what was happening within the justice system. The role held by the lawyer was described positively in two of the situations experienced by the interviewees.

*"The state paid for the lawyer. And I had a good lawyer, by the way. (...) The lawyer did a great job. As a matter of fact, he did. He explained things to me. He advised me not to speak at the first interview (...) and then to speak when I went to court. (...) he explained to me that it had to act like that so that justice would give me justice."
[08_man with disability]*

EXPERIENCES ABOUT THE ACCESS TO JUSTICE OF DEFENDANTS WITH DISABILITIES

01 Defendants' with disabilities experiences

The two women with mental health condition, on the other hand, had negative experiences with their lawyers. In one situation, the woman who was a defendant never talked to her lawyer, and in the other situation (compulsory treatment) the contact with the lawyer was only on the hearing day. The words exchanged with the defender were very vague:

"The only thing she said to me was - I am your lawyer. And I kept waiting for her to tell me something else, but she didn't tell me anything else. (...) it was all a farce because the lawyer didn't speak to me." [05_woman with mental illness]

"I didn't realise that [if she had a lawyer]. There was a lady there talking. I didn't understand what she was saying (...). I didn't want to go back to the court, nor to the hospital... (...) In the hospital, I demanded the presence of a lawyer, and a doctor told me to shut up. He told me: That's not an issue right now. And I kept quiet. He told me to sign a paper if I wanted to leave the hospital. And I said. But do I have to take all this medication? (...) Sign if you want to leave the hospital. I signed it." [09_woman with disability]

In the situation described, the woman was assisted by the social worker. Otherwise, she was not able to understand the process.

Requests for and offers of accommodations

None of the interviewees was asked by the police, prosecutor or judge what kind of support measures or accommodations they needed. However, in the case of the man with intellectual disabilities, as he lived in a small town and the police officers involved in the arrest already knew him, the knowledge of the disability was used to treat him in a benevolent way (for instance, the police allowed him to be accompanied to the hospital by friends who witnessed the situation; repeating the alcohol test in the hospital in order to register the minimum value).

EXPERIENCES ABOUT THE ACCESS TO JUSTICE OF DEFENDANTS WITH DISABILITIES

01 Defendants' with disabilities experiences

"Was the judge asked directly to use plain language with the interviewee? No. Probably the lawyer could have informed the judge that the case involved a citizen with an intellectual disability and could have asked him to use easy and understandable communication. That could be the role of the lawyer". [02_man with disability]

Although the public lawyer was informed about the defendants' intellectual disability, and the need to be always accompanied by the social support technician (to facilitate communication), the lawyer did not use this information to request other accommodations, such as the presence of the intermediary seated by the defendant in the hearing day.

Right to interpretation and communication support

Contact with police

Only one interviewee (the case related to compulsory treatment) stated that they had no contact with the police officers. Others described this contact as being positive (the case described above), and others described it as neutral, that is, doing their job without being violent:

"Two guards came and took me by force. (...) I don't remember anything. They didn't treat me badly. They grabbed me and made me go. I was never rude".
[09_woman with disability]

But in this case, previous contact with the police was negative:

"She asked for a lawyer at the police [because she wanted to complain about another situation], but they said they couldn't get lawyers there. (...) the police asked her: Do you want to continue or drop the complaint? And I saw that I had no help, and I withdrew the complaint. And I told myself I would never again file a complaint with the police. (...) I stopped trusting ... I felt that everyone rejected me".
[09_woman with disability]

EXPERIENCES ABOUT THE ACCESS TO JUSTICE OF DEFENDANTS WITH DISABILITIES

01 Defendants' with disabilities experiences

In prison

Only one defendant was imprisoned (14 days, after which he stayed at home wearing an electronic bracelet), but he described the experience as a kind of life lesson:

"It was in prison that I understood that not everyone is equal and that not everyone has the same heart. But I didn't feel discriminated against in court. It was even a good blow on the head saying that you have to change your life (...)". [08_man with disability]

His parents were allowed to visit him in prison and made him feel supported.

He described the prison as a place with nasty people, which made him understand that he was not like that.

Psychiatric hospital/institution

Three of the interviewees had experiences of compulsory internment in psychiatric wards of hospitals, which they described as a very negative experience:

"I was interned several times [in psychiatry]. Half of them I didn't want to, but they made me. (...)they tied me to the bed, I didn't even understand why, I had already had an injection, I didn't want to take the injection, and the lady told the policeman to grab me and that she was going to give me the injection anyway. I was trapped, I couldn't get up, I couldn't do anything". [08_man with disability]

"I was mistreated, I said the patient's rights were not being met, (...) I said the hospital should be sued. If times were different, they wouldn't let me out. It's a psychiatric prison, (...) a worse patient than me tried to drown me (...)

EXPERIENCES ABOUT THE ACCESS TO JUSTICE OF DEFENDANTS WITH DISABILITIES

01 Defendants' with disabilities experiences

they are all people much worse than me, more aggressive, they only thought about killing". [09_woman with disability]

"[the injection] It was given brutally so that it hurt me. I don't even know what they injected me with. It was like a punishment (for leaving the hospital without permission). ... my parents never hit me when I was a child... you see the situation. They treated me like a child. I was punished. (...)I think the doctors' behaviour towards patients is not paternalistic; I would say that they are indifferent". [05_woman with mental illness]

During the trial/ contact with judges

None of the interviews mentioned the contact with prosecutors.

The contact with the judges was described as being difficult, owing to difficulties in understanding what was being said:

"For me, it was a headache; if it weren't for Dr. A and Dr. B (the institution's technicians), I would have gone crazy! Dr. A said, I'm going inside. Stay outside [the courtroom]. She went right in. She is very brave. She has helped me a lot". [09_woman with disability].

"(were you allowed to talk about your resistance to medication due to side effects?) No, they didn't. They considered me as not responsible by decree. Not that I felt "unimputable" (exempt from criminal liability), but by decree, they consider me so. (...) They were in the courtroom, where they tried to listen to me but didn't pay any attention to me. They completely ignored me". [05_woman with disability]

EXPERIENCES ABOUT THE ACCESS TO JUSTICE OF DEFENDANTS WITH DISABILITIES

01 Defendants' with disabilities experiences

Adopting procedures for hearings

In contrast with the experience in the psychiatric units, one of the interviewees described the presence in the court very positively. Inside the courtroom, all the social actors tried to make the woman feel comfortable and confident:

"I went to the court in [name of the city], and they treated me very well. They opened the shutters and showed me the sea so I could calm down. They were nice and told me to sit down. I didn't understand what they told me, and they just said the case was closed (...). I liked the people at the court. They were very polite, put me at ease and treated me very well". [09_woman with disability]

However, in the case of compulsory treatment, the hearing experience was described negatively again:

"When they called me I had, they didn't even give me a chance to sit down. I was left standing talking; they didn't listen to me, nor did the defence lawyer, nor did anyone bother to inform me". [05_woman with mental illness]

As previously mentioned, the woman had to address the judge while standing, with her parents outside the courtroom, without knowing nor feeling empathy for the lawyer. In other words, the situation made her feel unprotected, distrustful and even more vulnerable. During the interrogation, she only knew one of the doctors present in court.

Right to be present at trial

All the interviewees were physically present in court, and the possibility of participating in the hearing using any remote mechanism was not raised.

EXPERIENCES ABOUT THE ACCESS TO JUSTICE OF DEFENDANTS WITH DISABILITIES

01 Defendants' with disabilities experiences

Voices heard and positive and/or negative experiences.

The woman subject to compulsory treatment was the only one who reported a very negative experience in the hospital and the justice system, justifying it by not being heard or contacted by the lawyer. She felt that the judge and doctors didn't care about their feelings (she refused the medication because of the side effects). Having the possibility to talk to a lawyer is important because people are being deprived of their liberty, and they must be heard:

"I think the reason why I didn't have more compulsory hospitalisations must have to do with the fact that I'm in an association (...) we're busy, which makes us feel useful to society, and that's very important for our balance (...) the truth is that they look for the positive aspects of people (...) they consider us to be experts through our experience of mental illness, and this is the secret of the whole thing. Which is to transform the experience of mental illness into an added value".

[05_woman with mental illness]

Other interviewees, on the other hand, mentioned a positive experience in the justice system, where they had the opportunity to speak with the judges (despite the fact that one of them didn't even contact her lawyer).

EXPERIENCES ABOUT THE ACCESS TO JUSTICE OF DEFENDANTS WITH DISABILITIES

01 Defendants' with disabilities experiences

Main Recommendations/lessons learned

- To **make clear what types of procedural accommodations** (e.g. facilitator or intermediary, information about defendants' rights and duties available in alternative formats such as easy-to-read language) **may be requested for defendants with disabilities and how to request them**. This information should be presented in a clear and accessible format.
- **Criminal justice professionals should use simple and accessible language with all citizens, particularly with persons with disabilities, to facilitate communication and understanding. This recommendation is applicable for the information conveyed** orally but also the written documents (e.g. use of images to communicate relevant information such as restrictions of rights).
- **Persons with disabilities should be consulted and involved in the debate on how to improve the justice system making it more accessible for them** (for instance, by participating in training actions for criminal justice professionals). They are the main experts on disability issues: *"We should be the ones to ask for advice. It's the doctors, the judges, the lawyers, the health system ... Being an asset rather than being seen negatively, and not reducing people, and labelling them as incapable because the future is in realising that. [05_woman with mental illness]*. This vision is also consistent with another important claim by the persons with disabilities interviewed: to be treated like human beings, **respecting their human rights**: *"Some people understand me and treat me like a human being. It's so good. To feel the affection of someone, it's very good. (...) I wish everyone with my illness didn't feel as abandoned as I did. That's what I wanted". [09_woman with disability]*.

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01 Defendants' with disabilities experiences

- **Greater societal openness (private companies, public services and others) is needed to receive defendants with disabilities who are required to carry out community service** (instead of a fine, for instance). This type of measure can be effective and pedagogical, particularly for minor crimes, but greater awareness of all entities is required in order to be possible to apply these measures.
- **More information about the rights of the persons subject to compulsory treatment, including the right to a lawyer, and how to communicate with them:** *"The character [in a movie described], when she's admitted to the hospital, says: "I want a lawyer". This awareness of needing a lawyer doesn't happen the first time, and perhaps not even the second time (...) The lesson that can be learned for the future is:*
"when someone is interned for psychiatric reasons, immediately ask for a lawyer. I think that is the first thing to do. Although I don't believe in lawyers either... in the cinema it happens, the lawyer worries". [05_woman with mental illness]

EXPERIENCES ABOUT THE ACCESS TO JUSTICE OF DEFENDANTS WITH DISABILITIES

02 Criminal justice professionals' experiences

Experiences, challenges and areas of improvement identified

Main challenges identified

According to the criminal justice professionals interviewed, **the main challenges faced by people with psychosocial and intellectual disabilities face in the criminal justice system are the following:**

- 1) to ensure clear communication** to facilitate the comprehension of the persons with disabilities (specifically those with intellectual disabilities);
- 2) identification of the disability**, as conditions are not always identified early in the process;
- 3) lack of clear information for all the actors** involved about what kinds of procedural accommodations are available;
- 4) lack of training regarding disability issues and procedural accommodations;**
- 5) scarcity of human resources** compromising the implementation of the mental health law;
- 6) high pressure to achieve results** and lack of time to give attention to these persons (during interrogations, for instance).

"I think maybe the biggest challenge is on our part - to understand if they are really understanding or not, sometimes we have this difficulty". [14_judge]

"But what I see, with enormous frequency, is a lack of procedures on the part of the court itself to (...) properly inform them, adapt their language, adapt their modus operandi (...)

Fortunately, we see attempts to adapt the speech to the understanding capacity of the person in front of us, but I would say that this effort is minimal compared to the needs we encounter". [10_lawyer]

EXPERIENCES ABOUT THE ACCESS TO JUSTICE OF DEFENDANTS WITH DISABILITIES

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Process of identification of disability

There are no specific procedures for identifying or evaluating defendants' intellectual and/or psychosocial disabilities:

"we act according to our empirical experience. The person seems imputable to us, is capable, and understands what is happening (...). In our city we know everyone. But if it's a big city, you get no different treatment". [01_Police]

Since there are no procedures, sometimes these persons get unnoticed, and assessments only take place during the trial:

"This person comes to court, (...) and I talk to the person and realise that something is not right here. Probably because of some lack of awareness in the police forces, in the investigation. [13_judge]

"They can go unnoticed. And it's already happened to me. I mean, this young man (...) I had heard him a month before at another enquiry, (...)I spoke to him for an hour, and with the lawyer, and nothing, nothing indicated to me that he had this schizophrenia problem. There are things that you can't get out of an hour-long conversation". [03_prosecutor].

However, in other cases, even without specific procedures, this assessment is done usually beforehand:

"I still say that the lawyer has a very important role here because he is close to the accused, because he can talk to him in a less formal and closer way, and can understand and explain and try to normalise things". [11_lawyer]

"But usually, when we go to a trial, we already have the forensics report. It's rarely at the time of trial. But it can happen". [14_judge].

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Some suggestions were made to avoid situations where the disability goes unnoticed, such as increased family involvement or an identification system (to be debated as it needs to respect the data protection rules), that could help police identifying these persons.

Contestation of the assessment

If the person disagrees with the Forensic Medicine Institute expert evaluation, they can request second medical expertise at the same place, but from a different professional.

"Generally, forensic investigations at the Forensic Medicine Institute are comprehensive. But the technicians are very few, it takes a long time. We are left waiting for expert opinions. (...)" [14_judge]

Consequences of assessments

Generally, after the medical assessments carried out by the Institute of Forensic Medicine, the persons may be considered criminally liable or exempt from criminal liability ("unimputable"). In case of being considered exempt from criminal liability but not dangerous, the case is dropped out. On the contrary, if defendants exempt from criminal liability are deemed dangerous, they will be subject to **security measures** in mental health units (not prisons).

However, there is a lack of resources in this area, and in some cases, they stay in regular prisons only receiving psychiatric follow-up:

"The defendants exempt from criminal liability ("unimputable") are all placed in mental health units, but in these cases, the system is very bad... because they stay a long time in prison waiting for a vacancy in mental health units. I have two or three situations at the moment (...)" [14_judge]

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It seems to be unusual to use these medical assessments to determine what adjustments to make in criminal proceedings for these persons:

*"I have never seen them ask for anything [procedural accommodations]. Sometimes they ask for second expertise, **but I've never seen them ask for anything to support the trial phase**". [14_judge]*

Information about accommodations

The case file – which is available on paper in the court but also digitalised (accessible online via Citius), – contains all the elements, and information about the case, since its beginning. The information is accessible to all the judicial actors with responsibilities in the process (if the proceedings are not under legal confidentiality), including the defendants (who can consult the information in the court or online on a specific website) [54]. Therefore, any relevant information about requested accommodations is always registered.

Use of force or coercion

The general perception is that force or coercion is not used based on the disability. However, due to the lack of knowledge about the person's disability, **sometimes the practices can be inadequate**:

"The colleagues [police officers] who arrived did not realise that he was an autistic young man, who was disturbed, and the procedure we had with him - and they didn't know - increased his aggressiveness. They tried to grab him, which is our procedure with an aggressive person, (...) this young man was alone in the hospital. The first person to arrive was the professional from the supporting organisation". [01_police]

[54] "Os meus processos" by authentication through the Citizen Card or the Mobile Digital Key.

EXPERIENCES ABOUT THE ACCESS TO JUSTICE OF DEFENDANTS WITH DISABILITIES

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Provision of procedural accommodations

In practice, the most common procedural accommodation mentioned is the **simplification of communication with the defendants:**

"But I may have a speech or approach the person differently than I would in a normal trial. (...) the accused being forced to stand up while everyone else is sitting down. I don't require the person to stand up". [13_judge]

"Sometimes repeating, speaking more slowly, and asking for help from a family member (happened to me). We tried our best, and the result I cannot guarantee". [14_judge]

Other situations also mentioned were: the **removal of judicial gowns by the judge** (e.g. in the cases of compulsory treatment or when the person is considered exempt from criminal liability ("unimputable"), not forcing defendants to stand up while the other persons are seated, providing pauses or breaks for the person to calm down (if they are visibly nervous), taking more time, allow a close relative or person of trust to be in the courtroom nearby (for instance, allowing this person to seat next to the lawyer so as not to be behind the defendant's back).

"This is the only way we can really do it. We don't have a room... there it is, it's the accused. It's not the victim, it's not the child. It's different. That is, in institutional terms, the institution itself treats it differently." [13_judge]

One of the suggestions was the amendment of the Procedural Penal Code to introduce the possibility of the person being accompanied by an intermediary or facilitator to help in the communication process if needed.

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A concrete situation was described regarding a person with a psychosocial disability:

"She was completely in a panic. She was crying, saying, I didn't do anything, apologising, (...)the fear was enormous, and she didn't quite understand where she was (...) we suggested the mother (who was in the audience) to sit next to her (...)What we are doing in the courts is occasionally and depending on the sensitivity of each one, to adapt, but this shouldn't be like this". [04_prosecutor]

As mentioned above, the absence of procedures regarding the provision of procedural accommodations leaves this issue to common sense and sensitivity of each justice professional, a situation that must be changed.

Right to information

Depending on the circumstance, the persons are informed about their rights and duties as defendants by the police forces, Public Prosecutor or criminal judge,. The procedure is the same for defendants with or without disabilities: the rights and duties^[55] are written on a paper that the defendant must read and sign. However, sometimes these rights and duties are also orally explained, mainly by lawyers but also by the police forces or the Public Prosecutor.

"The rights are read to him (...). They may not be able to understand them. That's the truth". [06_prosecutor]

As mentioned, the procedure adopted to inform defendants about their rights makes no mention of the need to convey the information in a simple and accessible language (nor is it available in alternative formats, such as easy-read language), jeopardizing the guarantee that defendants with disabilities effectively understand their rights as defendants.

[55] Article n° 61 of Code of Criminal Procedure

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"Lawyers must also have this concern before the participation of the defendants in the proceedings to explain to them what is going to happen in a clear way and in a way that they understand". [11_lawyer]

The lawyer is seen as a key actor responsible for explaining this information to their clients, even when the persons are detained.

Right to interpretation and communication support – general

As **Portuguese law does not foresee a facilitator or intermediary**, generally, in the courtroom, **the judge**, in practice, **tries to use easy and understandable language**, avoiding technical language, and repeat the questions if necessary (but not all, depending on the judges and prosecutors).

"Some magistrates use extremely formal language, even when reading the sentence ... it is perfectly clear that people did not understand anything, (...) [the magistrate refers], look later talk with your lawyer. They are not open to this dialogue". [04_prosecutor]

These professionals, however, also mention a **lack of resources** – human and specialised technicians, intermediaries or facilitators, training on this topic, a lack of awareness in the justice system for the human rights of persons with disabilities -, and **lack of procedures** (e.g. case-by-case decisions about accommodations).

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Right to interpretation and communication support – questioning

In general, there is no planning for questioning persons with disabilities, and the language is adapted to the person's characteristics. **Video-link systems** that allow defendants to attend **questioning and hearings remotely** are **not allowed** (only in exceptional and duly explained cases). However, experts and testimonials can use these remote systems under certain rules.

"I demand that the defendant goes to the courtroom, also so that I can see if that person understands or not". (...) [13_judge]

In the case of compulsory treatment, video-link systems are allowed with the judge's permission.

"According to the Code of Criminal Procedure, it is possible that the expert and the internee may be via videoconference from the hospital centre. And if the person is hospitalised, why do I ask the questions via videoconference? The doctor who accompanies the person is on their side. The person is not alone". [13_judge]

Requests for and offers of accommodations

In general, the defendants are those who are considered responsible for indicating the kind of accommodations they need. For instance, if they need support to understand the results of the medical assessment, they can do it:

"I've never seen it, but it can. You can request the process, the main interlocutor will be the lawyer, but as most of the time it is the defence that raises this issue [exempt from criminal liability], in order not to hold the defendant responsible ..." [04_prosecutor]

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If the person is in a psychiatric hospital/institution, the lawyer must convey the information:

"In practice, all defendants have a lawyer, whether constituted or appointed. He is never alone. A defender always accompanies him. Apart from that, in practice, there is no one else to explain". [03_prosecutor]

Insanity defence

The main challenges identified regarding insanity defence were: 1) lack of places in adequate mental health units for psychiatric treatment for persons exempt from criminal liability ("unimputable") but considered dangerous, which are subject to a security measure (e.g. hospitalisation in an adequate facility), but sometimes go to prison.[56]; 2) Although security measures are reviewed periodically, a person can theoretically be imprisoned for longer than the maximum prison sentence in Portugal (25 years):

"But many do not have any support. And they are hospitalised: minimum 3 years. And then it is revised, and can be almost indefinitely until you are considered rehabilitated, (...) you can stay forever in a psychiatric establishment. In Portugal, we say that the maximum prison time is 25 years, but in the case of hospitalisation, it is reviewed ... I am not aware of any that have stayed for many years, but they may stay." [14_judge]

"(...) sometimes it is even heavier to have a security measure than a prison sentence because they are always based on medical criteria, (...) the court does not interfere either..." [04_prosecutor]

[56] "The European Court of Human Rights condemned the Portuguese State to pay compensation of 14 thousand euros to a prisoner, for having served a prison sentence without psychiatric hospitalisation to which he had been sentenced" in Diário de Notícias (15 de junho 2021) available at: <https://www.dn.pt/sociedade/tribunal-europeu-condena-portugal-a-indemnizar-recluso-por-falta-de-internamento-psiquiatrico-13839027.html>

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Compulsory treatment

As mentioned above, according to the Mental Health Law, compulsory treatment is only possible with a court decision based on a psychiatrist's evaluation. Additionally, the person has a designated lawyer and a family member should be notified. Generally, when a court session is held, the person may attend in person or remotely from the hospital. Medication can sometimes cause the persons to not feel well.

"I remember one in particular that struck me in which it was clear that the person was not understanding anything. He was also heavily medicated". [11_lawyer]

However, lawyers claim that mainly in non-urgent cases, it may be useful to schedule a prior session to explain what will happen to the person.

"We receive information that we are in that process and represent that person. We receive that notification. Normally, that notification comes with a report on the situation, the facts that happened and what procedurally led to that. (...) we knew each other [the person subject to compulsory treatment] on the day of the hearing (...). This is not good, neither for the lawyer nor for the person, and I think that maybe it was something that could be changed". [11_lawyer]

"The lawyer, in cases of compulsory treatment, my experience, is that the lawyers never have, how to say ... never oppose hospitalisation... may ask some questions of the doctor but usually does not ask questions of the intern..." [13_judge]

Although, according to the law, the hearing regarding compulsory treatment should be behind closed doors, some judges allow the presence of the relative inside the courtroom, allowing some comfort and a sense of a safe place to the person:

"What's the problem if the mother is there [inside the courtroom), ... if the person won't feel so intimidated and won't feel so lost in such a situation. The law itself allows for a

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family member to be informed. (...) all support is given more quickly by a close relative than by me, the lawyer or the police". [13_judge]

In one case, one prosecutor mentioned communication issues, between judges and doctors, regarding compulsory treatment:

"We speak different languages, there is not much cooperation and it is not being very easy. This dialogue has not been easy. Several training actions were carried out. There is a monitoring committee specifically for compulsory hospitalisations, but in the last two years, after the pandemic, things have gotten much worse. Doctors find it difficult to follow court orders; courts sometimes question medical opinions, which is a bit complicated". [04_prosecutor]

Attitudes and training/awareness

In general, it was considered that there had been a significant improvement towards how persons with disabilities are viewed and perceived by criminal justice professionals, highlighting the need to respect them and not be paternalist, according to the human rights perspective. Yet, it was also recognised that stigma exists - inside the justice system and Portuguese society as a whole – and that training and awareness using a human rights-based approach to disability should be strengthened since the offer is very scarce.

In collaboration with the ministries in charge of Health and Social Security, the Portuguese Parliament and the Ministry of Justice were identified as the main entities capable of making the necessary changes to make the justice system more accessible for people with intellectual and/or psychosocial disabilities.

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Best practices

The only best practice mentioned was the disability a working group operating at the local level, comprised of police officers, local disability organisations, representatives from the municipality, and representatives from the local health system.

This network of different institutions allows all entities to learn about the people with disabilities in the municipality, exchange relevant information, and develop appropriate and flexible responses to local problems. They also carry out regular training activities (for instance, the police go to the Disabled People Organisation to talk about domestic violence to persons with disabilities, and the local disability experts also go to the police facilities to receive training about specific issues).

Main recommendations

- **To develop clear procedures and identify the types of procedural accommodations** that could be made **available for persons with disabilities**, such as having a **facilitator or intermediary** (it was also suggested that this amendment could be explicitly included in the Code of Criminal Procedure), among other things. These procedures would avoid the current practice of relying on common sense in making about **procedural accommodations** decision-making.
 - To facilitate communication, simple and accessible language should be used. It was also mentioned that there is a problem of illiteracy in the justice system among all citizens in general, and that persons with disabilities are especially vulnerable. This illiteracy should be combated by making judicial language more accessible to all citizens.
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- **Develop specific training activities and awareness raising**, including a best practices manual that the Prosecutor General's Office could develop.
- **Making more resources (particularly human) available within the criminal justice system** for improving services and developing adequate measures to ensure the provision of procedural accommodation for persons with disabilities. The lack of resources was mentioned in several areas: lack of adequate responses for the persons considered exempt from criminal liability (“unimputable”) subject to security measures; lack of support services within the criminal justice system (for instance, technicians in the police stations and also in the courts providing the necessary support to the criminal justice professionals); and lack of programs for aggressors (for instance, developed by the Directorate-General of Reintegration and Prison Services); scarcity of mental health community-based responses preventing crisis situations;lack of time to give more attention to the persons with disabilities within the justice system (explaining them what is happening, if needed) or providing them the necessary resources and means to understand their rights and duties as citizens, because the criminal justice professionals work under enormous pressure to achieve specific performance indicators.
- **To discuss possible solutions for registering and sharing information between entities** about disability. However, due to data protection concerns, information regarding disability cannot be shared. It is difficult to find a balanced solution that takes into account privacy, data protection and security.
- **Removing architectural barriers** in courts and other justice-related facilities (e.g. prisons).

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Experiences, challenges and areas of improvement identified

Equality Perception's

According to psychologists interviewed, **persons with disabilities are not treated on an equal basis with other citizens in the justice system**. Regarding intellectual disabilities, it was stated that it would be important to distinguish two situations: whether or not the person perceives that they are in court and why. If the person does not understand, the presence of intermediaries, for instance, could be useless. When the person perceives, the **natural anxiety of being in the court would be "increased"** [07_psychologist], **which can lead to some communication issues** (implications in terms of information processing, reasoning, more time is needed). To guarantee that the person understands, **complementary forms of communication** support should be used (e.g. specialised persons, images, others). However, these procedures are not regulated by law, which jeopardizes **the equal participation of persons with disabilities**.

Another barrier identified was the **difficulty of the persons with disabilities in making complaints on their own** (usually through a relative, neighbour, or other):

"It is not guaranteed that the person on his own initiative can access the court"

[07_psychologist].

Additionally, **not all the magistrates treat these persons in the same way, because it is dependent on their sensibility and common sense** regarding these matters. In this regard, **training focused on a human rights perspective should be prioritised:**

"to empower these professionals to have tools, to treat the persons with disabilities"

[07_psychologist] equally.

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Regarding the experience of **mental illness**, it was mentioned that there is a significant **lack of knowledge** regarding these issues, which raises concerns but could be mitigated through criminal justice professionals' training. Additionally, one of the interviewees was very critical regarding the current Penal Code:

“There are the issues regarding exempt from criminal liability (“unimputability”) that we do not defend. We defend equal rights and duties for each person [12_psychologist].

This psychopathological characterisation, based on the diagnosis, will determine if the person will be interned or goes to prison. **But professionals should go beyond this medical perspective:**

“A lawyer must have other strengths to be able to defend his constituent. And this dimension of his personal narrative, what he/she did, managed to do, who is that person” [12_psychologist] is very important, because “having a mental illness and hearing voices does not imply that there is disrespect for fundamental rights” [12_psychologist].

Procedural accommodations

Accessible information

When the person is in court, all the criminal justice professionals should ***“talk to him, not about him” [07_psychologist]***. This is the only way to guarantee their human rights. In other words, ***“everyone can have their voice, they just have to learn to have their own narrative and explain themselves” [12_psychologist]***. Additionally, the importance of an intermediary was emphasized once again to facilitate understanding.

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Support services

The available support services are geared towards children (e.g. the Multidisciplinary Team of Technical Support to Courts) which works under the Social Security (psychologists and social workers) and provides technical assistance to the courts in cases involving children/young people:

“given the number of processes they have, sometimes the technicians are unable to respond in a timely manner with reports [requested by the courts]” [07_psychologist].

These teams do not work directly under the Ministry of Justice, and this could be changed:

“The courts should have multidisciplinary teams capable of responding to any citizen or question. It would be a proximity service for the people (...) and also would help the magistrates. (...) this was going to be a more plural, more inclusive justice, which is what we should be looking for”. [07_psychologist]

As being in court can cause stress, it was considered important to “create a safe place (...) It's the same as preparing a job interview (...) we have to prepare that moment and the context, working with the lawyer, giving all the information” [12_psychologist].

In Portugal, **defendants are not entitled to psychological assistance** . The **lack of resources was highlighted**, for instance, in public hospitals, there are long waiting lists for these services. One of the interviewees thought it was important to **provide psychological support to defendants** in general, as well as specific programs to aggressors *“to work their emotional and social skills” [07_psychologist].*

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However, this was not a consensual theme. The other psychologist interviewed expressed disagreement about psychological support during the trial:

"The psychological support determined in judicial terms is very reductive because we are psychopathologizing a possibly criminal situation (...) we run the risk of not blaming the aggressor and of never having a behaviour change. And, so, we don't prevent violence"
[12_psychologist].

However, it was also argued that the penalties should be more creative, with less emphasis on prison and institutionalisation.

Identification of disability

The identification of disability was considered to be difficult. In some cases, external factors cause certain behaviours to occur:

"When there is some reaction that is not appropriate to the context is when we realise that something is not right" [07_psychologist].

However, an alert was issued regarding the tendency to rely solely on the medical diagnosis:

"Psychosocial reports are very diagnosis-based, and lack the personal narrative, people's capabilities and contextualisation that allow for a deeper look to explain what happened in a given situation" [12_psychologist].

An alternative should be a community-based intervention that promotes empowerment and recovery (not in the sense of the cure of the disease, but the acceptance and learning on how to live with certain mental health conditions).

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Awareness and attitudes

Fighting against stereotypes and prejudices about disability and mental health was also deemed very important, not only within the field of psychology professionals but also within the justice system, which also **should shift from a paternalistic to a human rights-based approach**:

*"We have already taken giant steps forward, but as long as we do not change the philosophy that **it is not the person who has to change, but the context itself...and in the judiciary context, is the same**". [07_psychologist]*

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Best practices

One of the interviewees has 30 years of professional experience in the mental health field and only experienced one situation of compulsory hospitalisation (and the same person was a defendant in a previous situation). She thought their ecological intervention model could be considered good practice:

"It aims to increase social support networks, establish partnerships with all community resources including police and fire forces, families, all entities that somehow strengthen and prevent crisis and disruptive behaviours" (...) This mechanism of prevention and knowledge of the person as a whole, of creating a safe place for those who hear voices and are vulnerable, recognising that the crisis is part of life and that we have to accept it as something that can allow evolution, or no, it is fundamental in our work. We work with each other in crisis prevention and intervention, we always defend people's rights and duties. We have zero tolerance for violence and abuse" [12_psychologist].

The psychologist adds that the ecological model is not mainstream in Portugal, where the medical model, based on the diagnosis and support within institutions, is dominant.

Main recommendations

Some recommendations were made to enable defendants with intellectual or psychosocial disabilities to participate at the same level as defendants without disabilities:

- To **develop training** targeting magistrates and other criminal justice professionals (e.g. how to talk to persons with disabilities;

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- To establish multidisciplinary teams under the Ministry of Justice (rather than the Social Security Services) to work with the justice system and provide support to all citizens, including defendants and magistrates;
- To allow the presence of intermediaries or facilitators (technician or familiar) in courts and interrogations to improve the accessibility of information and communication in the case of intellectual disability. In the case of psychosocial disability, the main purpose of this figure would be to provide a safe place (if the person wants to be accompanied). **In both cases, the person should have the voice;**
- To ensure that aggressors, regardless of the crime committed, have specific intervention programs;
- To debate and eventually abolish the legal framework governing criminal liability exemption (“unimputable”).

EXPERIENCES ABOUT THE ACCESS TO JUSTICE OF DEFENDANTS WITH DISABILITIES

04 Brief analysis of patterns

The main barriers identified were the following:

- None of the interviewed actors – persons with intellectual and psychosocial disabilities, judges, prosecutors, lawyers and psychologists -have a clear idea of what **kind of procedural accommodations** could be made **available for defendants with disabilities** in the Portuguese criminal justice system. **Although article 13 of the CRPD mentions the right to procedural accommodations**, there is **no domestic law information on the subject**. Therefore, **persons with disabilities** generally **do not request any specific procedural accommodation** (although informally, technicians ask for accompanying the person with disabilities, and the decisions are made case by case, but without the clear notion that this could be a procedural accommodation). However, according to the testimonies collected, it should be noted that in practice, depending on the judge, some procedural accommodations could be taken into account (e.g. taking time during the hearing to calm down, having families next to them, making an effort to simplify the language).
- Judges, prosecutors and lawyers emphasize that they strive to use simple and accessible language with all citizens, especially with persons with disabilities. However, they also admit that it can be **challenging to tell if the person truly understands what is said**. To overcome this difficulty, and while it is recognised that the lawyer is responsible for explaining all the information, they welcome the figure of a facilitator or intermediary to assist in the communication process (if needed). The written documentation (e.g. rights and duties of defendants) should also be more accessible and available in alternative formats. Persons with disabilities also mentioned the importance of having someone they can trust with them. The psychologist reinforced this idea of creating a safe environment where persons could easily control their anxiety and focused on questions and how to respond. This is easily achieved with companions, who can also serve as security.

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- There was also agreement on the importance of developing adequate training in this field. The suggestions for contents of the training were focused on the human rights model of disability, relational issues, promoting capabilities in the criminal justice professionals to deepen their knowledge about disability and mental health issues, but also on community-based interventions based on competence and abilities, as opposed to the medical model, which is dominated by the diagnosis and limitations of the persons. Persons with disabilities believe that they should be listened to by these professionals, because they are the experts on their own conditions, as they live with intellectual or mental health issues. Training was considered vital for influencing change in the justice system: from the medical model to a human rights-based model of disability.
- As mentioned by one of the judges, architectural barriers prevent persons from accessing the court and sometimes result in situations of loss of dignity. Their removal should be prioritised, and it should be easily implemented if adequate financial resources are made available.
- The persons with disabilities who were interviewed felt they had no say in situations involving **compulsory treatment**. Lawyers, judges, prosecutors and psychologists expressed concerns about compulsory treatment where there is room for improvement. For instance, the role of the lawyer has been described as being passive by the persons with disabilities (e.g. the person gets in touch with the lawyer only in the court), the judges (who mention that generally the lawyer never opposes or asks questions to the doctors and not to the persons) and even the lawyers acknowledge that at least in the non-urgent cases the contacts with these persons should be improved, and solutions should be sought (for instance, talking to the persons prior to the hearing day).

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- The possibility of sharing information about disability may facilitate police intervention, such as mobilising more specialised resources. However, this information cannot be shared due to data protection. one possible solution could be on the side of the person who can bring a document with relevant information. This model was mentioned by one of the psychologists interviewed: all the persons with whom she works have a **crisis intervention plan** that is done with the people when they are well (these plans are made with the collaboration of the person and have the telephone of the doctor, which person to call in a crisis situation; in case of internment what is the procedure, medication if some medication is considered unacceptable this is also written). This plan is periodically reviewed and respected.
- Criminal justice professionals and psychologists suggested more human resources to create support services with multidisciplinary teams that could work under the Ministry of Justice. Persons with disabilities did not suggest these services; however, in all but one case they were helped by technicians from the local institutions where they lived, who assisted them in following the judicial procedure where they were defendants.

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CONCLUSIONS AND RECOMMENDATIONS

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01 Conclusions

The general aim of this national briefing paper was to provide an overview of the main national barriers - and best practices to overcome the main gaps – regarding access to justice and the provision of procedural accommodations to defendants with intellectual and/or psychosocial disabilities in Portugal. The study was based, among others, on the International Principles on Access to Justice for Persons with Disabilities (UN, 2020) (Principles 1, 3, 4, 5, 6 and 10). The main barriers to participation identified will be presented according to the principles analysed:

Principle 1. All persons with disabilities have legal capacity and, therefore, no one shall be denied access to justice on the basis of disability.

In Portugal, the law guarantees that all persons have **legal capacity** through the scheme of the adult accompanied [57], which permits that if a person cannot exercise their rights, it is possible to request the necessary accompanying measures from the Court. However, the following **barriers persist**: 1) **the justice system relies almost exclusively on medical professionals as the only experts capable of determining a person's decision-making capacity**. Although the role of the psychiatrist is fundamental, in light of the current scientific knowledge, namely the social determinants of mental health, it would be important to reflect on the possibility of the constitution of multidisciplinary teams, where **psychiatric expertise should be required, but complemented with other experts' evaluations** (e.g. psychologists, social workers); 2) the absence of clear legislation authorising the provision of intermediates or facilitators to enable clear communication; 3) defendants with disabilities which are considered exempt from criminal liability (“unimputable”) may be subject to security measures based on perceived dangerousness; these criteria should not be used according to the UN guidelines on access to justice.

[57] Law n. º 49/2018. Available at <https://dre.pt/dre/detalhe/lei/49-2018-116043536>

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Principle 3. Persons with disabilities, including children with disabilities, have the right to appropriate procedural accommodations.

The right to appropriate procedural accommodations is guaranteed for children but not for adults with disabilities. One of the main **barriers to participation** in the justice system for adults with disabilities is related to the **lack of guidelines with clear information about procedural adjustments and modifications available** for adults with disabilities, including defendants (e.g. availability of intermediaries or facilitators trained to provide communication assistance, modification of the method of questioning, providing extra time to answer, using plain language, among others). Currently, some requests are made (e.g. allowing the presence of a person of trust), but decisions are made on a case-by-case basis. Additionally, the **lack of training of professionals involved in arrests and investigations** (police officers, prosecutors, and others) about the rights of persons with disabilities and the need to adjust their procedures is also a barrier to participation. The right to access a lawyer is ensured, but the presence of the lawyer in all procedural acts is only guaranteed if the accused person has “any visual, hearing or speaking impairment or is illiterate, cannot speak or understand the Portuguese language, is less than 21 years old, or where the issue of his excluded or diminished criminal liability has been raised”[58]. As in many situations, disability is not related to unimputable issues; in practice, lawyers cannot accompany persons with disabilities in all procedural acts.

Principle 4. Persons with disabilities have the right to access legal notices and information in a timely and accessible manner on an equal basis with others.

The difficulty in understanding written judicial information, or legal illiteracy, is considered a cross-cutting issue, affecting most citizens and even more persons with disabilities. Lawyers were appointed as the key actors to help defendants and their accompanying persons understand judicial information (the Portuguese system does not provide the possibility of independent intermediaries or facilitators). The capacity to make legal information accessible relies on the goodwill of the lawyers (assuming that they are available to play this role). There are no procedures for providing legal notices in accessible formats, which is also a barrier to participation.

[58] Portuguese Code of Criminal Procedure (Decree-Law 78/87), article 64.^o (d), available at <https://dre.pt/dre/detalhe/decreto-lei/78-1987-662562>

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Principle 5. Persons with disabilities are entitled to all substantive and procedural safeguards recognised in international law on an equal basis with others, and States must provide the necessary accommodations to guarantee due process.

Portuguese law guarantees procedural safeguards recognised in international law, including the presumption of innocence and the right to remain silent. However, the right to information in criminal proceedings is compromised as the Code of Criminal Procedure is not clear about the right to receive this information in **simple and accessible language**, as recommended by Directive 2012/13/EU.

Principle 6. Persons with disabilities have the right to free or affordable legal assistance.

Portuguese law formally guarantees legal aid for suspects and accused persons in criminal proceedings. However, the **lack of training** of lawyers on the human rights of persons with disabilities could be a barrier to the participation of persons with disabilities in the justice system. For instance, persons who are submitted to **involuntary hospitalisations** share experiences where their **contacts with the lawyers were very small or inexistent** (although a lawyer is appointed to the case) **and their voice was not heard**.

Principle 10. All those working in the justice system must be provided with awareness-raising and training programmes addressing the rights of persons with disabilities, particularly in the context of access to justice.

In Portugal, the lack of training on the rights of persons with disabilities targeting police, judicial officers, lawyers, forensic experts, psychologists, social workers, judges, and prosecutors - is a significant barrier to their access to justice. The available training is very scarce, and information about good practices in interactions with persons with disabilities is also rare.

CONCLUSIONS AND RECOMMENDATIONS

02 Recommendations

To combat the discrimination faced by persons with disabilities in accessing justice, it would be important:

- **To prioritise in the national political agenda the access to justice of persons with disabilities, namely the provision of procedural accommodations** (a theme absent from the strategic political documents, although CRPD Committee recommendations).
- To develop a consistent and coordinated **plan of training regarding disability issues targeting the different stakeholders** who work in the justice system. Persons with disabilities should also participate in training actions as they are the main experts in disability issues.
- To **identify and disseminate best practices regarding the identification of disability**, enabling police officers, prosecutors and others involved in arrests and investigations of criminal offences, and lawyers, to be aware of their human rights and adjustments that should be made.
- To amend the current legal framework to include the right of **procedural accommodations – including the possibility of an intermediary or facilitator - applicable for persons with disabilities, including accused defendants, and dissemination of this information through persons with disabilities, their organisations and the criminal justice professionals.**
- All criminal justice professionals should **use simple and accessible language** in all procedural acts. Regarding the **right to information** in criminal proceedings, this information should also be provided in **simple, easy-to-understand, and accessible language** or receive **written information in accessible formats** (e.g. braille, easy-read language).

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02 Recommendations

- **Persons with disabilities and their representative organisations should be heard, consulted, and involved** in the debate on how to improve the justice system making it more accessible for them, and how to promote their human rights.
 - **To prioritise the removal of architectural barriers** through the allocation of adequate financial resources (as the information about lack of accessibility in judicial buildings has already been collected and is available in the Multi-annual Strategic Plan for Requalification and Modernization of the Court Network 2018 – 2028”).
 - **To create adequate support services** (e.g. multidisciplinary teams) within the criminal justice system to **ensure the provision of procedural accommodation** for persons with disabilities and guarantee a more accessible justice for these persons.
 - **To improve the website accessibility.**
 - The legislation regarding **mental health and compulsory hospitalisation** is currently being debated and reviewed. This modification should guarantee that persons submitted to compulsory hospitalisation **have a voice and effective access to a lawyer** that can advocate for their human rights. Although formally, in these cases, persons with disabilities have a lawyer appointed to the case, this seems just a formal right, as in practice, decisions are based on medical reports, neglecting their voice and human rights.
 - **To guarantee that the persons considered exempt from criminal liability (“unimputable”) subject to security measures have access to adequate responses**, and do not stay in regular prisons because there are no vacancies in other facilities. Additionally, it was also considered important to **debate and eventually abolish the legal framework regarding exemption from criminal liability.**
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ANNEXES

ANNEXES

Annex 1 - Profile of the interviewees

| ID | Interviewee* | Sex | Age | Duration of the interview | Years when had contact with the justice system | Type of interview (remote, on-site, other) | Other relevant information |
|---------------|--|--------|-----|---------------------------|--|--|---|
| PT/DPS/M/08 | Person with psychosocial and intellectual disabilities | Male | 33 | 42 min. | 2019-2021 | Remote | Defendant; prisoner; compulsory treatment |
| PT/DI/M/02 | Person with intellectual disabilities | Male | 41 | 49 min. | 2017-2020 | Remote | Defendant |
| PT/DPS/F/05 | Person with psychosocial disabilities | Female | 58 | 1h27 | 2011 and before | Remote | Compulsory treatment |
| PT/DPS/F/09** | Person with psychosocial disabilities | Female | 62 | 1h00 | 2021-2022 | Face to face | Defendant and compulsory treatment |

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Annex 1 - Profile of the interviewees

| ID | Interviewee* | Sex | Age | Duration of the interview | Years when had contact with the justice system | Type of interview (remote, on-site, other) | Other relevant information |
|-----------|--------------|--------|-----|---------------------------|--|--|-------------------------------|
| PT/L/F/10 | Lawyer | Female | 54 | 1H58 | Over the years working as a lawyer | Remote | Working experience with NGOs |
| PT/L/F/11 | Lawyer | Female | 39 | | Over the years working as a lawyer | Remote | Working experience with NGO's |
| PT/P/M/01 | Police | Male | 47 | 1h05 min. | During the last 6 years | Remote | - |
| PT/J/F/13 | Judge | Female | 45 | 1h38 | Last 12 years | Remote | - |
| PT/J/M/14 | Judge | Male | 40 | 1h00 | Last 2 years | Remote | - |
| PT/J/F/03 | Prosecutor | Female | 57 | 1h06 | Since 2021 | Remote | - |
| PT/J/F/04 | Prosecutor | Female | 47 | 1h46 | Since 2016 | Remote | - |

ANNEXES

Annex 1 - Profile of the interviewees

| ID | Interviewee* | Sex | Age | Duration of the interview | Years when had contact with the justice system | Type of interview (remote, on-site, other) | Other relevant information |
|-----------|-------------------------|--------|-----|---------------------------|--|--|----------------------------|
| PT/J/F/06 | Prosecutor | Female | 34 | 44 min. | Last 2 years | Remote | - |
| PT/S/M/07 | Psychologist | Male | 46 | 1h18 | Only regarding legal capacity | Remote | - |
| PT/S/F/12 | Psychologist / Director | Female | 59 | 1h48 | One case of compulsory treatment | Remote | - |

* First the interviewees were asked to read the informed consent form, and only after it was read and signed did the interview and its recording begin.

** Refused to sign the informed consent but authorised verbally the record of the interview.

ANNEXES

Annex 2 - Number of persons considered exempt from criminal liability (“unimputable”) with security measures in Portugal (2016-2022)

Table 1 – Number of persons considered exempt from criminal liability (“unimputable”) with security measures in Portugal (2016-2022)

| Year* | 2016 | 2017 | 2018 | 2019 | 2020 | 2021 | 2022 |
|--|-----------|-----------|-----------|-----------|-----------|-----------|------|
| Interned in prison psychiatric clinics | 144 (54%) | 138 (50%) | 142 (50%) | 171 (52%) | 187 (54%) | 183 (48%) | 198 |
| Interned in civil psychiatric clinics or hospitals | 122 (46%) | 137 (50%) | 143 (50%) | 159 (48%) | 159 (46%) | 195 (52%) | - |
| Total | 266 | 275 | 285 | 330 | 346 | 378 | - |

Source: Direção-Geral de Reinserção e Serviços Prisionais (Statistics and indicators about detention facilities available at <https://dgrsp.justica.gov.pt/Estat%C3%ADsticas-e-indicadores/Prisionais>)

*Situation on 31 December

ANNEXES

Annexe 3 - Number of new judicial cases of compulsory treatment in Portugal (2014-2022)

Table 2 – Number of new judicial cases (courts of first instance) of compulsory treatment in Portugal (2014-2022) (N)

| Year/trimester | 1º trim. | 2ºtrim. | 3º trim. | 4º trim. |
|----------------|----------|---------|----------|----------|
| 2022 | 805 | 869 | 935 | - |
| 2021 | 735 | 867 | 872 | 801 |
| 2020 | 676 | 639 | 762 | 679 |
| 2019 | 726 | 853 | 826 | 711 |
| 2018 | 672 | 744 | 796 | 721 |
| 2017 | 707 | 693 | 707 | 664 |
| 2016 | 581 | 663 | 702 | 632 |
| 2015 | 548 | 581 | 662 | 584 |
| 2014 | 568 | 565 | 1567 | 640 |

Source: Estatísticas da justiça. Available at:

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