



DISABILITY BENCH BOOK

SPAIN

This Disability Bench Book was developed by Plena inclusión Spain within the project “Enabling Inclusion and Access to Justice for Defendants with Intellectual and Psychosocial Disabilities” (ENABLE – 101056701 – JUST-2021-JACC). The project seeks to promote access to justice and fairer criminal proceedings for defendants with intellectual and psychosocial disabilities in 8 EU countries¹.

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“THEY STARTED TO TAKE ALL MY THINGS, MY GLASSES, BUT THEY DIDN'T EXPLAIN TO ME THAT IT WAS THE PROTOCOL THEY HAD TO FOLLOW. I THOUGHT THEY WERE TAKING EVERYTHING BECAUSE THEY WANTED TO PUNCH ME”



EXPERT BY EXPERIENCE

NATIONAL WORKING GROUP

01

ABOUT THE BENCH
BOOK

A. Background

Regardless of whether they are victims, witnesses or alleged perpetrators of crimes, persons with disabilities face numerous barriers in accessing justice and interacting with legal operators. At the same time, persons with psychosocial and intellectual disabilities are four to ten times more likely to be abused (including sexually) than non-disabled persons², especially those in residential care³, in turn facing severe exclusion from judicial proceedings and violations of their right to a fair trial⁴. Outdated laws that do not recognise their legal capacity and standing, lack of disability screening and provision of the necessary support to access information and communicate, lack of procedural adaptations, lack of access to effective legal advice and attitudinal barriers of legal operators, as well as their lack of specialisation and training⁵ are some of the systemic challenges faced by persons with intellectual and psychosocial disabilities, who are involved in criminal proceedings in the EU.⁶

At the same time, the UN Convention on the Rights of Persons with Disabilities⁷ (CRPD), which was ratified by the European Union⁸ and all its Member States without reservations⁹, imposes important obligations on States to identify and remove obstacles or barriers and to take proactive and systemic measures to ensure that all persons with disabilities can exercise their right of access to justice on an equal basis. However, while relevant EU directives¹⁰ and Member States' legal frameworks recognise the need to ensure access to justice for persons with disabilities, legislation is silent on the specific needs and barriers of persons with intellectual and psychosocial

2 <https://disabilityjustice.org/justice-denied/abuse-and-exploitation/>

3 Amelink Q, Roozen S, Leistikow I, Weenink JW. Sexual abuse of people with intellectual disabilities in residential settings: a 3-year analysis of incidents reported to the Dutch Health and Youth Care Inspectorate. *BMJ Open*. 2021 Dec 6;11(12):e053317. doi: 10.1136/bmjopen-2021-053317. PMID: 34873008; PMCID: PMC8650479.

4 Smith, T. (2023). *Autism and Criminal Justice. The Experience of Suspects, Defendants and Offenders in England and Wales*. Routledge.

5 Validity Foundation, [Fair Trial Denied: Defendants with Disabilities Face Inaccessible Justice in the EU](#), 2024. synthesis report (section specifying the CJSP's weak capacities on the ground)

6 Validity Foundation, [Fair Trial Denied: Defendants with Disabilities Face Inaccessible Justice in the EU](#), 2024. synthesis report.

7 UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution adopted by the General Assembly, A/RES/61/106, 24 January 2007, <https://www.refworld.org/legal/resolution/unga/2007/en/49751>.

8 The European Union ratified the CRPD on 23 December 2010.

9 With some exceptions mentioned here:

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=en

10 Directive on the right to interpretation and translation in criminal proceedings (2010/64/EU); Directive on the right to information in criminal proceedings (2012/13/EU); Directive on the right of access to a lawyer in criminal proceedings (2013/48/EU); Directive on strengthening certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings (2016/343/EU); Directive on legal aid for suspects and defendants in criminal proceedings (2016/1919/EU); Directive on procedural safeguards for children suspected or accused in criminal proceedings (2016/800/EU).

disabilities¹¹. This is despite the fact that very often the same kind of measures are provided throughout the criminal justice process to other vulnerable groups, such as minors or women victims of domestic or sexual violence. In the case of the few States that have recognised at the legislative level that support mechanisms should be put in place, the measures extend only to persons with intellectual and psychosocial disabilities who participate in the proceedings as victims, leaving out other forms of participation, such as defendants or witnesses.¹² Some countries have also taken the lead in recognising some of these vital support mechanisms in legislation, such as a facilitator to assess the support needs of persons with disabilities in court proceedings and to carry out the necessary adaptations¹³ or to use procedural documents written in accessible language.¹⁴

Despite this reality, we see that there are legal operators and non-profit organisations in all the countries assessed that provide support to people with intellectual and/or psychosocial disabilities involved in criminal proceedings, including people involved as defendants. Despite the lack of legislation and necessary national regulations, there are legal operators who use accessible language, or speak at a slower pace to allow information to be processed; they also collaborate with specialised NGOs to assess the need for procedural accommodations and allow family members to support persons with intellectual and psychosocial disabilities throughout the criminal process.

The purpose of this National Bench Book is to inform legal operators and other relevant stakeholders about best practices to ensure the effective participation of persons with intellectual and psychosocial disabilities accused in criminal proceedings. The findings are the result of a comprehensive analysis of the situation in eight EU countries, including Bulgaria, Czech Republic, Lithuania, Portugal, Romania, Slovakia, Slovenia and Spain, while the proposed solutions are based on relevant international and regional standards and reflect best practices collected globally.

11 For example, Directive 2010/64/EU on the right to interpretation and translation guarantees the right to a foreign language interpreter and assistance for persons with hearing or speech disabilities in criminal proceedings. Cognitive barriers - difficulties in understanding proceedings and accommodation - are left out of the scope. Similarly, Directive 2012/13/EU on the right to information in criminal proceedings ensures that hearing or speech impaired defendants have access to information about their rights, charges and case materials. The Directive also does not require this information to be accessible to defendants with cognitive impairments.

12 Validity Foundation, [Fair Trial Denied: Defendants with Disabilities Face Inaccessible Justice in the EU](#), 2024. synthesis report.

13 Briefing paper on the barriers faced by defendants with intellectual or psychosocial disabilities in the judicial system in Spain, Enable project, April 2023, p.29.

14 Lithuania National study, Enable project, April 2023, p.9.

B. Who is this Bench Book for?

The primary audiences for this National Bench Book are judges, prosecutors, lawyers, law enforcement officials and other professionals (broadly defined as "*criminal justice actors*") working in criminal cases involving persons with intellectual and/or psychosocial disabilities as defendants. While the focus of this booklet is on persons with disabilities as defendants in criminal justice settings, the principles, standards and recommendations made here may be applicable to other forms of participation, such as victims and witnesses, as well as in broader contexts, including civil proceedings.

C. How to use this Bench Book?

The National Bench Book is designed to be a practical guide for criminal justice actors in their work on cases involving persons with intellectual and/or psychosocial disabilities who experience multiple barriers (legal, environmental, informational, attitudinal, among others) and require support to equally exercise their right of access to justice.

This booklet offers some practical tools to address these barriers to enable defendants with intellectual and/or psychosocial disabilities to participate equally in proceedings.

D. Bench Book Overview

This booklet is structured as follows:

Chapter 1 - Introduction.

Chapter 2 - Rights of Persons with Disabilities: International and EU Legal Framework - provides an overview of the main rights and fair trial guarantees for accused persons with disabilities.

Chapter 3 - Persons with intellectual and psychosocial disabilities and the justice system - provides an overview of the barriers faced by persons with disabilities in exercising their right of access to justice.

Chapter 4 - Implementing the Procedural Rights of Defendants with Disabilities - identifies practical tools to overcome the barriers identified in the previous chapter,

including screening for disability and support needs, provision of procedural accommodations, accessible information, etc.

Chapter 5 - includes some annexes that aim to:

- ✓ Some definitions of different types of disabilities that can provide general information for criminal justice actors (Annex 1).
- ✓ A list of resources to share contacts of organisations and entities in Spain that provide support to people with disabilities (Annex 2).
- ✓ List of useful sources of information for further reading (Annex 3).

E. Methodology

The content of this National Bench Book was developed by Plena Inclusion Spain based on the results of the national research on barriers for defendants with intellectual and psychosocial disabilities in the criminal justice system,¹⁵ carried out in the framework of the ENABLE project.¹⁶ The information presented, including practical recommendations, was gathered through consultations with representatives of disability organisations, groups of judges, prosecutors, lawyers and other stakeholders who attended national working groups organised by Plena Inclusion between April 2023 and March 2024.

F. Main definitions and terminology

- **Equity vs Equality** - The words equity and equality are often used interchangeably, but they have different meanings. Equality means that each individual or group of people receives the same resources or opportunities. Equity recognises that each person has different circumstances and allocates the exact resources and opportunities they need to achieve the same outcome as others. In other words, it is not giving everyone exactly the same. If we give everyone exactly the same thing, expecting that this will make people equal, it

¹⁵ ENABLE Project, Country Briefing Papers: <https://validity.ngo/projects-2/enabling-inclusion-and-access-to-justice-for-defendants-with-intellectual-and-psychosocial-disabilities/national-briefing-papers/>

¹⁶ Full project name: Enabling inclusion and access to justice for defendants with intellectual and psychosocial disabilities (101056701 - ENABLE - JUST-2021-JACC). More information at: <https://validity.ngo/projects-2/enabling-inclusion-and-access-to-justice-for-defendants-with-intellectual-and-psychosocial-disabilities/>

assumes that everyone started in the same place, and this can be very inaccurate because not everyone is equal.¹⁷

- **Universal accessibility** - is the condition that environments, processes, goods, products and services, as well as objects, instruments, tools and devices must meet in order to be understandable, usable and practicable by all people in safety and comfort and as autonomously and naturally as possible. Universal accessibility includes cognitive accessibility to enable easy understanding, communication and interaction for all people. Cognitive accessibility is deployed and made effective through easy reading, alternative and augmentative communication systems, pictograms and other human and technological means available for this purpose. It presupposes the strategy of "universal design or design for all people", and is without prejudice to reasonable accommodation to be adopted.¹⁸
- **Facilitator** - A person who works, as needed, with justice system staff and persons with disabilities to ensure effective communication during all phases of legal proceedings. The facilitator supports the person with a disability to understand and make informed decisions by ensuring that the entire process is adequately explained through understandable and easy-to-understand language, and that appropriate accommodations and support are provided. The facilitator is neutral and does not speak on behalf of persons with disabilities or the justice system, nor does he or she direct or influence decisions or outcomes.¹⁹
- **Legal capacity** - Legal capacity includes the capacity to hold rights and the capacity to act in law. Legal capacity to hold rights gives the person full protection of his or her rights under the legal system. The legal capacity to act in law recognises that person as an actor entitled to enter into transactions and to create, modify or terminate legal relationships.²⁰

17 <https://www.internationalwomensday.com/Missions/18707/Equality-versus-Equity-What-s-the-difference-as-we-EmbraceEquity-for-IWD-2023-and-beyond>

18 Royal Legislative Decree 1/2013, of 29 November, approving the Consolidated Text of the General Law on the Rights of Persons with Disabilities and their Social Inclusion.

19 Royal Decree 193/2023, of 21 March, which regulates the basic conditions of accessibility and non-discrimination for people with disabilities for access to and use of goods and services available to the public.

20 Committee on the Rights of Persons with Disabilities, General Comment No. 1 (2014 - CRPD/C/GC/1) on article 12, equal recognition before the law. Available at the following link: <http://www.convenciondiscapacidad.es/wp-content/uploads/2019/01/Observación-1-Artículo-12-Capacidad-jurídica.pdf>

- **Person with disabilities** - Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others"²¹ . Royal Legislative Decree 1/2013, of 29 November, approving the Consolidated Text of the General Law on the Rights of Persons with Disabilities and their Social Inclusion defines disability as a situation resulting from the interaction between persons with foreseeable permanent impairments and any type of barriers that limit or prevent their full and effective participation in society, on an equal basis with others.
- **Procedural accommodation** - All necessary and appropriate modifications and accommodations in the context of access to justice, where required in a particular case, to ensure the participation of persons with disabilities on an equal basis with others. Unlike reasonable accommodation, procedural accommodations are not limited by the concept of "disproportionate or undue hardship".²²
- **Reasonable accommodation** - All 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.²³ Reasonable accommodation is an intrinsic part of the immediately enforceable obligation not to discriminate in the context of disability and therefore applies to all rights.²⁴ Reasonable accommodation is enshrined in the International Convention on the Rights of Persons with Disabilities, a body of law that is mandatory in Spain by virtue of Articles 10.2 and 96 of the Spanish Constitution, in Royal Legislative Decree 1/2013, of 29 November, approving the Consolidated Text of the General Law on the Rights of Persons with Disabilities and their Social Inclusion (hereinafter, LGDPD), and in Law 15/2022, of 12 July, on equal treatment and non-discrimination.
- **Supported versus substituted decision making** - Supported decision making is a model that implies that people with disabilities can accept help in making

21 UN Convention on the Rights of Persons with Disabilities, Article 1

22 UN International Principles and Guidelines on Access to Justice for Persons with Disabilities (2020), https://www.ohchr.org/sites/default/files/Documents/Issues/Disability/SR_Disability/GoodPractices/Access-to-Justice-EN.pdf p 10.

23 Article 2 of the CRPD. For more detailed information, see Annex 4.

24 CRPD/C/GC/6 para. 23 and A/HRC/34/26 para. 27.

decisions, but without giving up the right to make their own decisions. In this system, freedom of choice is never infringed, it does not question the wisdom of the person's choices, but allows everyone to face the dignity of risk. It helps the individual to understand information and to make decisions based on his or her preferences.²⁵ In contrast, surrogate decision-making is a model that delegates to others the right to make decisions on behalf of persons with disabilities (most often someone is appointed as a "guardian" by law). The latter system is common in legal systems around the world, even though it violates the autonomy and legal capacity of persons with disabilities and violates the Convention on the Rights of Persons with Disabilities.

- **The medical versus the human rights model of disability:** the medical model of disability focuses on the condition of the person, which is understood to directly cause their disability; the human rights model, on the other hand, focuses on the individual and their inherent dignity, recognising that it is the barriers created by society that prevent persons with disabilities from enjoying human rights on an equal basis with others.²⁶ The CRPD adopts the human rights model, defining disability as an evolving concept that "results from the interaction between persons with impairments and attitudinal and environmental barriers that prevent their full and effective participation in society on an equal basis with others".²⁷

25 The social model of disability: origins, characterisation and implementation in the International Convention on the Rights of Persons with Disabilities. A. Palacios. CERMI.ES Collection N°36. Available at the following link: <https://pronadis.mides.gub.uy/innovaportal/file/32232/1/el-modelo-social-de-discapacidad.pdf>

26 Anna Lawson & Angharad E. Beckett (2021) The social and human rights models of disability: towards a complementarity thesis, *The International Journal of Human Rights*, 25:2, 348-379, DOI: 10.1080/13642987.2020.1783533

27 CPRD Preamble, p. e)



The right of access to justice for persons with disabilities is recognised in a number of national and international legal instruments. At the international level, a key instrument is the United Nations Convention on the Rights of Persons with Disabilities (hereinafter the CRPD). The Convention is an international human rights treaty validly signed and ratified by Spain and in force since 3 May 2008. It is also important to note the General Comments, which are authoritative interpretations of the Convention issued by the Committee on the Rights of Persons with Disabilities (hereinafter *the Committee*)²⁸. Among the General Comments (hereafter GCs) most relevant to the topic of this BBPP booklet are the GCs on Article 12 (Equal recognition before the law)²⁹, Article 9 (Accessibility)³⁰, Article 19 (Right to live independently and be included in the community)³¹, Article 5 (Equality and non-discrimination)³². The *Committee* and the Special Rapporteur on the Rights of Persons with Disabilities also issued important guidelines for the implementation of the CRPD, including the Guidelines on Article 14 on the Right to Liberty and Security of Persons with Disabilities³³, as well as the International Principles and Guidelines on Access to Justice for Persons with Disabilities (hereinafter *the International Principles*)³⁴.

Also at the UN level, we find the Report of the Office of the United Nations High Commissioner for Human Rights on the right of access to justice under article 13 of the Convention on the Rights of Persons with Disabilities. In this report, the Office provides guidance on the implementation of article 13, identifying good practices and making recommendations.

Among the most important procedural guarantees enshrined in the CRPD, the GCs and the International Principles in relation to access to justice for persons with disabilities are:

- Equality and non-discrimination (art. 5 CRPD)
- Accessibility (art. 9 CRPD)

28 The Committee on the Rights of Persons with Disabilities, established by the Convention (Article 34), monitors the implementation of the Convention by States Parties. The Committee monitoring the implementation of the CRPD issues General Comments and Concluding Observations on progress in the implementation of the Convention by States Parties.

29 <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-1-article-12-equal-recognition-1>

30 <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-2-article-9-accessibility-0>

31 <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no5-article-19-right-live>

32 <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no6-equality-and-non-discrimination>

33 The Guidelines on the right to liberty and security of persons with disabilities are annexed to A/72/55, Biennial Report 2016 of the Committee.

34 UN, Special Rapporteur on the Rights of Persons with Disabilities, International Principles and Guidelines on Access to Justice for Persons with Disabilities (2020).

- Equal recognition as a person before the law (art. 12 CRPD)
- Access to justice (art. 13 CRPD)
- Liberty and security of the person (art. 14 CRPD)
- All persons with disabilities have legal capacity and therefore no one shall be denied access to justice on the basis of disability (Principle 1).
- Persons with disabilities, including children with disabilities, have the right to appropriate procedural accommodations (Principle 3).
- Persons with disabilities have the right to access information and legal notices in a timely and accessible manner, on an equal basis with others (Principle 4).
- Persons with disabilities are entitled to all substantive and procedural safeguards recognised in international law on an equal basis with others, and States must make the necessary accommodations to ensure due process (Principle 5).
- Persons with disabilities have the right to free or affordable legal aid (Principle 6).
- Awareness-raising and training programmes on the rights of persons with disabilities, particularly in relation to their access to justice, should be provided to all justice system workers (Principle 10).

Also, at the international level we can find the European Convention on Human Rights (hereafter ECHR). The rights of persons with disabilities are covered in several provisions of the ECHR³⁵, however, with regard to the procedural rights of persons with disabilities when accused of committing a crime, it is particularly relevant to consider the following articles and related case law: Article 3 on prohibition of torture and inhuman or degrading treatment or punishment, Article 5 on the right to liberty and security, Article 6 on the right to a fair trial, Article 13 on the right to an effective remedy and Article 14 on prohibition of discrimination.

For its part, the European Court of Human Rights has on numerous occasions, based its jurisprudence on or referred to the CRPD³⁶. For example, in its *Glor v. Switzerland*

³⁵ For other articles of the ECHR that have examined the rights of persons with disabilities, see the following document: https://www.echr.coe.int/documents/fs_disabled_eng.pdf

³⁶ Among them, we can find: ECtHR, *Guberina v. Croatia*, Application No. 23682/13, Judgment of 22 March 2016; ECtHR, *Çam v. Turkey*, Application No. 51500/08, Judgment of 23 May 2016; ECtHR, *Enver Şahin v. Turkey*, Application No. 23065/12, Judgment of 30 January 2018.

judgment³⁷ the Court held that the CRPD provided evidence of a European and global consensus on the need to protect persons with disabilities from discriminatory treatment. The ECtHR has also stated that the denial of legal capacity to persons with disabilities constitutes a violation of due process and fair trial.³⁸

Moreover, the European Social Charter protects the rights of persons with disabilities in its article 15 recognising the right of persons with disabilities to autonomy, social integration and participation in the life of the community. The European Committee of Social Rights can examine collective complaints against State Parties, for example, in a recent ground-breaking decision in the case *European Disability Forum and Inclusion Europe v. France* (complaint 168/2018) the Committee considered that several provisions of the European Social Charter (arts. 11, 15 and 16) had been violated by the lack of accessibility for persons with disabilities to health care services, education, buildings and facilities, public transport, social support services and economic support.³⁹ The Council of Europe has also developed a disability strategy for the period 2017-2023 to set out its priorities for the promotion, protection and implementation of the rights of persons with disabilities. This strategy identifies equal recognition as a person before the law as one of its priorities and focuses on issues of legal capacity and access to justice for persons with disabilities.⁴⁰

Also at the European level is the Charter of Fundamental Rights of the European Union. Article 20 of the Charter recognises that all persons are equal before the law, and Article 21 prohibits all discrimination, particularly on the grounds of disability, among other grounds. Article 26 recognises that persons with disabilities have the right to benefit from measures that guarantee their autonomy, their social and professional integration and their participation in the life of the community. Specifically in the field of justice, Articles 47 to 50 recognise the right to effective judicial protection and to an impartial judge, as well as the right to the presumption of innocence and the right to defence, the principle of legality and proportionality of crimes and penalties and the right not to be criminally accused or convicted twice for the same crime.

Also at the European Union level, there are different directives that recognise different rights to persons suspected or accused of committing a crime and that must be respected in all EU countries. These rights include the right to information, to

37 *Glor v. Switzerland* (Application No. 13444/04, judgment 30 April 2009).

38 ECtHR, *Dragan Kovačević v. Croatia*, Application No. 49281/15, Judgment of 12 August 2022

39 ECtHR, *European Disability Forum (EDF) and Inclusion Europe v. France*, Complaint No. 168/2018

40 Council of Europe, *Human rights: a reality for all. Council of Europe Disability Strategy 2017-2023* (2016).

interpretation and translation, to have a lawyer, to the presumption of innocence and to be represented in court, as well as the right to legal assistance.

Among the directives we can find:

- Directive on the right to interpretation and translation in criminal proceedings (2010/64/EU)⁴¹
- Directive on the right to information in criminal proceedings (2012/13/EU)⁴²
- Directive on the right of access to a lawyer in criminal proceedings (2013/48/EU)⁴³
- Directive on strengthening certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings (2016/343/EU)⁴⁴
- Directive on legal aid for suspects and defendants in criminal proceedings (2016/1919/EU)⁴⁵
- Directive on procedural safeguards for juvenile suspects or accused persons in criminal proceedings (2016/800/EU)

The European Commission has also issued two particularly pertinent recommendations:

- Recommendation on Procedural Safeguards for Vulnerable Persons Suspected or Accused in Criminal Proceedings (2013)⁴⁶
- Recommendation on the Procedural Rights of Suspects and Accused Persons in Pre-Trial Detention and on the Material Conditions of Detention (2022)

The EU Directives and Recommendations should be read in line with Articles 6, 47 and 48 of the EU Charter and Articles 6 and 13 of the ECHR, as well as Articles 5, 9, 14

41 Directive 2010/64/EU of the European Parliament and of the Council - Articles 1, 2, 4 and 5.

42 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.

43 Directive 2013/48/EU of the European Parliament and of the Council - On the right of access to a lawyer in criminal proceedings, on the right to have a third party informed of the deprivation of liberty and to communicate with third parties - Articles 3, 4, 11 and 13.

44 Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on strengthening certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings - Articles 6 - 8 and Recital 42.

45 Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on free legal aid to suspects and accused persons in criminal proceedings and to requested persons in European Arrest Warrant proceedings - Articles 4 and 9.

46 Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable suspected or accused persons in criminal proceedings - sections 2 and 3.

and 2.3 of the ICCPR, which provide for the right to a fair trial, including pre-trial rights, and access to an effective remedy.

Although there is no specific EU instrument specifically targeting the rights of defendants with disabilities, there is the EU strategy on victims' rights⁴⁷, which sets out a number of important safeguards also for persons with disabilities in criminal proceedings.

None of the Directives adequately conform to States' obligations to ensure equal access to justice for persons with disabilities, nor do they provide sufficient guidance and direction to legal operators in seeking to do so. Legal operators must therefore interpret EU legislative instruments in light of States' obligations under the CRPD and other applicable international law and standards to ensure that their application does not result in discrimination against persons with disabilities. This is reflected in the Recommendation on procedural rights of suspects and accused persons subject to preventive detention and on material conditions of detention, which states in its preamble that the recommendation should be understood in light of the rights and obligations set out in the CRPD, and that it should be ensured that if persons with disabilities are deprived of their liberty in criminal proceedings, are entitled, on an equal basis with others, to guarantees in accordance with international human rights law and are treated in accordance with the objectives and principles of the CRPD, including by providing reasonable accommodation to take into account their special needs and ensuring their accessibility.

In the specific field of Spain, Article 96.1 of the EC recognises that international treaties validly concluded, once they are officially published in Spain, form part of the internal legal order. By virtue of this precept, the CRPD, ratified by Spain in 2007, forms part of Spanish law. Article 10.2 also states that the rules relating to fundamental rights and freedoms recognised in the Constitution must be interpreted in accordance with the international human rights treaties and agreements ratified by Spain. Thus, this precept endows treaties on rights with a special value by giving them constitutional status. Consequently, the CRPD completes and specifies the content of constitutional rights in the context of disability.

In short, in relation to Article 10.2 of the Constitution, we must consider the jurisprudence of the Constitutional Court, which establishes that this interpretation

⁴⁷ EU Strategy on Victims' Rights <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0258>

cannot disregard the interpretation made by the Treaty's guarantee bodies, i.e. the Committees. Thus, in STC 61/2013, of 14 March, the Court states:

"The Covenant not only forms part of our domestic law, in accordance with art. 96.1 CE, but also, and as far as is relevant here, the rules relating to fundamental rights and public freedoms contained in the Constitution must be interpreted in accordance with the international treaties and agreements on the same matters ratified by Spain (art. 10.2 CE); an interpretation which cannot be disregarded, in turn, by the guarantee bodies established by those same international treaties and agreements (STC 116/2006, FJ 5). 10.2 CE); an interpretation that cannot disregard that which, in turn, is carried out by the guarantee bodies established by those same international treaties and agreements (STC 116/2006, of 24 April, FJ 5; or STC 198/2012, of 6 November, FJ 9)."

03

PERSONS WITH
INTELLECTUAL AND
PSYCHOSOCIAL
DISABILITIES IN THE
JUSTICE SYSTEM

In the Spanish sphere, as mentioned above, the CRPD has been part of the Spanish legal system since it entered into force on 3 May 2008. Spain has also ratified other international instruments such as the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the International Covenant on Civil and Political Rights and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

With regard to EU directives, there are some that are transposed into Spanish law through different laws, such as the directive on the right to information and translation (directive 2010/64/EU), on the right to information in criminal proceedings (directive 2012/13/EU).⁴⁸ In turn, some directives are partially transposed into Spanish law, such as the directive on the right to legal counsel in criminal proceedings (directive 2013/48/EU) and legal aid (directive 2016/1919).⁴⁹ On the other hand, there are directives that have not yet been transposed into Spanish law, such as the directive on strengthening certain aspects of the presumption of innocence and the right to be present at the trial in criminal proceedings (directive 2016/343), even though the deadline for its transposition has passed.

Exceptionally, although there is no law that specifically incorporates the Commission's recommendation of 27 November 2013 on procedural guarantees for vulnerable suspected or accused persons into the Spanish legal system, there are legislative reforms that incorporate the content of the recommendation to some extent, such as the obligation to make adaptations and adjustments in proceedings in which persons with disabilities participate, regardless of whether they do so as a party or in a different role.

Article 14 of the Spanish Constitution recognises that Spaniards are equal before the law, without any discrimination on grounds of race, sex, religion, opinion or any other personal or social condition or circumstance. In turn, Article 17 recognises the right to liberty and security of all persons, as well as the right to be informed immediately and in a comprehensible manner of their rights and the reasons for their detention. For its part, Article 24 of the Constitution regulates the right of access to justice and

⁴⁸ Both directives are transposed into Spanish law through Organic Law 5/2015 of 27 April 2015.

⁴⁹ These directives are partially transposed into Spanish law through Law 3/2018 of 11 June.

establishes that all persons have the right to obtain the effective protection of the judges and courts in the exercise of their rights and legitimate interests, and that under no circumstances may they be defenceless. It also recognises other rights, such as the right to be informed of the accusations made against him/her, the right to a public trial with all guarantees and the presumption of innocence. With regard to persons with disabilities, Article 49 recognises that all persons with disabilities exercise the rights provided for in the EC in conditions of real and effective freedom and equality, and the public authorities must promote policies that guarantee the full personal autonomy and social inclusion of persons with disabilities in universally accessible environments.

Also in this regard, Article 6 of Royal Legislative Decree 1/2013, of 29 November, approving the Consolidated Text of the General Law on the Rights of Persons with Disabilities and their Social Inclusion, recognises respect for personal autonomy and the duty to ensure the provision of support for decision-making. It also requires that personal circumstances be taken into account in the provision of accessible information and in decision-making processes. Article 7 of the law, which focuses on the right to equality, obliges administrations to provide particularly strong protection of the right to effective judicial protection on equal terms.

The Criminal Procedure Act establishes a number of rights for persons under investigation and in detention in order to ensure equality in the process. Article 118 establishes the right to defence, which includes the right to be informed of the charges, to participate in the proceedings, to request free legal aid and the right to remain silent. Specifically for persons with disabilities, Article 109 recognises the obligation to make the necessary adaptations and accommodations in relation to communication, understanding and interaction with the environment. It also recognises that expert staff must be allowed to participate as facilitators to make the necessary adaptations and adjustments to enable the person with a disability to understand and be understood. Although this article is incorporated in the area of victims, a broad interpretation of this precept should be made so that it can also be applied in the case of persons with disabilities when they participate as defendants.

Regarding intellectual disability and persons with mental health problems in the field of criminal liability, the Spanish Criminal Code recognises that those who cannot understand the wrongfulness of the act or act in accordance with that understanding due to any "psychic anomaly or alteration", as well as those whose awareness of reality has been seriously altered by alterations in perception since birth or childhood, will not

be criminally liable. This exemption from criminal responsibility can be complete or partial and results in the application of a security measure that is usually served in penitentiary psychiatric hospitals or ordinary penitentiary centres.

Despite existing legislation in this regard, there is a significant lack of knowledge in society about the existence and problems of people with intellectual disabilities in prison. Despite the advances in awareness raising and training, this lack of knowledge can reach in some cases judges, prosecutors, lawyers, prison officers and police officers. People with intellectual disabilities are sentenced or subjected to security measures in ordinary prisons. In contrast, more specialised care for people with intellectual disabilities in prison depends on the work of civil society organisations, which in practice is linked to obtaining sufficient public subsidies. Therefore, in times of economic crisis, this assistance is seriously compromised. Specialised civil society works on screening, orientation and counselling of staff, as well as on support and material development of inmates, but it is insufficient because it does not reach the entire prison population with intellectual disabilities. The right of inmates with intellectual disabilities to information adapted to their specific needs is only respected in prisons with specialised units (posters, pictograms, texts in easy language, ways of transmitting information by officials).

In terms of statistics, in Spain there are no official data or statistics on people with disabilities who are involved in legal proceedings. According to the report *A cada lado*⁵⁰, only 51.4% of the people who participated in the report had a disability certificate prior to the proceedings and in only 3.3% of the cases was the disability detected during the judicial proceedings. Moreover, out of the 743 proceedings analysed in the report, disability was taken into account at some point in only 31.5% of the proceedings. In 57.7% it was not taken into account, and in 10.8% it was not known.

In relation to people with disabilities in prisons, there are data on the website of the Judiciary that allow us to observe the prison population in Spain, broken down by autonomous communities, sex and nationality, but in no case does it include disability. In the General Report for the year 2021 of the General Secretariat of Penitentiary

⁵⁰ On either side. Informe sobre la situación de personas con discapacidad intelectual reclusas y ex-reclusas en España, available at the following link: <https://www.plenainclusion.org/publicaciones/busador/a-cada-lado-informe-sobre-la-situacion-de-personas-con-discapacidad-intelectual-reclusas-y-ex-reclusas-en-espana/>

Institutions⁵¹ we can find as official data that in the fourth quarter of the year 2021 in all penitentiary centres there were 3,963 inmates and 290 inmates with some type of disability, but the data is not broken down by type of disability.

51 https://www.interior.gob.es/opencms/pdf/archivos-y-documentacion/documentacion-y-publicaciones/publicaciones-descargables/publicaciones-periodicas/informe-general-de-instituciones-penitenciarias/Informe_General_IIPP_2021_12615039X.pdf

04

IMPLEMENTING
PROCEDURAL RIGHTS
FOR DEFENDANTS WITH
INTELLECTUAL AND
PSYCHOSOCIAL
DISABILITIES

As we have been able to observe, although there is legislation that protects the rights of people with disabilities to access to justice, reality shows us that, although many advances are being made over time, reality does not always correspond to theory. As highlighted in the Briefing Paper on the barriers faced by defendants with intellectual or psychosocial disabilities in the Spanish justice system⁵² carried out by Plena Inclusion also in the framework of the Enable project⁵³, people with disabilities still face numerous barriers when they are accused or suspected of committing a crime. One of the main barriers is the lack of detection of disability; there is no practical tool to detect early on that the person has or may have an intellectual disability. In general, this is subject to the awareness or training of legal operators, however, in many cases, when it is detected that the person may have a disability, an assessment of his or her procedural capacity or criminal liability is requested, but on very few occasions is the assessment of procedural accommodations that the person with a disability may need carried out.

On the other hand, although procedural accommodations are recognised in the legislative sphere, there is a need for a regulatory development that allows them to be carried out in reality. In the briefing paper, we observed that many legal practitioners are aware that procedural accommodations must be made, but do not know how to implement them in practice. The lack of knowledge and awareness of legal operators about the rights of people with disabilities is another of the main barriers faced by people with disabilities.

In turn, the lack of understanding of disability and its characteristics by legal operators leads to the fact that the characteristics of persons with disabilities are often misinterpreted as uncooperative behaviour in police investigations or court proceedings. For example, the need for more time to answer questions, or a lack of understanding of the questions, which results in the person not answering what is being asked.

This chapter therefore aims to provide practical tools to address these barriers, as well as recommendations to guarantee the right of persons with disabilities to access to justice.

52 <https://www.plenainclusion.org/publicaciones/buscador/documento-informativo-sobre-las-barreras-que-enfrentan-las-personas-acusadas-con-discapacidad-intelectual-o-psicosocial-en-el-sistema-judicial-en-espana/>

53 You can access more information about the Enable Project through the following link: <https://www.plenainclusion.org/conocenos/proyectos/ficha/proyecto-enable/>

A. Right to equal participation in the criminal process

The right of persons with disabilities to access to justice recognised in Article 13 of the CRPD requires that persons with disabilities have the right to participate, on an equal basis with others, in the justice system as a whole. This participation takes many forms and includes persons with disabilities taking on the roles of, for example, plaintiffs, victims, defendants, judges, juries and lawyers, as part of the democratic system that contributes to good governance.

The CRPD requires all States to amend civil, criminal and procedural laws that prevent persons with disabilities from participating directly or indirectly in judicial or administrative proceedings on an equal basis with others.

According to the Report of the Office of the United Nations High Commissioner for Human Rights on the Right of Access to Justice under Art. 13 of the CRPD:

*"States parties have an obligation to provide procedural and age-appropriate accommodations to facilitate the performance of persons with disabilities **as direct and indirect participants** in all judicial proceedings, including at the investigative and other preliminary stages. Therefore, procedural accommodations are a means of effectively asserting the right to a fair trial and the right to participate in the administration of justice, and are an intrinsic element of the right of access to justice."*

The Committee has specifically noted that the denial of appropriate measures to participate on an equal basis with others, for example through sign language interpretation, has led to violations in relation to access to justice, non-discrimination, accessibility, freedom of expression, access to information and participation in political and public life.⁵⁴

In its Views on Communication Medina Vela v Mexico No 32/2015, the CRPD Committee found a violation of (among other articles of the Convention) article 5 in relation to article 4, resulting in discriminatory treatment of Mr Medina Vela by not allowing his participation in the judicial proceedings against him, because he was not allowed to testify in a case against him, to appoint his own defence counsel, or to receive support or procedural accommodations as a consequence of the application of

⁵⁴ R v. D.A.I. (Case No. 33657), judgment of 10 February 2012.

the special procedure for persons with disabilities provided for in Mexican domestic law.

The International Principles and Guidelines on Access to Justice for Persons with Disabilities incorporates in its seventh principle that persons with disabilities have the right to participate in the administration of justice on an equal basis with others. It states that the right to equal access to justice requires that persons with disabilities have the opportunity to participate directly in adjudicative processes and to perform various functions in the administration of justice on an equal basis with others.

At the national level, the STS 695/2021 of 15 September echoes the case law of the ECtHR, in that it has repeatedly stated that when a person has a disability, criminal proceedings **must be organised by adopting measures to promote their ability to understand and participate in the process.**⁵⁵ For its part, the Constitutional Court in its judgement 77/2014, of 22 May establishes that the duty to carry out complementary measures to those strictly legal to **clear up any doubts in relation to the participation of persons with mental disabilities in criminal proceedings** is based, in our law, on the mandate of article 9.2 EC, which obliges the public authorities to promote the conditions for the equality of individuals to be effective, removing the obstacles that prevent or hinder its fullness, and is protected by the special duty of protection and support enjoyed by persons with disabilities.

In Spain there is the possibility that a person may be declared procedurally incompetent, that is to say that he or she does not have the capacity to intervene consciously and effectively in his or her own defence. Among the causes that are considered to have a negative influence on a person's capacity to stand trial in criminal proceedings are serious mental disorder or mental deficiency, concepts which have historically included intellectual disability. In this regard, we must not forget that article 12 of the CRPD recognises the obligation of all states parties to equal recognition as a person before the law, so that instead of assessing whether or not the person has capacity to stand trial, it should be assessed what support or procedural accommodations the person with a disability needs to be able to participate in the proceedings on an equal footing with other persons. The Committee has strongly opposed the concept of procedural incapacity and has made it clear that the application

⁵⁵ -vid. ECHR, Adamkiewicz case. Poland, no. 54729/00, §70, 2 March 2010; Panovitsc. Cyprus, no. 4268/04, §67, 11 December 2008; V. v. the United Kingdom [GC], no. 24888/94, §86; and T. v. the United Kingdom [GC], no. 24724/94, §84, 16 December 1999.

of these concepts and rules are discriminatory and contrary to the Convention⁵⁶ and urges all States Parties to eliminate all such rules in their justice systems⁵⁷. This position has been supported by the Working Group on Arbitrary Detention, which has called for persons with psychosocial disabilities to be given the opportunity to be brought promptly to trial, with the necessary support and adjustments, rather than being declared incompetent⁵⁸.

Recommendations for justice professionals

1. Recognise the right of accused persons with disabilities to participate at all stages of the proceedings and in all courts.
 - a. Provide persons with disabilities with the necessary support and accommodations to participate in the procedures;
 - b. Ensure that concepts such as "procedural incapacity" determined, for example, by assessments of functional or mental status, are not used to restrict a person's right to participate in the procedure.
 - c. Laws should be interpreted in accordance with the CRPD. Judges and other relevant justice actors should draw the attention of legislators to any legislation that violates the CRPD.
 - d. Judges should be able to initiate proceedings to review legislation incompatible with the CRPD. For example, in Slovakia, judges can initiate proceedings before the Constitutional Court to annul legislation that they consider to be contrary to international treaties.
2. Ensure that all assessments of accused persons with disabilities prior to and during court proceedings are aimed at identifying the procedural accommodations and support necessary to ensure their full and effective participation in the proceedings;
 - a. These assessments should take into account the wishes and preferences of the person with a disability.

⁵⁶ "Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: the right to liberty and security of persons with disabilities, adopted by the Committee at its fourteenth session, held in September 2015", para. 16.

⁵⁷ See CRPD/C/KOR/CO/1, para. 27.

⁵⁸ See United Nations Basic Principles and Guidelines on Remedies and Procedures relating to the Right to a Remedy and Reparation (A/HRC/30/37, annex), guideline 20, para. 107 (b).

3. Ensure the safe, fair and effective participation of persons with disabilities in proceedings and the opportunity to participate fully in them.
 - a. Ensure the provision of adjustments, accommodations and supports, including the involvement of facilitators, where and when necessary, to enable clear communication between persons with disabilities and the justice system throughout the process, including the police phase.
 - b. The effective right to participate must be respected and guaranteed from the first contact with the State Security Forces and Corps.

4. Lawyers must ensure that decisions that directly or indirectly involve the participation of the respondent with a disability in the process are made by the respondent with a disability in an informed and supported manner, and that the will of the respondent with a disability is not substituted at any time.
 - a. The person with a disability is always the decision-maker, with the necessary supports.
 - b. It must be ensured that the decision is made in accordance with the will and preference of the accused person with a disability.

5. Review of policies, guidelines and practices
 - a. Review all policies, guidelines and practices that directly or indirectly restrict the capacity of persons with disabilities, including those that establish and apply doctrines of "procedural incapacity", which prevent persons with disabilities from participating in legal proceedings based on questions or determinations of their capacity;
 - b. Review all policies, guidelines and practices that authorise medical professionals to be the sole or preferred "experts" in determining how, to what extent and with what support persons with disabilities can participate in legal proceedings;

6. Consult closely with persons with disabilities and their representative organisations and actively involve them in all discussions and decision-making processes on justice-related issues, for example, by allowing them to participate meaningfully on boards, committees, commissions, sentencing councils, and guidance and monitoring bodies;

7. Collect disaggregated data on the participation of persons with disabilities in the justice system and, based on this data, develop and implement strategies to reform policies, practices and laws to ensure equal access to justice.

B. Right to procedural accommodations

Procedural accommodations are all necessary and appropriate modifications and accommodations in the context of access to justice, where required in a given case, to ensure the participation of persons with disabilities on an equal basis with others.⁵⁹ Procedural accommodations are a means of effectively asserting the right to a fair trial and the right to participate in the administration of justice, and are an intrinsic element of the right of access to justice.

Equality of arms is an element of the right to a fair trial that ensures that all parties have the same procedural rights in order to ensure access to the same information and the same opportunities to present or rebut evidence.⁶⁰ The lack of procedural accommodations violates the right to a fair trial and may lead to effective exclusion from judicial proceedings or result in unfair sentences being handed down, as the Committee has stated in the Communication on Medina Vela v. Mexico.

Unlike reasonable accommodation, procedural accommodations are not subject to the **proportionality test**; consequently, the failure to provide procedural accommodations when a particular person with a disability requires them constitutes a form of **discrimination on the basis of disability** in relation to the right of access to justice.

We speak of adjustments because it is not enough to establish rules of accessibility applicable to all cases, but it is necessary to examine **each case individually**, given that each person has specific features and difficulties, which mean that possible obstacles must be assessed individually in terms of their nature and entity.

Although the necessary adjustments must be made, Article 7a(1) of the Civil Procedure Act sets out the areas in which adaptations must be made: they may relate to communication, comprehension and interaction with the environment. This last area is a clear manifestation of the social approach to disability.

For the elaboration of the individualised profile of procedural accommodations measures, the person with a disability should be heard and his or her opinion should be taken into account, if the needs of the person concerned change over time, the

⁵⁹ International Principles and Guidelines on Access to Justice for Persons with Disabilities. UN, 2020

⁶⁰ Report of the Office of the High Commissioner for Human Rights on the right of access to justice under article 13 of the Convention on the Rights of Persons with Disabilities

procedural accommodations should be modified or replaced as appropriate. This requires that on the basis of the interview conducted and the analysis of the documentation provided, a profile should be drawn up that is as personalised and contextualised as possible. Generalisations and the use of stereotyped formulas should be avoided. It must be made absolutely clear which are the areas in which the person needs help and which are those in which he/she enjoys full autonomy. Rigorous and methodologically strict data collection appropriate to the person's disability will lead to such a comprehensive screening that the rights of persons with disabilities to access to justice will not be violated.

Therefore, adjustments: minimise the impact of a person's disability on their daily life, are anticipatory, which means that it is necessary to think about and prepare the types of general adjustments that might be needed in advance, adjustments are personal, which means that everyone has different needs that should be taken into account in agreement with the person with a disability.

Procedural accommodations are recognised in the legal system in the following articles:

- Article 13 CRPD
- Article 7 bis of the Code of Civil Procedure
- Article 7 bis Voluntary Jurisdiction Law
- Article 109 of the Criminal Procedure Code

B.1. Individual assessment

It is essential to differentiate between the assessment of support needs and the profiling of procedural accommodations measures. The former focuses on identifying and providing the necessary supports to enable a person with a disability to live independently and participate fully in society. The intervention approach is comprehensive and person-centred, covering aspects such as education, employment, independent living, and social participation. It is usually carried out by health professionals, social workers and specialised educators.

In contrast, the second, which is the main focus of the procedural facilitator, is to identify the specific procedural accommodations that need to be made in the police and judicial environment to ensure accessibility and fairness in police and judicial

processes. The approach taken is specific and contextual, focusing on adapting police and judicial procedures, environments and methods to ensure accessibility. It is carried out by facilitators, who must have a thorough knowledge of the guidelines and regulations for judicial procedural accommodations.

Elaboration of the individualised profile of procedural accommodations measures

The primary role of the procedural facilitator is to advise police officers and legal operators on the measures of adjustment to the police or judicial procedure that have to be carried out with the person with a disability, as well as the implementation of the individualised profile of supports during the police or judicial procedure, so that the effective participation of the person in the procedure is ensured.

There will basically be two areas where adjustments or support may be necessary for the development of the police or judicial procedure, namely:

A) The profile of limitations/strengths for PwD communication:

1. Sensory, cognitive or intellectual limitations resulting from their disability (the facilitator is not able to assess these limitations, but can provide adjustments if he/she has sufficient information either through the PIA (individualised support programmes or expert psychological reports).
2. Communication
3. Understanding
4. Emotional and behavioural management
5. Interpersonal Interaction (social behaviours)

B) The profile of barriers to communication in the police and/or judicial context, which usually presents barriers such as, for example, prejudices or stereotypes about PwDs, the physical spaces of police stations and judicial headquarters are often intimidating, and the complexity and rigidity of police and judicial procedures.

Therefore, the design of the individualised profile of procedural accommodations will be developed according to the individual characteristics of the person with a disability in interaction with the police and/or judicial environment in which the procedure is to take place, always with the participation and informed consent of the person with a disability.

The design of the individualised procedure adjustment profile could be composed of the following four steps:

1. Detect relevant areas of adjustment.
2. Identify the relevant adjustment activities for each of the areas.
3. Assess the level or intensity of adjustment needs.
4. To transfer by means of a report the individualised profile of the adjustment needs to the procedure.

In order to carry out the above, the steps in the procedural facilitator's action to elaborate the profile and to capture it in the report are the following:

- a. Compilation and analysis of all available information on PcD

The procedural facilitator should collect information that will allow him/her to establish the profile of limitations and strengths of the PwD and of the police or judicial context where the procedure is going to take place and which will deal with the areas indicated: understanding, communication, emotional and behavioural management and interpersonal interaction (social behaviours). This first phase of information gathering will also help the professional to prepare the screening interview with the PwD.

The main sources of information will come from:

- Collateral reports. The procedural facilitator should review and analyse all clinical, social and procedural information about the PwD that can be collected.
- Significant third parties in the life of the PwD. The procedural facilitator will conduct an information-gathering interview with family members and relatives of the PwD.

- b. Adjustment needs assessment interview and direct observation

The screening interview should be understood as a process, in which we will distinguish phases with specific objectives. It is a flexible scheme that will always have to be adapted to the needs of the PwD and should not be conceived as closed phases that are carried out in a predetermined order.

- c. Elaboration of the profile of limitations and strengths of the person in such contexts, analysing the areas of interest and the intensity of support needed.

Drawing up the procedural accommodations report: The procedural accommodations report is the means by which the procedural facilitator will communicate in written or oral form the individualised procedural accommodations profile to the activating police, judicial or welfare body. After the elaboration of the profile of limitations/strengths of the person with a disability for an effective communication and the barriers of the context (police/judicial) have been analysed, the report should clarify the most representative aspects that help both the person with a disability and the legal operators to understand and be understood. Therefore, the purpose is not to help the person get the outcome they want in their legal process, but to make their participation in the justice system more effective. Each piece of information should be analysed in terms of its impact on the participation of the person with a disability in the police and/or judicial process and any necessary accommodations should be proposed.

Communication of results to police indicators and legal operators: one of the functions of the facilitator is to advise police officers and legal operators on the supports to be implemented and the relevant adaptations to be made based on the assessment of the person with a disability. In the light of the detection of support needs and procedural accommodations, supports should be developed to enable the actors involved to communicate and interact appropriately with the person with a disability throughout the procedure.

B.2. The procedural facilitator in procedural accommodations

The figure of the procedural facilitator plays a crucial role in ensuring that persons with disabilities (PwD) can access justice on equal terms. This professional acts as a bridge between the PwD and the different actors in the justice system, including police, legal operators, forensic technicians and victim assistance mechanisms. The main function of the facilitator is to ensure that the PwD understands the police, judicial or assistance procedures and participates fully in the judicial or assistance process, thus avoiding situations of defencelessness and barriers to access to justice.

Characteristics and skills of the procedural facilitator.

- **Communication Skills:** The facilitator must master human communication skills to interact effectively with different Justice System professionals, the PcD and their family members. This includes maintaining proper body posture, eye contact, and the ability to ask clarifying or confrontational questions when necessary.

- Adaptability: The facilitator needs to have extensive knowledge of the different types of disabilities and their possible co-morbidities, as well as the contexts in which he/she will be working (police stations, courts, correctional facilities, etc.).
- Observation and Assessment: He/she must be able to read the situation quickly and make relevant decisions, adapting his/her behaviour according to the moment and the state of the PwD.

Specific Functions:

- Adjustment Design and Implementation: Assist in designing and implementing the necessary adjustments and supports for PwD to effectively participate in the judicial process.
- Interaction and Coordination: Interacting with other professionals in the Justice System and with the PwD, their family members or relatives, to ensure effective communication.
- Ongoing Assessment: Organise regular meetings to assess needs and adjust collaboration as necessary.

Skills of the Process Facilitator

a. Basic Skills:

- Scientific and legal knowledge: Updated in disability, legal framework (Civil Procedure Act and Criminal Procedure Act), and human communication.
- Teamwork: Collaborate with police, legal operators, forensic technicians, and victim care professionals.

b. Specific Skills:

- Information gathering: Assess the case and prepare the necessary adjustments to the procedure.
- Professional Intervention: Assisting during police or judicial proceedings to ensure effective and appropriate communication.

c. Handling Difficult Situations:

- Create a Climate of Trust: Generate a positive and accepting environment that motivates the PwD to collaborate.

- Physical and Personal Space: Ensure a physical environment that facilitates the relaxation and comfort of the PWD.
- Empathy and Rapport: Developing an empathetic connection without losing the objectivity necessary for your work.
- Active Listening: Ensure that communication with the PwD is clear and effective, showing understanding and respect.

Qualities of a Good Procedural Facilitator

To perform his or her role effectively, the procedural facilitator must possess certain qualities:

1. Commitment:
 - With equal access to justice for PWD.
 - Do not speak on behalf of the PWD or influence their decisions, but facilitate their active participation.
2. Rigour:
 - Continuously train and update the knowledge and skills necessary for their work.
 - Maintain high quality standards in their professional performance.
3. Ingenuity:
 - Adapt knowledge and skills to the specific circumstances of each case.
 - Communicate effectively with multiple professionals and PwD, taking into account the heterogeneity of disabilities.
4. Integrity:
 - Act impartially and objectively, avoiding influencing the PwD's decisions or responses.
 - Recognise and manage potential biases that may arise during your intervention.

5. Patience:

- Understand and adapt to the shortcomings of the justice system (procedural times, cancelled summons, etc.).
- Intervene in complex conditions and under pressure.

6. Honesty:

- Recognise their own limitations and refer particularly complex cases to more specialised colleagues.

7. Confidentiality:

- Handle sensitive information with care to avoid legal breaches or interference with investigations.

In summary, the procedural facilitator is an essential figure in ensuring that persons with disabilities have fair and equal access to the justice system, using a combination of communication skills, specific knowledge and personal qualities to perform their role effectively.

Recommendations for justice professionals

1. The right to procedural accommodations must be respected from the first contact with the justice system or law enforcement agencies.
 - a. Legal operators and law enforcement agencies must ensure that the necessary procedural accommodations are made from the first moment a person with a disability comes into contact with the justice system.
 - b. The assessment of the necessary adjustments and adaptations should, if possible, be made prior to the police interview or statement taking.
 - c. All procedural accommodations should be gender and age appropriate.
 - d. Appropriate support services should be made available by the administration of justice to ensure that the necessary procedural accommodations are made for persons with disabilities.
 - e. All persons should be informed of their right to have procedural accommodations made.

2. Practical disability screening tools must be developed in order to ensure that persons with disabilities go through the entire judicial process with the necessary accommodations to ensure their effective participation.
3. It should not be the sole responsibility of the accused person to request procedural accommodations;
 - a. Legal operators have a proactive duty to request the assessment of procedural accommodations when a person with a disability is involved, regardless of his or her role in the process.
4. All legal operators and members of law enforcement agencies should be trained and sensitised on disability and the rights of persons with disabilities.
5. Authorities and justice actors should closely consult and actively involve persons with disabilities and their representative organisations in all decision-making on procedural accommodations.
6. Procedural accommodations need to be developed legislatively to ensure that they are adopted in reality.
7. Responsible authorities should identify and disseminate good practices regarding the identification of disability and the adoption of procedural accommodations, as well as develop and implement training courses focusing on the human rights model of disability and on the procedural accommodations that need to be adopted to enable persons with disabilities to participate equally in all procedures.
8. Good practice - In Bulgaria, the courts use an "NGO assessment of the social functioning of persons with disabilities and their special needs". This assessment is designed to be used in all courts dealing with cases involving

persons with disabilities. It aims to increase effective participation in the trial and to improve the protection of the rights and interests of the person.⁶¹

C. Right to information and communication in accessible formats

According to Article 21 of the CRPD, States must ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through **all forms of communication of their choice**. To this end, States Parties must provide to persons with disabilities information to the general public in accessible formats and technologies appropriate to different kinds of disabilities, in a timely manner and without additional cost, as well as accept and facilitate the use of sign language, Braille, augmentative and alternative modes, means and formats of communication and all other accessible modes, means and formats of communication of their choice by persons with disabilities.

Article 9.2.f of the CRPD imposes an obligation on States Parties to promote appropriate forms of assistance and support to persons with disabilities to ensure their access to information. The CRPD Committee has noted that:

"People with intellectual and psychosocial disabilities, as well as deafblind people, face barriers when trying to access information and communication due to the lack of easy-to-read formats and augmentative and alternative modes of communication."

Article 19(2) of the ICCPR states that:

"[e]veryone has the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of

⁶¹ For more information, see the Bulgaria country report carried out in the framework of the project. <https://validity.ngo/projects-2/enabling-inclusion-and-access-to-justice-for-defendants-with-intellectual-and-psychosocial-disabilities/national-briefing-papers/>

frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".

In the criminal justice context, this should be read in conjunction with Article 14.3 (a) and (b) of the ICCPR, which provides that:

"[I]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing [...]"

At the national level, Law 6/2022, of 31 March, expressly incorporates cognitive accessibility within universal accessibility, establishing that specific measures to guarantee equal opportunities, non-discrimination and universal accessibility must also be applied to the field of telecommunications and the information society, urbanised public spaces, infrastructure and information, as well as in the field of the **administration of justice**.

In turn, it recognises that cognitive accessibility is deployed and made effective through easy reading, alternative and augmentative communication systems, pictograms and other human and technological means available for this purpose.

However, persons with disabilities continue to face numerous barriers in the area of information and communication in legal proceedings. As stated in the Spanish briefing paper, almost all persons with disabilities recall that they have been read their rights, but state that they have not understood them, and that legal operators such as judges, prosecutors or lawyers speak very fast and in words that are very difficult to understand.

Right to information in accessible formats

According to Directive 2012/13/EU on the **right to information in criminal proceedings**, Member States must ensure that suspects or accused persons are informed of their procedural rights, including the right of access to a lawyer; the right and conditions to receive free legal advice; the right to be informed of the charge; the right to interpretation and translation; and the right to remain silent.

Article 3 of Directive 2012/13/EU imposes an obligation on States to **ensure that suspects and accused persons are informed of their rights** "orally or in writing, in plain and accessible language, taking into account any particular needs of vulnerable suspects or accused persons".

The Court of Justice of the EU (CJEU) has addressed the issue of access to information for defendants with disabilities in Case C-467/2018,⁶² holding that:

"Directive 2012/13 must be interpreted as meaning that persons suspected of having committed a criminal offence must be informed as soon as possible of their rights from the time when they become the subject of suspicions justifying, in circumstances other than an emergency, the restriction of their liberty by the competent authorities by means of coercive measures and, at the latest, before they are formally questioned for the first time by the police."

According to the EU Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, persons with disabilities should receive, upon request, information about their procedural rights in a format accessible to them.⁶² However, we consider that this recommendation errs in stating that accessible information must be requested in advance, when it is the administration of justice that must guarantee the rights of persons with disabilities.

At the national level, art. 118 of the Criminal Procedure Act establishes that any person charged with a punishable act has the right to be informed of the facts with which he or she is charged, as well as of any relevant change in the object of the investigation and of the facts with which he or she is charged. In turn, it recognises that the information shall be provided in a **language that is understandable and accessible to the accused**, adapting the information to their age, degree of maturity, disability and any other personal circumstance that may result in a change in their capacity to understand the scope of the information provided.

On the other hand, art. 520 of the LECrim in relation to the exercise of the right to defence, the assistance of a lawyer and the treatment of detainees and prisoners recognises that any person detained or imprisoned shall be informed in writing, in

⁶² Organic Law 5/2015 of 27 April 2015, which amends the Criminal Procedure Act and Organic Law 6/1985 of 1 July 1985 on the Judiciary to transpose Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings and Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings, transposes these provisions into Spanish law.

simple and accessible language, in a language they understand and immediately, of the facts with which they are charged and the reasons for their deprivation of liberty, as well as the rights they are entitled to.

There are different tools to make information accessible to people with disabilities, the essential thing is to take into account the specific needs of each person to whom the information is addressed.

However, one of the most common tools in the field of intellectual disabilities is easy reading, which is a method that gathers a set of guidelines and recommendations regarding the writing of texts and the design and layout of documents and the validation of their comprehensibility. In other words, it is a way of creating documents that are easier to understand. It can also be used in web pages or video scripts. It takes into account text, design and illustrations and is useful for all people, however it must follow certain rules and its content must be validated by people with comprehension difficulties.

It consists of three steps:

- a. Adaptation of the document by professionals who are familiar with the European rules for easy-to-read adaptation.
- b. Validation of at least 3 people with comprehension difficulties.
- c. Text layout.

Right to communicate

Everyone has the right to understand and be understood in all judicial processes and proceedings, so that access to justice is guaranteed for all.

The convention defines communication in Article 2 as:

“Communication” shall include languages, text display, Braille, tactile communication, large print, accessible multimedia devices, as well as written language, auditory systems, plain language, digitised speech media and other augmentative or alternative modes, means and formats of communication, including accessible information and communications technology.

Article 109 of the Criminal Procedure Act establishes that in proceedings involving persons with disabilities, the necessary adaptations and adjustments shall be made.

These adaptations may relate to **communication, understanding and interaction with the environment**. It must be ensured that:

a) **All communications with persons with disabilities, whether oral or written, are made in clear, simple and accessible language**, in a manner that takes into account their personal characteristics and needs, making use of means such as easy reading. If necessary, communication shall also be made to the person who supports the person with a disability in exercising his or her legal capacity.

b) **The person with a disability is provided with the assistance or support necessary to be understood**, including interpretation in legally recognised sign languages and means of oral communication support for deaf, hard of hearing and deafblind persons.

c) An expert professional is allowed to participate as a facilitator to carry out the adaptation and adjustment tasks necessary for the person with a disability to **understand and be understood**.

(d) The person with a disability may be accompanied by a person of his or her choice from the first contact with authorities and officials.

There are different tools to support people with disabilities in the field of communication, among them:

- Alternative and augmentative communication: means used by a person with difficulties in oral communication to express themselves and interact effectively in any environment, with the necessary support appropriate to their abilities, the use of which is shared with their interlocutors, and which enables them to exercise their rights, as well as their active participation in society, with equal opportunities.
- Assistive listening devices and systems: help amplify the sounds you want to hear, especially when there is a lot of background noise.
- Real-time subtitling systems.
- Software for screen reading, magnification and optical readers.
- Note takers.
- Sign language interpreters or tactile interpreters.
- Relay services.

Right to interpretation and translation

Article 14(3)(h) of the ICCPR establishes as a minimum guarantee that everyone shall have the right, "in full equality", "to be assisted free of charge by an interpreter if [he] does not understand or speak the language used in court".

Article 6(3)(e) of the ECHR provides similar guarantees. Persons with disabilities have the right to access interpretation and translation services to ensure their effective participation in the judicial process. Such interpretation and translation services may be particularly important for persons with visual or hearing impairments.

The Office of the United Nations High Commissioner for Human Rights provides examples of how the CRPD Committee has demonstrated that procedural accommodations can be made through

"[p]rovision of sign language interpretation, legal and judicial information in accessible formats for, multiple media, easy-to-read versions of documents, Braille and video-link testimony, among others".

Under Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, states must ensure that suspects or defendants who do not speak or understand the language of the criminal proceedings are provided with interpretation. This includes the provision of assistance to persons with "hearing or speech impediments", as well as written translation of all documents essential to ensure that persons can exercise their rights of defence and to safeguard the fairness of the proceedings. Article 6 of the Directive also provides that judicial personnel must be trained to communicate with persons who do not speak or understand the language with the assistance of an interpreter. Apart from interpretation for persons with "hearing or speech impairments", the Directive does not contain any specific assistance for disabled persons with other needs. This absence constitutes a gap in EU legislation, which should be directly addressed.

At the national level, art. 520 of the LECrim in relation to the exercise of the right to a defence, the assistance of a lawyer and the treatment of detainees and prisoners recognises that all persons detained or imprisoned shall be informed in writing, in simple and accessible language, in a language they understand and immediately, of the facts with which they are charged and the reasons for their deprivation of liberty, as well as the rights they are entitled to, in particular:

"(h) the right to be assisted free of charge by an interpreter, in the case of a foreigner who does not understand or speak Spanish or the official language of the action in question, or of deaf or hearing-impaired persons, as well as other persons with language difficulties.

Recommendations for justice professionals

1. All persons with disabilities have the right to make decisions for themselves and should have access to all relevant information and support necessary to do so, from the first contact with law enforcement authorities.
 - a. Information should be shared in an accessible manner with accused persons at all stages of the proceedings, including, but not limited to, pre-trial, trial and post-trial information.
 - b. Information about existing support resources and accommodations for people with disabilities, as well as how to access and use them, should be available and communicated in a way that is accessible to people with disabilities.
 - c. Access to a facilitator should be guaranteed to ensure effective communication during all stages of the judicial proceedings.
2. Law enforcement and other justice professionals should ensure that the person with a disability understands his or her rights and procedures.
3. Legal professionals should ensure that defendants with disabilities are provided with accessible and understandable information about their rights at all stages of the process,
 - i. including the right not to testify against oneself;
 - ii. in relation to what will happen in any judicial proceedings,
 - iii. the rules of places of detention, and
 - iv. that they can count on the support of organisations, from their first contact with justice.
4. Where there is communication with the accused person, ensure that it is accessible to him or her, taking into account his or her specific communication needs.

- a. Legal practitioners should have access to a list of concrete tools for accessible communication and clear guidance and examples on how to use them.
5. Written information should be available in a variety of accessible formats: judicial actors should ensure that documents are easy to read and accessible.
6. Ensure adequate training on communication tools and methods for all legal practitioners.
7. At all stages of the proceedings, ensure that all judicial processes provide the necessary technical and other support to enable accused persons with disabilities to use whatever form of communication is necessary for their full participation. This includes:
 - a. Hearing aid systems and devices;
 - b. Open, closed and real-time subtitling, decoders and subtitling devices;
 - c. Voice, text and video-based telecommunications products;
 - d. Videotext displays;
 - e. Real-time computer-assisted transcription;
 - f. Screen reader software, magnification software and optical readers;
 - g. Video description and secondary auditory programming devices that capture the audio signals of television programmes, among others.
8. Provide communication support, including through third parties, for example:
 - h. Note takers;
 - i. Qualified sign language and oral interpreters;
 - j. Relay services;
 - k. and tactile interpreters.
9. Provide legal professionals with training and communication tools that they can use when communicating with persons with disabilities. For example, reading rights in easy-to-read language.

D. Right to access to a lawyer and legal aid

Article 14(3)(d) of the International Covenant on Civil and Political Rights provides for the right to defend oneself by oneself or through legal assistance of one's own choosing; to be informed of one's right, if one does not have it; to have legal assistance assigned to one's defence counsel whenever the interests of justice so require; and to have legal assistance free of charge if one does not have the means to pay for it. This includes the pre-trial phases.

The European Convention on Human Rights recognises the right of access to a lawyer and to legal assistance in Article 6(3), which establishes for any person accused of a criminal offence the right to defend himself in person or through legal assistance of his own choosing or, if he does not have sufficient means to pay for legal assistance, to obtain legal aid where the interests of justice so require.

Spanish jurisprudence, endorsing European doctrine, as required by Article 10.2 of the Spanish Constitution, confirmed that, within the right to defence, the accused is guaranteed three rights: to defend himself, to **defend himself through legal assistance of his own choosing** and, in certain circumstances, **to obtain free legal aid.**⁶³

Under the CRPD, all persons have the right to equality and equal treatment before courts and tribunals and, more generally, in all judicial processes and proceedings. States have a legal obligation to ensure effective access to justice for persons with disabilities on an equal basis with others. Any person arrested or detained and any person facing criminal charges (whether in detention or not) has the right to the assistance of counsel.⁶⁴ Legal counsel is one of the principal means of protecting the human rights of persons accused of criminal offences and, in particular, their right to a fair trial. Whether or not persons have the assistance of a lawyer often determines whether or not they are able to participate in court proceedings in a meaningful way.⁶⁵

As the CRPD Committee has made clear:

"Legal aid is an essential element of a fair, humane and efficient system of administration of justice based on the rule of law. It is a basis for the enjoyment of other rights, including the right to a fair trial and the right to an effective remedy, a

⁶³ SSTC 181/1994 of 20 June 1994 and 29/1995 of 6 February 1995.

⁶⁴ Article 14 of the International Covenant on Civil and Political Rights, Article 13 of the Convention on the Rights of Persons with Disabilities, Human Rights Committee General Comment 32, para. 34.

⁶⁵ HRC General Comment 32, §10.

precondition for the exercise of such rights, and an important safeguard guaranteeing fundamental fairness and public confidence in the administration of justice".⁶⁶

Right of access to a lawyer

The intrinsic connection between the right to defence and legal defence can be inferred from the constitutional text as well as from international and European texts. In the same way that the essential subjects that implement the granting of effective judicial protection are judges, magistrates, magistrates, who are responsible for the duty of judging and applying the law, the legal profession is closely linked to the guarantee of the right to defence. Legal defence is expressly mentioned in Article 24.2 of the Constitution, which states that everyone has the right to a defence and the assistance of a lawyer.

However, when it comes to the legal defence of persons with disabilities, it is not only sufficient to guarantee access to a lawyer, but it is also necessary to ensure the effectiveness of the defence counsel's actions. This means that, in order for such defence to be effective, defence lawyers, in any proceedings, will be subject to an aggravated standard of diligence as they must deploy all the necessary activities aimed at determining whether or not the presence of such disability may affect the specific exercise of their client's right of defence and, if so, to request the implementation of procedural accommodations to ensure the exercise of that right without discrimination.

In this line of reasoning it is necessary to cite STS 1712/2021 of 5 May, which considers that ineffective legal aid can cause defencelessness and, therefore, violate the right of defence contemplated in Article 24 of the Constitution (FJ 2, submotive a 2.3):

*"Technical assistance of the investigated or accused person is an essential functional tool to ensure fair and equitable proceedings. It must therefore be agreed that such assistance must **be effective**. Only legal aid that meets **acceptable standards of effectiveness** can satisfy the constitutional and conventional requirements of justice and fairness to which our model of criminal justice must respond -vid. ECHR, Sakhnovski v. Russia, 2 November 2010.*

⁶⁶ Report of the UN Special Rapporteur on the independence of judges and lawyers, Legal Aid, UN Doc. A/HRC/23/43 (9 April 2013) 3.

Right to free legal aid

Legal defence should also be an equal protection mechanism, which is why legal aid should be available to all those who cannot afford to pay for legal services. According to EU Directive 2016/1919, Member States:

"shall ensure that suspects and accused persons who lack sufficient resources to pay for legal assistance are entitled to legal aid where the interests of justice so require". Furthermore, in terms of Recital 29, "[...] Member States should respect and ensure the rights set out in this Directive, without discrimination on any ground such as [...] disability".

The obligation of States to provide, where appropriate, free legal aid has been recognised. Interpreting the aforementioned Article 6(3)(c) ECHR, in judgments such as that of 13 May 1980, the ECtHR states that

"paragraph c (...) enshrines the right to an adequate defence, either in person or through a lawyer, a right reinforced by the obligation on the State to provide free legal aid in certain cases".

Principle 6 of the International Principles and Guidelines states that persons with disabilities have the right to free or affordable legal assistance in all legal proceedings regardless of the role of persons with disabilities in the proceedings or the possible consequences or outcomes. In turn, States must ensure ease of access to legal aid by removing all administrative, communication and physical barriers to accessing legal aid.

In Spain, Article 119 of the Spanish Constitution recognises that justice will be free of charge when so provided by law and, in any case, for those who can prove insufficient resources to litigate. In turn, Law 1/1996 of 10 January 1996 on free legal aid recognises the possibility of accessing free legal aid in the case of people with disabilities when they do not exceed five times the IPREM (it establishes a higher threshold than in other cases), also taking into account the lack of sufficient assets.

Recommendations for justice professionals

1. The right of access to a lawyer must be guaranteed from the pre-trial stages, before the first police proceedings, and throughout the trial.
 - a. Guarantee accused persons with disabilities the right to legal assistance from the first contact with law enforcement, regardless of the nature of the offence with which they are charged, and under conditions no less favourable than those for persons without disabilities.
 - b. Inform accused persons of their right of access to a lawyer.
 - c. The public defence system must ensure equal access to lawyers who provide high quality services to all accused persons, including persons with disabilities;
 - d. Develop and regularly update a list of legal representatives with disability expertise who are knowledgeable about the rights and procedural accommodations that persons with disabilities may need in legal proceedings.
 - e. Provide basic training on the rights of persons with disabilities to all lawyers.
2. When a person is arrested, or there is any risk that legal proceedings may lead to his or her arrest, it is particularly urgent that he or she has effective access to a lawyer and legal assistance.
3. Legal aid should be provided to all persons who cannot afford to pay for it.
 - a. This should be taken into account for all persons with disabilities, who may find themselves more often in such a situation.
 - b. And it must be guaranteed from the pre-trial stages - before the first proceedings in criminal proceedings - and throughout the trial.
4. Inform persons with disabilities of their right to legal aid and other possibilities, such as access to representation through free legal aid.

E. Right to be present at trial and the right to presumption of innocence

Under general international law, including human rights treaty law, a person accused of a crime enjoys the right to be presumed innocent. This is set out, inter alia, in Article 14(2) of the ICCPR and Article 6(2) of the ECHR. This right is absolute. The right to be present at the trial is provided for in Article 14(3) ICCPR. This right can only be waived by the subjective person himself.

Principle 5 of the UN International Principles explains that

"States shall ensure that all substantive and procedural guarantees recognised in international law, whether in criminal, civil or administrative proceedings, including the presumption of innocence and the right to remain silent, are afforded to all persons with disabilities on an equal basis with others".

According to the Spanish Briefing Paper, there have been cases in which some behaviours displayed by certain persons with disabilities were considered by justice operators as suspicious or uncooperative. For example, a defendant's sincere lack of understanding has often been perceived as a lack of willingness to cooperate, especially in cases involving persons with intellectual disabilities who also have drug use problems. This type of stereotyping can have an impact in terms of the presumption of innocence.

As for the right to be present at trial, this is recognised by the international legal framework, in particular, Article 14(3) of the ICCPR recognises that everyone shall be entitled in full equality to the following minimum guarantees: **to be tried in his presence**.

The ECHR provides that

*"[e]veryone charged with a criminal offence has the following minimum rights: [...] (c) to **defend himself in person** or through legal assistance of his own choosing or, if he does not have sufficient means to pay for legal assistance, to have it assigned to him free of charge if the interests of justice so require.*

According to Article 8 Directive 2016/343/EU⁶⁷ on strengthening certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings, "*Member States shall ensure that suspects and accused persons **have the right to be present at their trial.***"

The right to a fair trial is one of the basic principles of a democratic society. The right of suspects and accused persons to be present at trial is based on that right and must be guaranteed throughout the European Union.

The right of suspects and accused persons to be present at trial is **not absolute**. In certain circumstances, suspects and accused persons must be able to waive that right, expressly or tacitly, but always **unequivocally**.

At the national level, the Supreme Court has expressed in its judgment 3144/2021 of 22 July that

*"The doctrine of the ECtHR points unequivocally to the **need for the accused to attend the trial as the predominant and preferable formula**. This methodology reinforces the guarantees of the right to a fair hearing. At the same time, it allows the accused's statements to be verified and compared with those of the witnesses testifying against him. Although not expressly mentioned, Art. 6.1 of the European Convention on Human Rights assumes such physical presence at the hearing. Indeed, paragraph 3 (c), (d) and (e) guarantees the right to defend oneself in person, to examine or have witnesses examined and to the assistance of an interpreter, if necessary. It is difficult, though not impossible, to **realise these rights without the presence of the accused** (ECHR of 5 October 2006).*

*Where there are exceptional reasons justifying it, remote intervention (e.g. videoconferencing) shall be compatible with the requirements of due process if it is agreed in order to safeguard a justified relevant public interest **and the effective participation of the person in the trial is ensured.***

There is no doubt that persons with comprehension difficulties, such as, for example, persons with intellectual or developmental disabilities, are, **as a general rule, in a**

⁶⁷ The Directive was published in the Official State Gazette on 11 March 2016. The deadline for transposition of the Directive was 1 April 2018, but transposition has not yet taken place. Although certain rights recognised in the Directive, such as the presumption of innocence, are guaranteed by the Spanish Constitution, Spain has a duty to transpose the Directive to further strengthen these guarantees.

situation of special risk for the exercise of their right to defence under equal conditions. But it is clear that this risk increases exponentially when means such as videoconferencing are used, since in the first place it will be particularly difficult for the judicial authority to **determine whether or not the person has a need for support without the presence of both parties**, something that occurs even when there is presence in person.

According to Plena Inclusión's study "A cada lado" (2020) on the situation of prisoners and ex-prisoners with intellectual disabilities in Spain, only in **3.3% of the cases was the presence of the disability detected** during the judicial procedure. Furthermore, secondly, there is no doubt that sacrificing direct communication results in the impossibility of achieving the same level of respect for the procedural guarantees of that person, as well as their effective participation in the procedure, which is why **additional guarantees** must be put in place and this type of mechanism should not be used unless it is absolutely impossible for the person to attend the procedure or it is a procedural accommodations for the person in the specific case.

Recommendations for justice professionals

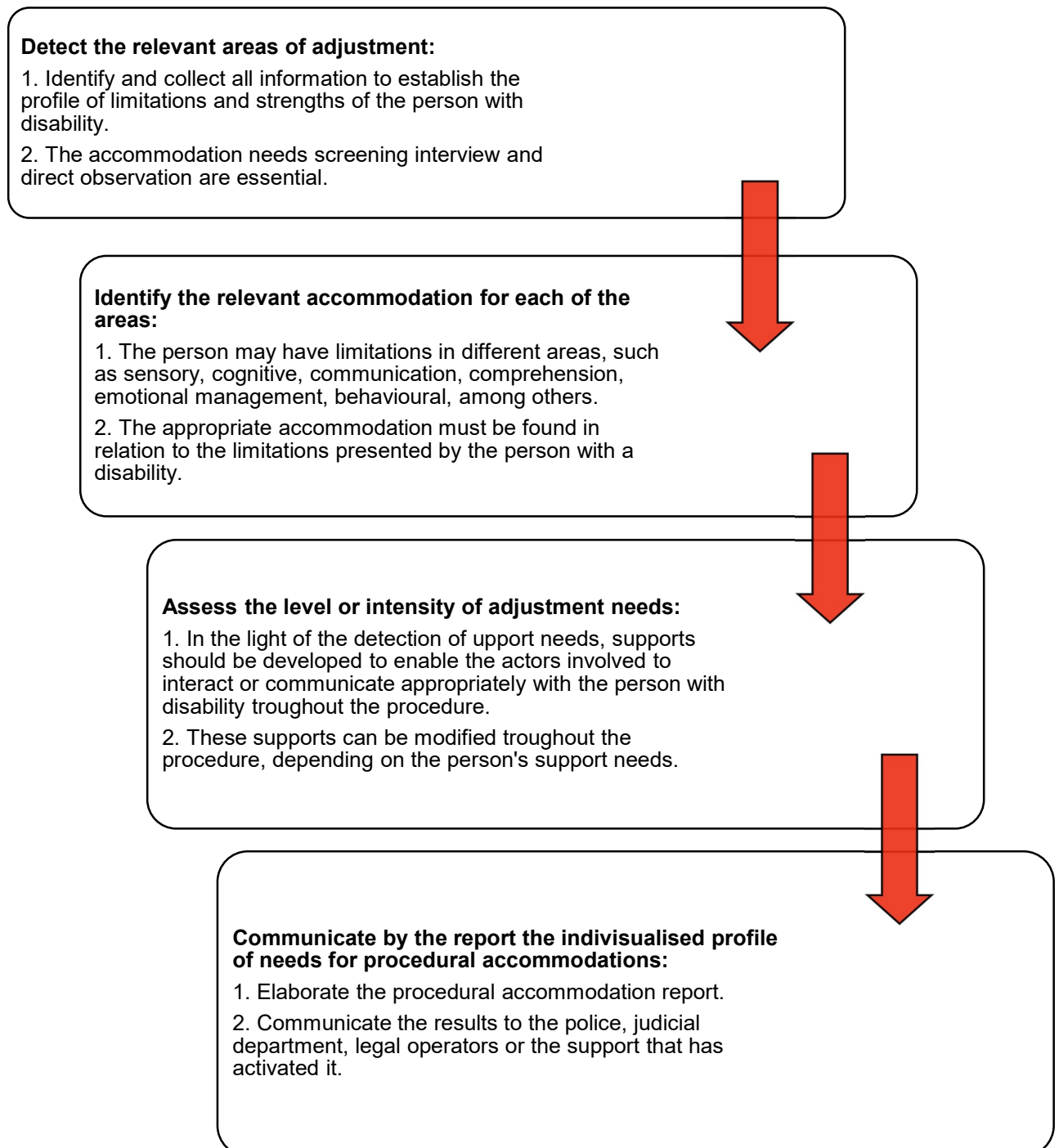
1. Ensure that the right of accused persons with disabilities to be present at trial and to defend themselves in person is respected.
 - a. The exceptions according to the right to be present at the trial apply equally to persons with disabilities.
2. Identify and carefully consider for whom the distance hearing might be (in)appropriate, respecting the person's wishes and preferences or seeking the "best interpretation of wishes and preferences" when the person cannot express them directly.
 - a. If remote hearings are used, ensure adequate training, computer tools and a good internet connection for legal professionals and such access for the person with a disability.
 - b. Ensure access to procedural accommodations, in remote hearings,
 - i. including, where appropriate, the involvement of facilitators,
 - ii. provide communication support also in remote hearings, including through third parties, e.g. note takers, qualified sign language and oral interpreters, relay services and tactile interpreters, if and when necessary.
 - c. Ensure that during a remote hearing, the role of each person participating in the online hearing is clear to everyone, including the accused person with a disability.

- d. Ensure that the pace of the procedures is well adjusted: for example, ensure that sessions are rather short and that there are frequent breaks.
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05

ANNEXES

A. The schematic algorithm of needs assessment and provision of accommodations throughout the criminal proceedings



B. Understanding disability: Examples of impairments

The CRPD itself describes disability as an "evolving concept" and indicates that other persons with disabilities include "those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".⁶⁸

This annex provides a list of different types of disabilities. It should not be interpreted as an exclusive or prescriptive list of disabilities. Rather, it is intended to provide general information on some disabilities, and may be a useful tool for legal operators to ensure the effective participation of persons with disabilities in proceedings.

A contextual analysis and assessment needs to be carried out in each and every individual case to consider whether specific adjustments, procedural or otherwise, are needed on a case-by-case basis.

- **Brain damage**

It is a sudden injury to the brain. It is characterised by its abrupt onset and by a varied set of sequelae depending on the area of the brain injured and the severity of the damage. These sequelae cause abnormalities in perception and communication, as well as physical, cognitive and emotional alterations. The main cause is, in 78% of cases, stroke, followed by traumatic brain injury and diseases such as anoxia, brain tumours or infections.⁶⁹

- **Hearing impairment**

A loss or abnormality of an anatomical and/or physiological function of the auditory system that impairs the ability to hear and results in an immediate hearing impairment. Hearing loss can be congenital, progressive or acquired and can occur at any age. Hearing loss is considered to exist when the decrease in hearing is equal to or greater than 25 decibels.⁷⁰

- **Developmental disability**

This term is used for all those disabilities that originate in the time of development; generally, in our culture, this time is limited to the first 22 years of a person's life. It

68 CRPD, Preamble, (e).

69 Spanish Federation of Cerebral Damage (FEDACE): <https://fedace.org/dano-cerebral>.

70 FIAPAS: <http://www.fiapas.es/que-es-lasordera>

indicates limitations in relevant areas of life such as language, mobility, learning, self-care and independent living.⁷¹

- **Physical disability**

It refers to the decrease or absence of motor or physical functions, which in turn has repercussions on the development or way of carrying out certain activities in a society that presents severe limitations and barriers. For this reason, people with physical disabilities encounter difficulties in carrying out movements or manipulating objects and it can affect other areas such as language. It occurs when a person has a physical condition that permanently and irreversibly prevents them from moving with the full functionality of their motor system. People with physical disabilities are those who have a significant decrease in the ability to move one or more parts of the body. This may refer to reduced or uncoordinated movement, impaired muscle tone or impaired balance.⁷²

- **Intellectual disability**

Intellectual disability implies a series of limitations in the skills that the person learns to function in daily life and that allow him/her to respond to different situations and places. Intellectual disability is expressed in the relationship with the environment. Therefore, it depends both on the person himself and on the barriers or obstacles around him. If we achieve an easier and more accessible environment, people with intellectual disabilities will have less difficulties, and therefore their disability will seem less. People with intellectual disabilities find it more difficult than others to learn, to understand and to communicate. Intellectual disability is usually permanent, i.e. lifelong, and has a major impact on the life of the person and his or her family.⁷³

- **Organic disability**

This is caused by the loss of functionality of some body systems, usually related to internal organs or physiological processes, whether congenital or acquired. This is the case of renal diseases (kidney), hepatic diseases (liver), cardiopathies (heart), cystic fibrosis (lungs), Crohn's disease and metabolic diseases (digestive system); lymphedema (lymphatic system), haemophilia (blood clotting), lupus (immune system); and headaches, migraines, Alzheimer's, Parkinson's, sleep disorders, fibromyalgia or

71 Plena Inclusión: <https://www.plenainclusion.org/discapacidad-intelectual/recurso/discapacidad-del-desarrollo/>.

72 COCEMFE: <https://www.cocemfe.es/informate/discapacidad-fisica-organica/>.

73 Plena Inclusión: <https://www.plenainclusion.org/discapacidad-intelectual/recurso/discapacidad-intelectual/>

chronic fatigue syndrome (central nervous system). In addition to invisibility, family, social and occupational misunderstanding and the lack of official recognition by the administration, there are different problems in each of them that pose major obstacles to daily life and affect quality of life.⁷⁴

- **Psychosocial disability**

This term refers to people who have received a mental health diagnosis and who have experienced negative social factors such as stigma, discrimination and exclusion. People living with psychosocial disabilities are former and current users of mental health services, as well as people who identify as survivors of these services or with the psychosocial disability itself.⁷⁵

- **Visual impairment**

Visual impairment is the consideration of total or partial visual impairment. It is measured through various parameters, such as near and distance reading ability, visual field or visual acuity. In this sense, when we speak in general of blindness or visual impairment, we are referring to conditions characterised by a total or very serious limitation of visual function in one or more of these measured parameters.⁷⁶

- **Cerebral palsy**

Cerebral palsy is a multi-disability caused by an injury to the brain that occurs before its full development and maturation. The injury that causes cerebral palsy may occur before birth, at birth, or after birth, up to the age of three. 80% of people with cerebral palsy have significant support needs, whether physical, cognitive, communication or a combination of 2 or more factors. 1 in 500 people have cerebral palsy in Spain, so 120,000 people are living with cerebral palsy in our country.⁷⁷

- **People with high support needs**

These are people who require extensive and generalised support in the basic and instrumental activities of daily living, the provision of which enables them to make their

74 COCEMFE: <https://www.cocemfe.es/informate/discapacidad-fisica-organica/>.

75 World Health Organization (2021). Mental Health Atlas 2020. World Health Organization.

76 <https://www.once.es/dejanos-ayudarte/la-discapacidad-visual>

77 ASPACE Confederation: <https://aspace.org/>.

own decisions, exercise their personal autonomy and participate in the community. In any case, these are considered to be those who have an official declaration of dependency, in accordance with the provisions of Act 39/2006, 14th December, on the Promotion of Personal Autonomy and Care for Dependent Persons, and those who are recognised as needing the assistance of a third person.

- **Person with deafblindness**

A person with a combined impairment of sight and hearing that makes access to information, communication and mobility difficult. This disability severely affects the daily skills necessary for a minimally autonomous life, requires specialised services, specifically trained personnel and special methods of communication.⁷⁸

- **Mental Health**

The concept of mental health is related to the promotion of well-being, the prevention of mental disorders and the treatment, rehabilitation and recovery of those affected. It can be said, therefore, that mental health is an aspect of a person's well-being, something we have to take care of, pay attention to and deal with if necessary. Everyone is likely to have a mental disorder. In fact, according to the World Health Organisation, one in four people will experience a mental disorder in their lifetime. Contrary to popular belief, having a mental health problem does not prevent you from living a full life, getting a job, starting a family or enjoying any aspect of life.⁷⁹

- **Down Syndrome**

It is the leading cause of intellectual disability and the most common human genetic disorder. This chromosomal abnormality is not considered a disease. People with Down syndrome show some common characteristics but each individual is unique, with a unique appearance, personality and abilities. With appropriate stimulation, they can study, work and live independently with the necessary supports.⁸⁰

- **Autism Spectrum Disorder**

It is a disorder of neurobiological origin that affects the configuration of the nervous system and brain functioning, resulting in difficulties in two areas of developmental

⁷⁸ Spain. Law 27/2007, of 23 October, which recognises Spanish sign languages and regulates the means of support for oral communication of deaf, hearing impaired and deafblind people. Official State Gazette, 24 October 2007, No. 255, pp. 43251-43259.

⁷⁹ Confederación Salud Mental España: <https://consaludmental.org/informate/>.

⁸⁰ Down Spain: <https://www.sindromedown.net/lf/sindrome-down/>.

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development: communication and social interaction and flexibility of thought and behaviour.⁸¹

⁸¹ Confederación Autismo España: [http:// www.autismo.org.es/sobre-los-TEA](http://www.autismo.org.es/sobre-los-TEA).

C. Directory

- Asociación a Favor de Personas con Discapacidad de la Policía Nacional (AMIFP): <https://www.amifp.org/>
- Disability Business Association (AEDIS): <https://www.asociacionaedis.org/>
- Spanish Centre for Cognitive Accessibility (CEACOG): <https://www.ceacog.es/>
- Spanish Committee of Representatives of People with Disabilities (CERMI): <https://cermi.es/>
- Confederación ASPACE Parálisis Cerebral: <https://aspace.org/>
- Confederación Autismo España: <https://autismo.org.es/>
- Spanish Confederation of Families of Deaf People (FIAPAS): <https://fiapas.es/>
- Confederación Española de Personas con Discapacidad Física y Orgánica: <https://www.cocemfe.es/>
- Confederación Estatal de Personas Sordas (CNSE): <https://www.cnse.es/>
- Confederación Salud Mental España: <https://consaludmental.org/>
- Dincat. Plena Inclusion Catalunya: <https://www.dincat.cat/>
- Down Spain: <https://www.sindromedown.org/>
- FADEMGA. Plena Inclusion Galicia: <https://www.fademga.org/es/>
- Federación Española de Daño Cerebral (FEDACE): <https://fedace.org/>
- FEVAS. Plena Inclusion Euskadi: <https://fevas.org/>
- Accessible Prosecutor's Office: <https://www.fiscal.es/web/fiscalia-accesible>
- Specialised Prosecutor's Office for the Protection of Persons with Disabilities and Elderly: <https://www.fiscal.es/-/personas-con-discapacidad-y-mayores>
- Justice and Disability Forum. Spanish Judiciary: <https://www.poderjudicial.es/cgpj/es/Temas/Foro-Justicia-y-Discapacidad/Presentacion/>
- A la Par Foundation: <https://alapar.org/>

- AEquitas Foundation: <https://aequitas.notariado.org/liferay/web/aequitas/inicio>
- Law and Disability Foundation: <https://www.fderechoydiscapacidad.es/>
- Guardia Civil: <https://www.guardiacivil.es/es/index.html>
- Liber. Association of Decision Support Organisations: <https://www.asociacionliber.org/>
- Spanish National Organisation for the Blind (ONCE): <https://www.once.es/>
- Plena inclusió Illes Balears: <http://plenainclusiobalears.org/>
- Plena Inclusion Andalusia: <https://www.plenainclusionandalucia.org/>
- Plena Inclusion Aragon: <https://www.plenainclusionaragon.com/>
- Plena Inclusion Asturias: <https://plenainclusionasturias.org/>
- Plena Inclusion Canarias: <https://www.plenainclusioncanarias.org/>
- Plena Inclusion Cantabria: <https://www.plenainclusioncantabria.org/>
- Plena Inclusion Castilla La Mancha: <https://www.plenainclusionclm.org/>
- Plena Inclusion Castilla León: <https://www.plenainclusioncyl.org/>
- Plena Inclusion Ceuta: <https://plenainclusionceuta.org/>
- Plena inclusión Comunidad Valenciana: <https://plenainclusioncv.org/>
- Plena Inclusion Extremadura: <https://plenainclusionextremadura.org/plenainclusion/>
- Plena Inclusion La Rioja: <https://www.plenainclusionlarioja.org/>
- Plena Inclusion Madrid: <https://plenainclusionmadrid.org/>
- Plena Inclusion Melilla: <https://www.plenainclusionmelilla.org/>
- Plena inclusión Navarra: <https://plenainclusionnavarra.org/>
- Plena Inclusion Region of Murcia: <https://plenainclusionmurcia.org/>
- National Police: https://www.policia.es/_es/index.php
- Royal Board on Disability: <https://www.rpdiscapacidad.gob.es/>
- Special Olympics Spain: <https://www.specialolympics.es/>

D. Further readings

- 10 tips to improve access to justice. Easy reading:
<https://www.plenainclusion.org/publicaciones/buscador/10-consejos-para-mejorar-el-acceso-a-la-justicia-lectura-facil/>
- On either side. Report on the situation of prisoners and ex-prisoners with intellectual disabilities in Spain:
<https://www.plenainclusion.org/publicaciones/buscador/a-cada-lado-informe-sobre-la-situacion-de-personas-con-discapacidad-intelectual-reclusas-y-ex-reclusas-en-espana/>
- Access to Justice: Procedural accommodations for Persons with Intellectual or Developmental Disabilities:
<https://www.plenainclusion.org/publicaciones/buscador/acceso-a-la-justicia-ajustes-de-procedimiento-para-personas-con-discapacidad-intelecual-o-del-desarrollo/>
- Record of detention and information of the rights of the minor under 18 years of age detained for the initiation of a case file in easy reading:
https://www.guardiacivil.es/web/web/documentos/prensa/lectura_facil/Protocolo06_GuardiaCivil_Final.pdf
- Act of information of rights for victims of sexual or violent crimes:
https://www.policia.es/miscelanea/ufam/acta_victima_sexuales.pdf
- Act of information of rights to the victim of a crime:
https://www.policia.es/miscelanea/ufam/acta_victima_delito.pdf
- Procedural Settings. Procedural Facilitator's Guide:
<https://www.ceacog.es/download/4870/?tmstv=1720171838>
- Police Care for Persons with Intellectual Disabilities:
https://www.policia.es/miscelanea/ufam/triptico_int_pol_pers_discapacidad.pdf
- Best practices on police intervention in the field of disability: case solving:
<https://www.amifp.org/media/download/66283>
- Procedural Facilitator Code of Good Practice:
<https://www.ceacog.es/download/4763/?tmstv=1715005697>

- Procedural Facilitator Code of Ethics:
<https://www.ceacog.es/download/4770/?tmstv=1715005863>
- Augmentative and alternative communication in the legal field: a guide for legal practitioners and facilitators:
<https://www.plenainclusion.org/publicaciones/buscador/comunicacion-aumentativa-y-alternativa-en-el-ambito-juridico-guia-para-operadores-juridicos-y-facilitadores-plena-inclusion/>
- Good Practice Notebook. Intervention guide for people with intellectual disabilities affected by the penitentiary penal regime:
<https://www.plenainclusion.org/publicaciones/buscador/cuaderno-de-buenas-practicas-guia-de-intervencion-para-personas-con-discapacidad-intelectual-afectadas-por-el-regimen-penal-penitenciario/>
- Arrest proceedings and information on rights and elements to challenge the arrest in easy reading:
https://www.guardiacivil.es/web/web/documentos/prensa/lectura_facil/Protocolo07_GuardiaCivil_Final.pdf
- Diligence of information of rights to the person under 18 years of age investigated and not detained in easy reading:
https://www.guardiacivil.es/web/web/documentos/prensa/lectura_facil/Protocolo03_GuardiaCivil_Final.pdf
- UN Guidelines on disability-inclusive language:
<https://www.ungeneva.org/sites/default/files/2021-01/Disability-Inclusive-Language-Guidelines.pdf>
- Briefing paper on the barriers faced by defendants with intellectual or psychosocial disabilities in the judicial system in Spain:
<https://www.plenainclusion.org/publicaciones/buscador/documento-informativo-sobre-las-barreras-que-enfrentan-las-personas-acusadas-con-discapacidad-intelectual-o-psicosocial-en-el-sistema-judicial-en-espana/>
- Guide to Police Intervention with Persons with Intellectual Disabilities:
https://www.policia.es/miscelanea/ufam/guia_int_pol_pers_discapacidad.pdf
- Clear judicial drafting guide:
https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/InstListDownload/Guía_clear_judicial_drafting.pdf

- Information for detainees in easy-to-read language:
https://transparencia.aragon.es/sites/default/files/documents/lf_derechos_personas_detenidas.pdf
- Easy-to-read information for research subjects:
<https://www.plenainclusion.org/publicaciones/buscador/derechos-de-las-personas-investigadas-lectura-facil/>
- Information for all. European rules for making information easy to read and understand:
<https://www.plenainclusion.org/publicaciones/buscador/informacion-para-todos-pautas-europeas-de-la-lectura-facil/>
- Report: Facilitating access to justice:
<https://www.plenainclusion.org/publicaciones/buscador/la-facilitacion-en-el-acceso-a-la-justicia/>
- Report: People with intellectual or developmental disabilities rate the lack of accessibility to Justice. Easy reading:
<https://www.plenainclusion.org/publicaciones/buscador/informe-las-personas-con-discapacidad-intelectual-o-del-desarrollo-valoran-la-falta-de-accesibilidad-a-la-justicia-lectura-facil/>
- The facilitator in legal proceedings:
<https://www.plenainclusion.org/publicaciones/buscador/la-persona-facilitadora-en-procesos-judiciales/>
- The Prison Step by Step (easy-to-read version):
<https://www.plenainclusion.org/publicaciones/buscador/la-prision-paso-a-paso-version-en-lectura-facil/>
- Proposal for the professional development of the procedural facilitator:
<https://www.plenainclusion.org/publicaciones/buscador/propuesta-de-desarrollo-profesional-de-la-figura-del-facilitador-procesal/>
- Procedural facilitator's protocol:
<https://www.plenainclusion.org/publicaciones/buscador/protocolo-de-actuacion-del-facilitador-procesal/>

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- VOICES 471. Special on Justice and the Facilitator:
<https://www.plenainclusion.org/publicaciones/buscador/voces-471-especial-sobre-justicia-y-persona-facilitadora/>
- International Commission of Jurists, [Model Disability Benchbook on the Rights of Persons with Disabilities in Criminal Proceedings](#), 2024
- Validity Foundation, [Fair Trial Denied: Defendants with Disabilities Face Inaccessible Justice in the EU](#), 2024