

Executive Summary

“The justice system and its symbols are scary. In most places, courts are not about justice, they are about power. For anyone, facing these symbols of power is disabling. Start with thinking about de-focusing the power; the focus should be on justice. It is really about the humanisation of the justice system itself and making it accessible for all. (Gábor Gombos, former member of the United Nations Committee on the Rights of Persons with Disabilities and former Senior Adviser to Validity)”

In the ENABLE project we have found that all odds are stacked against persons with disabilities in 8 EU countries, whenever they wish to access justice. Barriers to participation in Bulgaria, Czechia, Lithuania, Portugal, Romania, Slovakia, Slovenia, Spain and criminal proceedings are enormous. Barriers that, when they interact with a person’s impairment, prevents them from having a fulfilling life and make decisions in their case. This includes social, legal, health, economical and/or gender-related barriers. For many that do not have disability-appropriate support, these become insurmountable. We have found that many defendants with intellectual and/or psychosocial disabilities in fact have not been receiving all or any support that is required in criminal proceedings. For many, experience in criminal justice system has been negative. They felt fearful for their life, their physical integrity, anxious, humiliated, patronised, ashamed, embarrassed due to deprivation of liberty, discriminatory and/or violent behaviour of criminal justice authorities. This without being given the resources to defend themselves or even acknowledgement of their capacity to make decisions. As it will be shown in this report, the prevailing view among interviewees and participants is that criminal proceedings is seen as a disempowering system, meant to punish defendants without treating them as rights holders. The situation further worsens with involvement of mental health systems. The perception on how defendants with disabilities are treated is well captured by Maria Krasteva:

““The general attitude toward defendants with disabilities is that they are a "problem" for the psychiatric care system. The justice system considers their job done as long as they are provided with a lawyer and psychiatric intervention.”¹

At the core of this situation is the way how disability interacts with how criminal justice system formally and traditionally operate. This is the case both at nationally and EU level. Disability should be seen as the result of external barriers that hinder participation in life, society and legal proceedings as explained by the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).² Disability does not need to be fixed or treated with a medical approach. What needs to be removed are barriers with supported decision-making and accessibility measures that are respectful of a person’s will and preference. Unfortunately, data and evidence collected throughout the ENABLE project suggests the opposite. Disability in suspects or accused of committing a crime is confused with either dangerousness, or something to be treated in psychiatric institutions or a “vulnerable” person that cannot understand or follow proceedings. Without consideration of procedural adjustments that need to be adopted to enable persons with disabilities to overcome barriers. A view that is perpetuated both by national practice and EU legislation.

¹ https://validity.ngo/wp-content/uploads/2023/06/KERA_National-briefing-paper_English.pdf p. 43

² See Article 1.

"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]"³

Guardianship schemes continue to limit how defendants can exercise their right to fair trials. There have been intersecting accounts, both by defendants with disabilities, support professionals and lawyers, which show that persons are guardianship do not have the support they need, criminal justice authorities do not communicate directly and their will is replaced by the guardian. In Lithuania there is no system in place for persons with disabilities to access remedies from their guardians that lead the institutions where they reside whenever there is conflict of interest. Person with disabilities legal capacity must be acknowledged throughout justice system, both in practice and in law. Member States are required to implement systems of supported decision-making to enable them to make decisions about their case according to their will and preference. Some Member States, especially Portugal⁴, Spain⁵, Slovenia and Bulgaria have enacted legislation for supported decision making, although in the latter two there is no consistent practice or policy to replace guardianship schemes. In Czechia, Lithuania, Romania and Slovakia whether in law or in practice, there are reports of communication and decisions about the case without involvement of suspect or accused of committing a crime, which made them feel ignored, patronized disempowered or not understanding what is happening in proceedings. Past unsupportive interactions with the police and discriminatory behaviour taking the form of violence, verbal abuse, finding someone not credible and humiliating behaviour by taking pictures and mocking a person's behaviour has further promoted distrust in the system.

"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]"⁶

The approach to criminal justice in all 8 EU countries for defendants with intellectual and/or psychosocial disabilities is medicalized and focused on punishment. Approximately half of suspects or accused of committing a crime interviewed in 6 EU countries were put in some form of compulsory treatment, protective detention, and/or forensic psychiatric after being held dangerous, unfit to stand trial or unfit to plea. Among the interviewees, women with disabilities are disproportionately represented with most being sent to psychiatric institutions. These decisions have been the result of individual assessments of capacity as a consequence of the use of insanity defence. In practice, reports show that once it is declared, proceedings are terminated with defendants not benefitting from same procedural guarantees and sent to psychiatric institutions. There are several accounts of persons with disabilities being sent to protective detention or psychiatric institutions without being informed they were being sent there. Moreover, once inside, they have struggled to reach family

³ https://validity.ngo/wp-content/uploads/2023/06/Fenacerci_National-briefing-paper_-English.pdf p. 66

⁴ See *Lei do Maior Acompanhado* [Law of the Accompanied Adult];

⁵ See Royal Decree

⁶ https://validity.ngo/wp-content/uploads/2023/06/Fenacerci_National-briefing-paper_-English.pdf p. 42

members or lawyers or obtain information about their case, hindering the exercise of their rights to a fair trial. As UNCRPD explains, capacity assessments of fitness to stand trial are discriminatory. The focus of individual assessments in criminal proceedings should be on determining procedural accommodations and supportive decision-making measures to enable defendants with intellectual or psychosocial disabilities to exercise their rights. Committing persons with disabilities on the basis of their disability is both discrimination and as well a violation of their right to independent living under the UNCRPD.

“According to the lawyers interviewed, law enforcement authorities have often failed to provide access to justice for persons who are found not criminally responsible due to their mental health condition. It can be encountered that in such cases the authorities do not care much because the proceedings will be closed anyway and they do not see protective treatment as a great punishment.”⁷

Less than half of defendants with intellectual or psychosocial disability interviewed confirmed they were informed about their rights, especially right to a lawyer across all 8 EU countries. Even among those that have been informed, information was not always accessible. Information was largely shared in standardized format and practices, such as requesting to read and sign bill of rights which are either too technical or long to be understandable. Understanding information required adjustments either by criminal justice authorities and lawyers in an easy-to-understand and appropriate manner. These may take several formats and mediums as appropriate to a person’s disability. This occurred, on occasion in some cases in Portugal, Spain, Romania and Lithuania.

There have been several positive developments to reinforce people’s access to legal assistance, driven in particular by Directive 2013/48/EU on access to a lawyer. There is legislation in place in all 8 EU countries requiring representation of a lawyer in proceedings, including changes to account for the “needs of vulnerable persons” in Slovenia.⁸ Access to legal assistance is supported by systems of legal aid that assure legal representation to those that cannot afford one in all 8 EU countries. Practice shows there are several barriers to finding, reaching and communicating with one, especially those whose services are paid under legal aid schemes (public defendants). Indeed, information shared with defendants is not accessible, especially to those that are sent to psychiatric institutions where becomes difficult to obtain information from outside. Furthermore, there are several accounts of defendants with disabilities only meeting their lawyer for the first time during a hearing, without having a chance to communicate privately beforehand. There are also cases where lawyers do not communicate with their clients or make decisions about them without respecting their legal capacity. There have been recommendations for capacity building for lawyers in particular on disability and communication and for further tools at their disposal to support communication with their clients with disabilities. Indeed, for legal aid schemes to be effective for persons with disabilities, they should extend to covering costs of interpreters, facilitators and communication aids/devices. The EU Legal Aid Directive does not assure for such costs to be covered.

Misunderstanding and stereotypes about disability, as well as behaviour of persons with disabilities while in crisis is confused with uncooperative and suspicious behaviour, which lead to violations of

⁷ https://validity.ngo/wp-content/uploads/2023/06/FORUM_National-Briefing-Paper_CZ_English.pdf p. 75

⁸ For example in Slovenia

their right to presumption of innocence. People with disabilities have also been forced to wear shackles, which further reinforces stereotypes of dangerousness. In some countries, such as Bulgaria, Czechia and Lithuania, there is the ongoing practice of defendants being forced to use shackles in public hearings or in public view.

“He felt tense and depressed (at the court hearing). His ears were buzzing. His father was at the courtroom but he was not allowed to speak to him. He had shackles around his ankles but they were very tight and his leg got swollen. He told this to the escorting police officers but they said “when the hearing ends we will loosen them.”⁹

“They put handcuffs on, my legs hurt, and they shoved them underneath... I couldn’t put my shoes on and they took me outside and then into detention. And my roommate thought that I had a problem with my head, you know?” – I.8¹⁰”

There are contrasting accounts between criminal justice authorities that defend a coercive approach during an arrest to ensure security of all whereas defendants with disabilities and lawyers claim that police (mis)uses force to deal with crisis situations of persons with disabilities inappropriately. This contrast is particularly captured in Czechia by Kristýna Šulková, Denisa Kramářová & Maroš Matiaško:

“Some interviewees [claimed] they had not witnessed [...] use of force or coercion based on disability. The goal of the police is not to force someone to confess to something they did not do when the true perpetrator is still at large. [I]f a police officer violated the rules during an interrogation, for example, the results of that investigation could not be used as evidence. Lawyers, on the other hand, claim that when defendants with disabilities refuse to cooperate or are in a state of crisis, police use mechanical restraints and, in some cases, taser weapons.”¹¹

All persons with disabilities have the right to any necessary age-, gender- and disability- appropriate modifications and adjustments in the context of access to justice, where needed in a particular case, to ensure their participation on an equal basis with others. Unlike reasonable accommodations, procedural accommodations are not limited by the concept of “disproportionate or undue burden”.¹² Neither EU legislation nor almost all EU countries investigated have legislation establishing explicitly a right to procedural accommodations. The sole exception is Spain, although it requires further regulation.¹³ Only a few interviewees recall being informed about a right to procedural accommodations in Romania,¹⁴ Spain¹⁵ and Portugal¹⁶, thanks to the collaboration of NGOs

⁹ https://validity.ngo/wp-content/uploads/2023/06/KERA_National-briefing-paper_English.pdf p. 112 - [112]

From an interview with a defendant with intellectual and psychosocial disability, male

¹⁰ <https://validity.ngo/wp-content/uploads/2023/06/LT-National-Briefing-Paper-ENG-FINAL.pdf> p. 39 - LT/DPS/ M/08

¹¹ https://validity.ngo/wp-content/uploads/2023/06/FORUM_National-Briefing-Paper_CZ_English.pdf p. 69

¹² A/HRC/34/26, para. 35.

¹³ https://validity.ngo/wp-content/uploads/2023/06/Plena_National-briefing-paper_-English.pdf p. 30

¹⁴ See for example interview with Police in Romania, which appreciated collaboration with NGO CLR.

¹⁵ Interviews with persons with disabilities in Spain, whereby the role of Plena Inclusion to introduce

¹⁶ Interviews with social worker/psychologist with the involvement of FENACERCI.

specialised in the disability field working with the police. The lack of regulation creates a policy vacuum which makes the adoption of procedural accommodations rare and inconsistent.

“The level of state structures, the activity is extremely timid, not to say non-existent. Rather, the steps forward are ensured by means that are supposed to be collateral and complementary to a state system, but at this moment in Romania we can say that they are the main ones. Specifically, the intervention of NGOs that compensate for the inaction or absence of the state.”¹⁷ Romanian male, lawyer

The most positive experiences reported occurred thanks to adoption of procedural accommodations across the proceedings. There are several examples, which include foregoing the adoption of speedy trials to ensure guarantee of rights,¹⁸ adjusting communication and questioning to simple language or easy to understand, allow defendant to be supported emotionally, communication by third-parties, such as intermediaries and family members. Across all 8 EU countries, only two male defendants with disabilities in Spain benefitted from procedural accommodations across proceedings, unlike female defendants where none did. The successful implementation of these in Spain was thanks to the intervention of third-parties, namely social assistants, family members and intermediaries. Facilitators, or intermediaries are independent professionals who support criminal justice authorities to assess and adopt procedural accommodations, including adjustments to information and communication that is easier to communicate with criminal justice authorities and follow proceedings. Intermediaries is a good practice that has been recommended as well part of the international Principles and Guidelines on Access to Justice for Persons with Disabilities. This practice is being piloted and replicated in different countries thanks to ENABLE’s work, in Bulgaria and Romania. Not only this enables defendants with intellectual and/or psychosocial disabilities to effectively exercise their rights, it also supports criminal justice authorities to more efficiently and effectively secure evidence in hearings.¹⁹

“It would have been preferable if someone had assisted me in understanding what I didn't understand, as happened later with Plena Inclusión. However, I didn't know anyone who could assist me. They didn't seem to be paying attention to me. [...] There were words I'd never heard before. They wouldn't let me say anything.”

Spanish defendant with intellectual disability

Policy

- All 5 EU Directives and Recommendation should be amended to reflect human rights model of disability whereby legal capacity of suspects or accused of committing a crime is recognised. To that end:

¹⁷ https://validity.ngo/wp-content/uploads/2023/06/CLR_National-Briefing-Papers_EN.pdf p. 59 - RO/L/M/06

¹⁸ https://validity.ngo/wp-content/uploads/2023/06/Plena_National-briefing-paper_-English.pdf p. 56

¹⁹ See for example Paula Backend, whereby an intermediary was able to ensure effective communication with defendant with disability to conclude an evidence hearing in 1 day, while past unsuccessful attempts by criminal justice authorities last for 4 days.

- Explicitly guarantee the right to legal capacity in criminal proceedings. They should ensure that all defendants are able to access and directly participate in all stages of the justice process according to their will and preferences.
 - Determination of supportive measures and procedural accommodations should not be dependent on assessment of vulnerable or condition that person cannot follow or understand proceedings or restricted to “needs”. There is a need of binding legislation setting procedure for determination of support, reasonable and procedural accommodations of found in Article 1 of the UNCRC. The non-binding process found in the European Recommendation is insufficient. Assessments must be done in dialogue with defendants, of the barriers that need to be removed, and the accommodations to be put in place for them to access their rights under the multiple Directives on procedural rights. The procedural accommodations must cover the ones listed in the International Principles and Guidelines on Access to Justice, including access to communication and information rights, intermediaries and support of third-parties. Overall, procedural accommodations must ensure defendants’ rights to a fair trial, including the right: to understand and be understood, to receive information, remain informed and have third-parties informed, to be provided with interpreters and facilitators, to be heard, protected during proceeding;
 - All Directives should establish remedies for contesting discriminatory assessments of capacity or violate fair trial rights;
 - All Directives should implement and monitor police and judicial training, based on UN Access to Justice Principles, training to build the skills of organisations of people with disabilities regarding the rights of defendants with disabilities and adjusting procedures to accommodate them in an age-, gender- and disability- appropriate manner.
- The European Commission and European Parliament should:
 - Create a platform to facilitate direct dialogue between people with disabilities and the European Commission in relation to the multiple procedural rights directives, including review, amendment and monitoring processes.
 - Support for research and feasibility studies appropriate information-sharing, throughout the criminal justice process such as case management systems and how they can become a source of real-time information of their rights, case and proceedings for defendants.
 - In partnership with persons with disabilities, the Commission should carry out a full review of the extent and use of guardianship orders and capacity assessments on fitness to stand trials or to plea involving defendants with disabilities, assess the violations of the right to legal capacity, and develop plans and recommendations to

cease and prohibit the use of guardianship orders and bring policy and practice into line with the UN CRPD. The practice of discriminatory assessments of either credibility or fitness to stand trial or pleas linked with impairment or disability should be identified as a type of secondary victimisation and prohibited.

- Criminal justice authorities and lawyers must improve how information about rights, proceedings and case is communicated in an accessible manner. Professionals must be aware that participation in criminal proceedings is challenging for defendants with intellectual or psychosocial disabilities on account of information, legal and social barriers. Defendants have communicated that they are often too stressed or fearful to be able to process information during hearings, questioning or upon arrest. For right to information to be effectively exercised, information shared has to be repeated continuously across proceedings, and in a manner that enables them to make decisions for the particular procedural act. This can be done with the support of specialised professionals, such as intermediaries or facilitators who can support justice professionals to adapt their communication in an easy to understand manner.
- EU Directive on right to information in proceedings should establish diversity of communication mediums to make information accessible. As well as obligation to make adjustments whenever information and communication devices, channels or mediums are not accessible and a duty to inform of this possibility.
 - The Directive should be amended to include the right to forms of support which enable effective communication, including describe ten ways that access to information can be ensured, including through the provision of sign language, video and audio guides, telephone-line advice and referral services, facilitated communication, braille, etc;
 - Information about the criminal justice system — including defendant's and victims' rights — must be easily and publicly accessible at the national level.
 - Any limitation to physical accessibility or information and communication, must be addressed by providing accommodations and access to a range of support services, as well as informal supports that a person chooses, which might include remote support and hearings;
 - All digital devices or remote technology deployed to facilitate access to information or communication must be accessible and conform with principle of universal design;
 - EU funding and resources should ensure that all states have disability sensitive and accessible support services.

- EU Directive on Access to a Lawyer and Legal Aid should be amended to ensure accessible access to lawyers and resources and funds to cover the costs for effective communication facilitation between them and clients outside the court room.
 - Ensure establishment of specific communication channels for access to lawyers in residential and psychiatric institutions;
 - Accessibility of legal representation includes ensuring the availability of meaningful and accessible information about rights to legal aid and to a lawyer including through support services with reasonable or procedural accommodations.
 - Clarify conditions under which legal representation would be an automatic right, and ensure that defendants are fully informed about their rights, options of representation and availability both before any hearings and proceedings where defendant is assessed of their capacity might be assessed as well as review of decisions to remain confined in psychiatric institutions.
 - All legal aid lawyers should have the skills, knowledge and experience to represent defendants with disabilities.
 - Develop the necessary training and capacity-building infrastructure for specialist lawyers. For example, either all lawyers would have to undergo a training on how to communicate with clients with various impairments (or vulnerable clients in general), or it would be elective (and more comprehensive), but then only lawyers who have undergone this specialised training would comprise the pool of lawyers who are appointed in these kind of proceedings.

- There is a need for an EU strategy on defendants with disabilities that articulates a vision for and framework of equal access to justice for people with disabilities, which can be implemented at the national level.

- Guidance, training courses and curricula based on UN Access to Justice Principles should be developed for Member States in partnership with people with disabilities.

- The innovative practices of individuals and NGOs creatively supporting defendants with disabilities in accessing their rights to participate must be actively nurtured and supported.

- All Member States must fully transpose and implement the 5 EU Directives and European Recommendation in line with the goals and spirit of the UNCRPD and International Principles and Guidelines on Access to Justice. It is important, just as we recommended for victims,²⁰

²⁰ International Synthesis and - <https://validity.ngo/wp-content/uploads/2022/09/International-syntesis-report-EN-new-footnote-220907.pdf> p. 86

that the European Commission exercises its responsibilities for oversight, monitoring and the initiation of infringement proceedings. This includes developing a data collection framework that allows an understanding of defendants' experiences of proceedings and, gaps in access to justice and a prioritisation of action