OPSIDIANET

VULNERABLE OFFENDERS

The Rights of Suspects and Accused with Psychosocial and Intellectual Disabilities

This report strives to bring together strands of scientific research from various fields, in order to shed some light on people with intellectual and psychosocial disabilities and the challenges they face in their interaction with the police and judicial authorities during criminal proceedings. The report was developed within the framework of the project *Offenders with Psychosocial and Intellectual Disabilities: Identification, Assessment of Needs and Equal Treatment (OPSIDIANET)*, funded by the European Union's Justice Programme (2014-2020).

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ABBREVIATIONS

AAIDD American Association on Intellectual and Developmental Disabilities
CRPD Convention on the Rights of Persons with Disabilities
DSM-5 Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition
ECHR European Convention on Human Rights
ECtHR European Court of Human Rights
EU European Union
FRA European Union Agency for Fundamental Rights
ICF International Classification of Functioning, Disability and Health
UN The United Nations
WHO World Health Organization

REPORT OVERVIEW

Several studies have demonstrated that psychological vulnerabilities in police suspects could interfere with the demand characteristics of an interrogation, for example with understanding the consequences of answers, and with giving a reliable, accurate and coherent statement[1]. Hence, it is no surprise, that people with intellectual and/or psychosocial disabilities comprise a disproportionate number of the people who are arrested, who come before the courts and who are deprived from liberty. The reasons for this are complex, but are generally attributed to clinical risk factors, such as co-occurring substance use problems and treatment non-compliance, as well as social and systemic factors, such as improperly implemented deinstitutionalisation policies, homelessness and poverty, community disorganisation, poorly funded and fragmented community-based mental health and social services, hospital emergency room bed pressures, overly restrictive civil commitment criteria, intolerance of social disorder, and criminal law reforms[2].

This report strives to bring together strands of scientific research from various fields, in order to shed some light on people with intellectual and psychosocial disabilities and the challenges they face in their interaction with the police and judicial authorities during criminal proceedings.

The introductory Sections provide general information about the research design and the methodology, used in this report.

Section I provides background to the evolution of the notion of disability as a whole and intellectual and psychosocial disabilities, in particular. Section II gives further context by presenting an overview of relevant human rights standards, at international and EU level.

Sections III-V explore the different legal systems in each of the four partner countries – Belgium, Bulgaria, Greece and Italy, with a focus on how people with psychosocial and intellectual disabilities are treated during criminal proceedings (i.e. their legal status, special procedural rules and practices and custodial and non-custodial measures, applicable to them). These sections compare and contrast jurisdictions

1 Gudjonsson, G. H. „Psychological vulnerabilities during police interviews: Why are they important?", Legal and Criminological Psychology, vol. 15, 2011, pp. 165–171.; Gudjonsson, G. H., and T. Joyce, T. "Interviewing adults with intellectual disabilities", Advances in Mental Health and Intellectual Disabilities, vol. 5, 2011, pp.16–21.; O'Mahony, B. M., B. Milne and T. Grant. "To challenge, or not to challenge? Best practice when interviewing vulnerable suspects", Policing, vol. 6, 2012, pp. 301–313.

2 Johann Brink et al. A Study of How People with Mental Illness Perceive and Interact with the Police, Mental Health Commission, 2011, https://www.mentalhealthcommission.ca/sites/default/files/Law_How_People_with_Mental_Illness_Perceive_Interact_Police_Study_ENG_1_0_1.pdf.

and examine how the identification, the assessment of needs and the equal treatment of the offenders with intellectual and/or psychosocial disabilities in the criminal proceedings are or are not being secured under current law and policy. Throughout, the report also seeks to convey the various alternative arrangements that are being developed in each country, so as to capture innovative ideas in law and policy.

METHODOLOGY

The report is grounded in an extensive literature review featuring both primary and secondary sources. The literature review is spanned between the triple focus of the project on 1) Legal status of individuals with psychosocial and intellectual disabilities, 2) Procedural rules and practices applicable to offenders with psychosocial or intellectual disabilities and 3) Custodial and non-custodial measures during criminal proceedings.

In addition, it draws upon four national reports on the identification, assessment of needs and equal treatment of offenders with psychosocial and intellectual disabilities, covering Belgium[3], Bulgaria[4], Greece[5] and Italy[6]. The reports include information on the factors affecting the social status of suspects and accused with psychosocial or intellectual disabilities. Particular attention was paid to the following:

a) General legal status of persons with psychosocial and intellectual disabilities;

b) Legal status of persons with psychosocial and intellectual disabilities in the area of criminal law;

c) Safeguards for protection of the rights of persons with psychosocial and intellectual disabilities, who have become involved in criminal proceedings as suspects or accused;

d) Custodial and non-custodial measures, that can be imposed on suspects and accused with psychosocial or intellectual disabilities during criminal proceedings;

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3 Droit au Droit. Country Report on Procedural Rights of Suspects and Accused with Psychosocial or Intellectual Disabilities: Belgium, March 2019, https://www.opsidianet.eu/2019/03/28/procedural-rights-of-suspects-and-accused-with-psychosocial-or-intellectual-disabilities-in-belgium-2/.

4 Center for the Study of Democracy. Country Report on Procedural Rights of Suspects and Accused with Psychosocial or Intellectual Disabilities: Bulgaria, March 2019, https://www.opsidianet.eu/2019/03/28/procedural-rights-of-suspects-and-accused-with-psychosocial-or-intellectual-disabilities-in-bulgaria-2/.

5 Centre for European Constitutional Law. Country Report on Procedural Rights of Suspects and Accused with Psychosocial or Intellectual Disabilities: Greece, March 2019, https://www.opsidianet.eu/2019/03/28/procedural-rights-of-suspects-and-accused-with-psychosocial-or-intellectual-disabilities-in-greece/.

6 The Pope John XXIII Community Association. Country Report on Procedural Rights of Suspects and Accused with Psychosocial or Intellectual Disabilities: Italy, March 2019, https://www.opsidianet.eu/2019/03/28/procedural-rights-of-suspects-and-accused-with-psychosocial-or-intellectual-disabilities-in-italy/.

e) Alternative measures, that can be imposed on persons with psychosocial and intellectual disabilities who have committed an offence but could not be held criminally responsible for it;

f) Promising practices in regard to persons with psychosocial or intellectual disabilities in criminal proceedings.

I. INTELLECTUAL AND PSYCHOSOCIAL DISABILITY

1. Intellectual disability

The influential definition of intellectual disability (also known as general learning disability, mental retardation, mental or intellectual handicap) is that of the American Association on Intellectual and Developmental Disabilities (AAIDD) (formerly known as the American Association on Mental Retardation), which defines *intellectual disability* as a disability characterised by significant limitations in both **intellectual functioning** and in **adaptive behaviour**, which covers many everyday social and practical skills and age of onset before 18 years[7]. Similarly, the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5)[8] defines the term intellectual disability as involving impairments of general mental abilities that impact adaptive functioning in three domains: 1) conceptual (skills in language, reading, writing, reasoning, knowledge and memory); 2) social (empathy, social judgement, interpersonal communication skills, etc) and 3) practical (personal care, job responsibilities, organising work tasks, etc).

Deficits in intellectual functioning generally include challenges in reasoning, problem solving, planning, abstract thinking, judgement, academic learning, and learning from experience, while adaptive functioning deficits result in failure to achieve age appropriate standards of behaviour[9].

According to the World Health Organisation (WHO) intellectual disability means a significantly reduced ability to understand new or complex information and to learn and apply new skills (impaired intelligence). This results in a reduced ability to cope independently (impaired social functioning), and begins before adulthood, with a lasting effect on development[10].

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7 American Association on Intellectual and Developmental Disabilities. Definition of Intellectual Disability, http://aaidd.org/intellectual-disability/definition.

8 DSM is the manual used by clinicians and researchers to diagnose and classify mental disorders. The American Psychiatric Association (APA) published DSM-5 in 2013, culminating a 14-year revision process. APA is a national medical specialty society whose more than 37,000 physician members specialise in the diagnosis, treatment, prevention and research of mental illnesses, including substance use disorders.

9 See American Psychiatric Association. Intellectual Disability, 2013, https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Intellectual-Disability.pdf and MentalHelp.net. Diagnostic Criteria for Intellectual Disabilities: DSM-5 Criteria, https://www.mentalhelp.net/articles/diagnostic-criteria-for-intellectual-disabilities-dsm-5-criteria/.

10 See World Health Organization Regional Office for Europe, Definition: Intellectual disability, http://www.euro.who.int/en/health-topics/noncommunicable-diseases/mental-health/news/news/2010/15/childrens-right-to-family-life/definition-intellectual-disability.

Intellectual disability is further categorised into four levels of severity: mild, moderate, severe, and profound.

Severity Category	Approximate Percent Distribution of Cases by Severity	DSM-5 Criteria (severity classified on the basis of daily skills)	AAIDD Criteria (severity classified on the basis of intensity of support needed)
Mild	85%	Can live independently with minimum levels of support	Intermittent support needed during transitions or periods of uncertainty
Moderate	10%	Independent living may be achieved with moderate levels of support, such as those available in group homes	Limited support needed in daily situations
Severe	3.5%	Requires daily assistance with self-care activities and safety supervision	Extensive support needed for daily activities
Profound	1.5%	Requires 24-hour care	Pervasive support needed for every aspect of daily routines

Source: Mental Disorders and Disabilities Among Low-Income Children. Committee to Evaluate the Supplemental Security Income Disability Program for Children with Mental Disorders; Board on the Health of Select Populations; Board on Children, Youth, and Families; Institute of Medicine; Division of Behavioural and Social Sciences and Education; The National Academies of Sciences, Engineering, and Medicine; Boat TF, Wu JT, editors. Washington (DC): National Academies Press (US); 2015 Oct 28.

Because the great majority of intellectually challenged people suffer from a disability with mild or moderate severity, their deficits may be difficult to perceive in an initial interaction, especially by non-specialists, such as law enforcers, judges, prosecutors and defence lawyers. Hence, it would be relatively easy to overestimate their intellectual capacity to understand the meaning and significance of the complex concepts of judicial proceedings[11]. As a result, people in the justice system often

[11] See Morgan Cloud et al. "Words without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects", University of Chicago Law Review, vol. 69 (53), 2002, pp. 495-624, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5134&context=uclrev.

misinterpret the communication and behavioural issues resulting from an individual's intellectual disability.

Equal recognition of persons before the law is a long-established human rights principle. Nevertheless, legal frameworks in many European Union Member States allow for the legal capacity of persons with intellectual disabilities to be restricted or removed under certain conditions. Even for those who are deemed competent, other barriers may stop them actually exercising the rights granted by law.

In the area of criminal justice, limited intellectual abilities, not amounting to learning disability, can influence the ability of suspects and accused to understand questions, articulate their answers and appreciate their implications. Many people with intellectual disability may respond to questions in a manner they believe is expected of them in order to please a person perceived to be an authority figure, thus giving the answers he or she believes are the desired ones rather than the correct ones. [12] Moreover, they may try to hide their disability and for example, answer a question to which they do not know the answer, so as not to appear 'stupid'[13]. Many individuals with intellectual disabilities also have memory lapses, especially with regard to facts or events they did not identify as important[14] and these lapses may be mistaken for lying.

People with intellectual disabilities may be more prone to suggestibility, catering their responses to the social cues of others and giving answers which may not necessarily be true[15]. Thus, leading questions by interviewing officers may be a distinct problem. Gudjonsson and Clark[16] suggest that there is a negative relationship between intelligence and suggestibility. It is argued, that on the one hand, suggestibility is related to uncertainty, which itself depends to a certain extent on the memory capacity of the individual and memory is significantly correlated with intelligence. On the other hand, suggestibility is thought to be influenced by the person's ability to cope with uncertainty, expectations and pressure, associated with interrogation. Persons with low intelligence would have more limited intellectual resources to assist

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12 Ibid.

13 Ierace, M. *Intellectual Disability – A Manual for Criminal Lawyers*. Redfern Legal Centre's Intellectual Disability Rights Service, 1989.

14 Clare, I.C.H. & G.H. Gudjonsson. "Interrogative Suggestibility, Confabulation, and Acquiescence in People with Mild Learning Disabilities (Mental Handicap): Implications for Reliability During Police Interrogations", British Journal of Clinical Psychology, 1993, pp. 295-299.;
Ellis, James W. & Ruth A. Luckasson. "Mentally Retarded Criminal Defendants", George Washington Law Review, vol. 53, 1985, pp. 414-427.

15 Clare, I.C.H. & G.H. Gudjonsson. "Interrogative Suggestibility, Confabulation, and Acquiescence in People with Mild Learning Disabilities (Mental Handicap): Implications for Reliability During Police Interrogations", British Journal of Clinical Psychology, 1993, pp. 295-299

16 Gudjonsson, G. H. and N.K. Clark. "Suggestibility in police interrogation: A social psychological model" *Social Behaviour, vol. 1*(2), 1986, pp. 83-104.

them to cope with an unfamiliar task, such as interrogation. Suggestibility is, as far as intelligence is concerned, most strongly associated with the capacity for logical reasoning, sequential thought, and social awareness and sophistication. In other words, people who can quickly assess a social situation are more able to critically evaluate the interrogative situation and adopt a facilitative problem-solving approach. However, there is strong evidence that the relationship between suggestibility and intelligence is significantly affected by range effects and an IQ range of average or above appears to have no significant correlation with suggestibility.

Studies show that people with significant intellectual impairment do not fully appreciate the legal consequences for suspects of making self-incriminating admissions during questioning. Therefore, their ability to make informed decisions during interrogation is impaired. For a study on decision making Clare and Gudjonsson[17] designed an experiment. A fictional film was made of a police interrogation, depicting a male suspect making a true and a false confession. At scheduled pauses during, and just after, the film, items from a semistructured interview schedule were presented. Compared with their average intellectual ability counterparts, the participants with intellectual disabilities were less likely to think that a police interview and a false confession might have serious consequences for the suspect. While the great majority of the average intellectual ability participants (95%) stated that the suspect would be remanded in custody until the trial, less than a half of those with intellectual disability (48%) believed this would the case. Their views reflected the importance they placed on the suspect's actual, rather than professed, guilt or innocence. The intellectually disabled participants were significantly more likely than the average intellectual ability participants to believe the suspect would be allowed to go home after making a confession to murder. They were also nearly 5 times more likely to state that the interrogator would believe the suspect if he retracted the confession (24% versus 5%).

Regarding the need for legal advice of the suspect, 90% of the average intellectual ability participants believed it necessary, in contrast to 52% of those with intellectual disability. Most importantly, the participants with intellectual disability were particularly likely to say that no legal advice was needed if the suspect was innocent of the offence. Moreover, they believed that an innocent suspect might be protected because his or her innocence would be evident to others.

The main implication of these findings is that persons with intellectual disability have an impaired capacity for rational decision making concerning custodial interrogation and confessions. They are likely to fail to fully appreciate the consequences of their

[17] Clare, I.C.H. & Gudjonsson, G.H. "The vulnerability of suspects with intellectualdisabilities during police interviews: a review and experimental study of decisionmaking", Mental Handicap Research, vol. 8, 1995, pp. 110–128.

participation in this type of judicial proceedings and believe that if they are innocent then the system will protect them regardless of their own statements. [18] This is why typical police interrogation tactics pose heightened risk of false confession for people with intellectual disabilities[19].

2. Psychosocial disability

Unlike intellectual disability, which is a generalised neurodevelopmental disorder and therefore a medical condition, psychosocial disability is an internationally recognised term, used to describe the experience of people with impairments and participation restrictions related to mental health conditions. These impairments can include a loss of ability to function, think clearly, experience full physical health, and manage the social and emotional aspects of their lives. It is also important to note, that the presented below information about this condition is extracted from almost exclusively Australian sources, which is to show, that awareness and care for this specific type of disability are still not very well developed worldwide.

In order to fully comprehend the concept of psychosocial disability and relation to a mental health condition, it is important to first explore the meaning of the term "disability". The following section is dedicated to some of the most widespread understandings of the term "disability" and is by no means exhaustive on the subject.

2.1. Models of disability

Models of Disability are tools for defining impairment and for providing a basis upon which government and society can devise strategies for meeting the needs of disabled people. Models are influenced by two fundamental philosophies. The first sees disabled people as dependent upon society, which can lead to paternalism, segregation and discrimination. The second perceives disabled people as equal participants in society. This leads to choice, empowerment, equality of human rights, and integration.

The charity approach is characterised by treating people with disabilities as unable to provide for themselves and hence in constant need of either charity or welfare payments. Under this model, persons with disabilities are disempowered, not in control of

[18] Gudjonsson, Gisli, The Psychology of Interrogations and Confessions: A Handbook. Chichester: John Wiley & Sons, 2003, http://www.al-edu.com/wp-content/uploads/2014/05/Gudjonsson-The-Psychology-of-Interrogations-and-Confessions.pdf.

[19] Schatz, Samson. "Interrogated with Intellectual Disabilities: The Risk of False Confession", Stanford Law Review, vol. 70, 2008, https://pdfs.semanticscholar.org/1438/ed8bccfc2fcaec8e509379edecd-88f41a08c.pdf.

their lives and have little or no participation. Ultimately, this model leads to additional division of people with disabilities from society, by victimising them and viewing them as a burden, dependent on the goodwill of society.

The medical model of disability views 'disability' as a health condition dealt with by medical professionals. People with disability were thought to be different to 'what is normal' or abnormal. 'Disability' was seen to be a problem of the individual. From the medical model, a person with disability is in need of being fixed or cured. This approach to disability has been rejected by many individuals with disability and disability advocacy groups, because it ignores the ability of many individuals to live full and successful lives and to be independent.

Based on the medical model, **the rehabilitation model** assumes that with adequate effort, one can overcome their disability. Not overcoming the disability is often perceived as a failure. A main deficiency of this approach is that it doesn't consider the reality of permanent disability. Furthermore, since it is very similar to the medical model, it is also a subject of criticism by many people with disabilities.

To both previous models' contrast stands the newer concept of **social model of disability**, which seeks to change society in order to accommodate people living with impairment, instead of trying to change persons with impairment to accommodate society. In this context, **disability** is the result of the interaction between people living with impairments and barriers in the physical, attitudinal, communication and social environment. The social model does not deny that a person has differences, or that these differences have an impact on their life, but aims to enable them to participate in society on an equal basis with others. The social model of disability views impairments as valuable diversity in ability of all members of society. It uses a strengths-based approach to identifying the supports needed for people with a disability to participate equally. In other words, it focuses on people's capabilities, identifies obstacles to participation and seeks to overcome these[20].

The adoption of the UN **Convention on the Rights of Persons with Disabilities**[21] **has marked the official paradigm shift in attitudes towards people with disability and approaches to disability concerns.** Its preamble states that:

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[20] Cobigo, V. and H. Stuart H. "Social inclusion and mental health", Current Opinion in Psychiatry, vol. 23, 2010, p. 454.

[21] The Convention on the Rights of Persons with Disabilities and its Optional Protocol (A/RES/61/106) was adopted on 13 December 2006 at the United Nations Headquarters in New York, and was opened for signature on 30 March 2007. There were 82 signatories to the Convention, 44 signatories to the Optional Protocol, and 1 ratification of the Convention. This is the highest number of signatories in history to a UN Convention on its opening day. It is the first comprehensive human rights treaty of the 21st century and is the first human rights convention to be open for signature by regional integration organisations. The Convention entered into force on 3 May 2008.

Disability is an evolving concept and that disability results from the interaction between persons with impairments and the attitudinal and environmental barriers that hinders full and effective participation in society on an equal basis.

In this context, Article 1 of the UN Convention on the Rights of Persons with Disabilities, provides the following definition of disability:

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

However, this understanding of disability is also not unanimously accepted. For example, it has been pointed out that this definition does not explain the full experience of someone with a disability by ignoring the complex role that health conditions play in the lives of people with a disability[22], although such factors and their consequences may have a major role in the life of a person with a disability and may require intervention by health care providers at times.

The biopsychosocial approach views disability as arising from a combination of factors at the physical, emotional and environmental levels. This model recognises that disabilities are often due to illness or injury and does not dismiss the importance of the impact of biological, emotional and environmental issues on health, well-being, and function in society. Its advantages are found in its holism, awareness of levels in nature, and inclusiveness of diverse perspectives. Critiques of this model have suggested that its inclusiveness results in an unscientific, pluralistic approach[23].

While **debates over the definition and the very nature of disability are ongoing**, the WHO is currently using a bio-psychosocial model of disability, as demonstrated in the International Classification of Functioning, Disability and Health (ICF)[24]. ICF provides a standard language and conceptual basis for the definition and measurement of disability. It integrates the major models of disability – the medical model and the social model – as a "bio-psychosocial synthesis". It recognises the role of environmental factors in the creation of disability, as well as the role of health conditions. The ICF aims to provide a multi-perspective, biopsychosocial approach which is reflected in the multidimensional model. Definitions and categories in the ICF are worded in neu-

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22 Taylor R. "Can the social model explain all of disability experience? Perspectives of persons with chronic fatigue syndrome" ,American Journal of Occupational Therapy, vol. 59(5), 2005.

23 Henriques, G. "The Biopsychosocial Model and Its Limitations", Psychology Today, 2015, https://www.psychologytoday.com/us/blog/theory-knowledge/201510/the-biopsychosocial-model-and-its-limitations.

24 World Health Organisation. How to use the ICF. A Practical Manual for using the International Classification of Functioning, Disability and Health, 2013, https://www.who.int/classifications/draft-icfpracticalmanual2.pdf.

tral language, wherever possible, so that the classification can be used to record both the positive and negative aspects of functioning.

According to the ICF, 'disabilities' is an umbrella term, covering impairments, activity limitations, and participation restrictions. An impairment is a problem in body function or structure; an activity limitation is a difficulty encountered by an individual in executing a task or action; while a participation restriction is a problem experienced by an individual in involvement in life situations. Thus, disability is a complex phenomenon, reflecting an interaction between features of a person's body and features of the society in which he or she lives.

In conclusion, this paradigm shift is probably best summarised by the Council of Europe Disability Action Plan[25], which states:

"[We] have moved from seeing the disabled person as a patient in need of care who does not contribute to society to seeing him/her as a person who needs the present barriers removed in order to take a rightful place as a fully participative member of society. Such barriers include attitudes and social, legal and environmental barriers. We therefore need to further facilitate the paradigm shift from the old medical model of disability to the social and human rights based model. We have shifted our focus to the individual as central to a coherent, integrated approach which respects the human rights, fundamental freedoms and dignity of all disabled individuals. Consequently there has been a shift in many European countries to promote active policies which empower the individual disabled person to control his/her life…"

2.2. Nature of psychosocial disability

Psychosocial disability is a term used to describe disabilities that may arise, due to mental health issues. The term differs from the term psychiatric disability in that it places an emphasis on the social consequences of disability whereas psychiatric disability focuses on the medically defined illness or impairment. Using the social model of disability, described above, the term assists in identifying a person's functioning, what limits it and the supports that are required for their full and effective participation in the community. Due to the individual nature of mental health conditions, no

[25] Recommendation Rec(2006)5 of the Committee of Ministers to Member States on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015.

one set of impairments will necessarily characterise the experience of someone with a particular mental health condition[26].

The World Network of Users and Survivors of Psychiatry refers to the term psychosocial as the interaction between psychological and social/cultural components of our disability. The psychological component refers to ways of thinking and processing our experiences and our perception of the world around us. The social/cultural component refers to societal and cultural limits for behaviour that interact with those psychological differences as well as the stigma that the society attaches to labelling them as disabled[27].

People with psychosocial disability may suffer from both functional (such as low mood, decreased motivation for physical activity and social withdrawal) and cognitive (thought disorders, memory problems and difficulty focusing attention on an activity) impairments.

Although psychosocial disability can be episodic, invisible and often not well identified[28], its implications are not to be underestimated. People affected by psychosocial disabilities may find it challenging to set goals and make plans, engage in education, training and employment and other social and cultural activities. Certain impairments can interfere with the ability to be flexible, the ability to monitor one's own behaviour and can cause people to become confused. Many people who have mental health conditions are easily distracted by environmental stimuli and find it difficult to focus or concentrate. Someone may not be able to make eye contact or speak to people. People with a history of mental health conditions report that symptoms are often exacerbated by stress[29]. Another typical example of psychosocial disability relates to a deficit of the working memory. Working memory is tied to executive functioning and is key to holding in conscious thought our everyday activities or thinking[30]. All of these factors contribute for a particular vulnerability of people with psychosocial disabilities during criminal proceedings (and especially interrogation).

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26 National Mental Health Consumer & Career Forum. Unravelling Psychological Disability. Canberra: NMHCCF, 2011, https://nmhccf.org.au/sites/default/files/docs/nmhccf_psychosocial_disability_booklet_web_version_27oct11.pdf.

27 World Network of Users and Survivors of Psychiatry. Implementation Manual for the UN Convention on the Rights of Persons with Disabilities, 2008, http://www.wnusp.net/documents/WNUSP_CRPD_Manual.pdf.

28 Disabilities Rights Fund. Psychosocial Disability : one of the most misunderstood areas of disability, http://disabilityrightsfund.org/our-impact/insights/psychosocial-disability/.

29 National Mental Health Consumer & Career Forum. Unravelling Psychological Disability. Canberra: NMHCCF, 2011, https://nmhccf.org.au/sites/default/files/docs/nmhccf_psychosocial_disability_booklet_web_version_27oct11.pdf.

30 National Mental Health Consumer & Career Forum. "Understanding Psychosocial Disability", Health Issues, vol. 11 (1), 2014, https://nmhccf.org.au/sites/default/files/docs/nmhccf_article-issue_111.pdf.

While not everyone with a mental illness will experience psychosocial disability, certain conditions such as schizoid disorders, anxiety disorders and mood disorders involve significant long term psychosocial impact. Psychosocial disability can intensify the negative effects of mental health conditions, by causing social isolation and economic marginalisation that can spiral into crisis, homelessness, poverty and risk of harm. Not unlike people with intellectual disability, people with psychosocial difficulties often try to manage or ignore their impairments in order to appear 'normal' and avoid the stigma experience.

3. Statistical data regarding people with intellectual or psychosocial disabilities

Finding reliable and specific data about the amount of people with intellectual and psychosocial disabilities in Europe turned out to be an unexpectedly difficult endeavour. It should be noted, that data in mental health is often collected based on diagnostic categories and psychosocial disability is the consequence of a diagnostic group, not a diagnosis in its own right[31]. This is why, in the paragraphs below, is presented data about people, suffering from mental illness, and not explicitly 'psychosocial disabilities'.

3.1. Statistical data on European level

According to a 2003 study by the European Intellectual Disability Research Network about people with intellectual disabilities, comparing data and policies from seven European states[32], people with intellectual disabilities were less than 1% of the general population of the studied countries. However, the authors explain that due to methodological problems, it is very difficult to make a truly accurate and reliable assumption[33].

According to an Eurostat article, providing an overview of the various types of longstanding health problems and basic activity difficulties reported by respondents aged 15-64 in 31 countries[34], while approximately 28 % of people aged 15-64 reported a longstanding health problem or a basic activity difficulty or both, a relatively small

31 Ibid.

32 Belgium, England, Germany, Greece, the Netherlands, Spain and Sweden.

33 European Intellectual Disability Research Network. Intellectual disability in Europe: Working papers. Canterbury: Tizard Centre, University of Kent at Canterbury, 2003, http://www.enil.eu/wp-content/uploads/2012/07/Intellectual-Disability-in-Europe.pdf.

34 The EU-28 Member States, Turkey, Iceland, and Switzerland.

number of people report having difficulty with basic activities: under 2 % of the population in three-quarters of the countries in 2011[35].

According to the European health and social integration survey[36], in 2012 there were 70 million people with disabilities aged 15 and over in the EU, equivalent to 17.6 % of the population aged 15 and over[37]. Other sources point out as relatively prevalent disabilities dyslexia (est. 25 million sufferers), stuttering (est. 5 million sufferers) and autism (est. 3.3 million)[38].

No information on European level was found concerning the rate of people with intellectual and psychosocial disabilities in the criminal justice system.

3.2. Statistical data from Belgium

In Belgium, there is no official database on persons with disabilities because there has never been a census of this population and the criteria for establishing the degree of disabilities in Belgium are not scrupulously identical from one region to another.

For example, people with disabilities receiving allowances and integration benefits from the Federal Ministry of Social Affairs are counted according to their degree of autonomy and dependence. Statistical data by type of disability are not currently available. In 2015, the number of persons receiving such benefits or allowances were as follows: 175,416 adults younger than 65 years old and 153,647 adults over 65 years old[39]. According to certain – not recent – studies, the percentage of persons affected by a mental or psychological disorder benefiting from such allowances amounts to an average of 34 %[40].

A survey, conducted in 2013[41] by the Scientific Institute of Public Health[42] collected data on specific themes (health status, lifestyle and prevention, health care consump-

35 Eurostat. Disability statistics – health, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Archive:Disability_statistics_-_health.

36 Eurostat Statistics Explained. Disability statistics background – European health and Social Integration Survey. 2015, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Disability_statistics_background_-_European_health_and_social_integration_survey.

37 Eurostat Statistics Explained. Disability statistics – need for assistance. 2015, https://ec.europa.eu/eurostat/statistics-explained/pdfscache/34419.pdf.

38 Ebels, Philip. Disability in Figures. Brussels: euobserver, 2012, https://euobserver.com/disability/118249.

39 Service Public Fédéral Sécurité sociale. Direction générale Personnes handicapée. Rapport annuel 2015. 2016, https://handicap.belgium.be/docs/fr/rapport-annuel-2015-fr.pdf.

40 Applica & Cesep & European Centre. Etude sur la compilation de données statistiques sur le handicap à partir des registres administratifs des Etats membres, rapport final. 2007.

41 For more information, see Sciensano. Enquête de Santé Rapports. https://his.wiv-isp.be/fr/SitePages/Rapports.aspx.

42 ISSP – Institut Scientifique de la Santé Publique.

tion, health and society, socio-economic inequalities). However, it was not able not provide a clear picture on the number of persons affected by psychosocial or intellectual disabilities.

On the basis of average prevalence, it is estimated that there are approximately 150,000 people with mental disabilities in Belgium, of which, according to the available data, around 50 000 people suffer from psychiatric and/or behavioural disorders, as well[43].

Belgium is facing an extreme lack of epidemiological judicial data, due to limited, non-systematic and inconsistent electronic data registration in national databases[44]. Moreover, Belgium currently does not use internationally standardised screening and assessment procedures in its prisons, that would more accurately identify the prevalence of mentally ill offenders. The absence of (evidence-based) treatment protocols leads to additional difficulties, including wrongful clinical diagnoses of mental health problems at the start of a person's incarceration, and consequently inadequate treatment and care. This shortcoming is particularly relevant, considering that a majority of mentally ill offenders have dual or multi-diagnoses, including substance disorders, psychotic disorders, personality disorders, impulse control disorders, and other severe mental disorders.

To date, this shortage of general and accurate descriptive information also regards mentally ill offenders subject to an compulsory treatment measure[45]. For instance, cross-sectional demographic, psychiatric and judicial information was until recently only available for mentally ill offenders residing in prisons at specific moments in time[46].

According to the results of a study[47], the majority of mentally ill offenders residing in Flemish prisons in 2013 (amounting to 713) were men (93.1 %) and had Belgian nationality. Median age was 41.64 years. Comorbidity between mental disorders was com-

43 André du Bus de Warnaffe, M. et al. Proposition de résolution relative à la prise en charge de personnes handicapées souffrant en plus d'un trouble psychique ou d'un trouble grave du comportement, et en particulier de celles qui requièrent une hospitalisation, Sénat de Belgique, Document législatif n° 5-2201/1, 2013, www.senate.be/www/?MIval=/publications/viewPub.html&COLL=S&LEG=5&NR=2201&VOLGNR=1&LANG=fr.

44 Dheedene, J., K. Seynnaeve and A. Van der Auwera. "De geïnterneerdenpopulatie in Vlaamse gevangenissen: Enkele cijfergegevens", Fatik, vol 32 (145), 2015, pp 4-9.

45 Jaspis, P. What's up, Doc? Twee jaar toepassing van de wet van 5 mei 2014 betreffende de interner-ing, paper presented at the Internering: praktijken, onderzoek en wetgeving; welke veranderingen?, Brussels, 2018.

46 Cosyns, P. et al. "Geïnterneerden in België: De cijfers", Panopticon, vol. 28(1), 2007, 46-61; Dheedene, J., K. Seynnaeve, and A. Van der Auwera. "De geïnterneerdenpopulatie in Vlaamse gevangenissen: Enkele cijfergegevens", Fatik, vol. 32 (145), 2015, pp. 4-9.

47 Dheedene, J., K. Seynnaeve, and A. Van der Auwera. 2015, *op. cit*.

mon (73.41 %). Most common psychiatric diagnoses were personality disorders (28.4 %), substance use disorders (21.1 %), psychotic disorders (15.7 %), mental disability (12.3 %) and sexual disorders (9.8 %). Regarding judicial characteristics, the study found that most common criminal offence categories were violent offences (including sex offences) (41.6 %), property offences (including scams and arson) (29 %), drug related offences (5.4 %) and jeopardising public safety (such as illegal possession of weapons and hostage) (5.3 %).

As a useful tool of comparison and evaluation, a more recent study[48] focused on the clinical and judicial profile of mentally ill offenders who were treated in medium secure units between 2001 and 2010 (531 profiles). As for mentally ill offenders residing in prison, the majority of them were men (94.9 %) and had Belgian nationality (90.1 %). Median age on admission was 36.5 years. Most common psychiatric diagnoses were personality disorders (55.2 %), psychotic disorders (43.9 %), and mood and anxiety disorders (6.4 %). Substance misuse was present in 56.7 % of the mentally ill offenders. Most of them were subjected to a compulsory treatment measure due to violent offences (including sex offences) (77.2 %). The majority (84.4 %) had a (violent) criminal history before the imposition of the compulsory treatment measure.

3.3. Statistical data from Bulgaria

No publicly available official data was found on the topic of persons with identified psychosocial and intellectual disabilities and their contact with the criminal justice system.

3.4. Statistical data from Greece

No official statistical data on persons with psychosocial and intellectual disabilities is kept in Greece.

A 2011 study conducted in the framework of the 'Psychargos' Project[49], under the aegis of the Greek Ministry of Health, uses European averages to calculate the number of persons affected by such disabilities. The Psychargos website includes a list of facilities providing care to such individuals[50], including links to their websites and

48 Jeandarme, I., X.Saloppé, P. Habets, and T.H.Pham. "Not guilty by reason of insanity: clinical and judicial profile of medium and high security patients in Belgium", The Journal of Forensic Psychiatry & Psychology, 2018, pp. 1-15.

49 Psychargos. Πρόγραμμα „ΨΥΧΑΡΓΩΣ", http://www.psychargos.gov.gr/Default.aspx?ID=26188&nt=18&lang=1.

50 Psychargos, Καλώς ήρθατε. http://www.psychargos.gov.gr/Default.aspx?lang=1.

contact information. However, no data on the number of patients hosted in each facility is publicly shared, either at the Psychargos or at the individual websites.

Limited data is available on detainees and prisoners with psychosocial and intellectual disabilities. Specifically, in May 2019, 211 people were detained in the Korydallos Prison psychiatric ward (the most populous prison in Greece)[51]. However, this number does not distinguish between detainees in pre-trial detention and convicted prisoners and only reflects a portion of persons receiving mental health care within the Greek prison system. It does not cover those treated by external health care providers in other prisons, or those who do not receive medical care.

No data is kept on conviction rates of offenders with psychosocial and intellectual disabilities, or the most prevalent types of psychosocial or intellectual disability for persons involved in criminal proceedings.

3.5. Statistical data from Italy

According to epidemiological studies carried out in 1999 in several Italian psychiatric prison hospitals [52], 70.1 % of the inmates had a diagnosis of schizophrenia or delusional disorder, which is an impressive number of people suffering from serious psychiatric conditions.

One of the most extensive and detailed European researches on the existence of mental disorders in prisons, was carried out in Italy in Sollicciano and Montelupo, between 2001 and 2002, in collaboration with the University of Florence[53].

As early as 2002 this research has shown the worrying rise of all types of mental health conditions except from personality disorders and intellectual disabilities within the prisons (with a prevalence of 46.7 % on new-joint subjects), then the very high rate of major depressive episodes (new-joined subjects 24.8 %) and finally the very high rate of serious personality disorders (not only of the antisocial personality disorder, but of the borderline and the paranoid personality disorders as well).

These findings are confirmed by the data released by the Regional Health Agency of Tuscany in 2013, regarding the health state of prisoners in the region in 2012: *'71.8 % of*

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51 Ministry of Justice. Data on the capacity of detention facilities, 16 May 2019, http://www.ministry-ofjustice.gr/site/el/ΣΩΦΡΟΝΙΣΤΙΚΟΣΥΣΤΗΜΑ/Στατιστικάστοιχείακρατουμένων.aspx.

52 Fioritti, A.et al. „Violence and mental illness: a study on the population of three Judicial Psychiatric Hospitals", Il reo e il folle 1999; vol. 9-10: 137-48.

53 It has been published in Il reo e il folle n° 30/31 of 2008, monographic issue on La Grande Ricerca and as Iannucci, Mario and Gemma Brandi. Il reo folle e le modifiche dell'ordinamento penitenziario. 2018, www.penalecontemporaneo.it/upload/7529-iannuccibrandi218.pdf.

the prisoners in Tuscan prisons are affected by at least one disease. The most common is mental disorder, which affects 41 % [of the prisoners]'. According to the information released by the Regional Health Agency of Tuscany in 2015, regarding the health state of 16,000 prisoners held in 57 Italian prisons: '*More than 70 % of prisoners are affected by at least one disease [...] The first pathology, which involves 24 % of the inmates of the survey, is substance dependence [...] More than 40 % of the prisoners enrolled are affected by at least one psychiatric condition [...]'*.

Other statistical data are available through the National Mental Health Information System (SISM[54]), managed by the Ministry of Health. The purpose of the system is to provide information for monitoring and protection of mental health and to create a database focused on the patient, from which could be acquired information, regarding the characteristics of patients undergoing treatments for mental health issues.

54 The acronym is in Italian.

Number of patients, undergoing treatments for mental health issues – standardised rate per 10,000 inhabitants in 2016[55]

Region	Male	Female	TOTAL
PIEMONTE	156,4	178,3	167,8
VALLE D'AOSTA	-	-	-
LOMBARDIA	162,3	180,6	171,7
PA BOLZANO	-	-	-
PA TRENTO	156,4	179,4	168,3
VENETO	158,7	195,0	177,5
FRIULI VENEZIA GIULIA	137,1	168,7	153,6
LIGURIA	190,1	203,2	197,1
EMILIA ROMAGNA	186,2	225,2	206,5
TOSCANA	120,2	146,5	134,0
UMBRIA	145,2	186,1	166,7
MARCHE	153,0	167,1	160,4
LAZIO	134,2	144,4	139,5
ABRUZZO	143,6	141,9	142,7
MOLISE	178,8	177,5	178,1
CAMPANIA	147,7	133,3	140,2
PUGLIA	179,5	165,4	172,2
BASILICATA	85,7	84,7	85,2
CALABRIA	144,4	161,5	153,3
SICILIA	196,5	182,4	189,2
SARDEGNA	15,1	19,8	17,6

[55] Italian Ministry of Health. Rapporto salute mentale: analisi dei dati del Sistema informativo per la salute mentale (SISM) anno 2016. 2017, http://www.salute.gov.it/portale/documentazione/p6_2_2_1.jsp?lingua=italiano&id=2731.

3.6. Statistical data from the United Kingdom and USA

For comparison, sources from the United States offer exact, though most probably outdated, information, claiming that about 5 % of the U.S. population suffers from mental illness[56].

It is estimated that about 7 % of all police contacts in the US involve people with severe mental illness[57] and that 16 % of such contacts result in arrest[58].

A study that looked at the number of people with disabilities in the US state and federal prisons found that fewer than 1 % of inmates had physical disabilities while 4.2 % had intellectual disabilities[59]. In 2000, an American Psychiatric Association research estimates that perhaps as many as one in five prisoners were seriously mentally ill, with up to 5 percent actively psychotic at any given moment[60]. Another study claims that people with intellectual disability are estimated to comprise 2% to 3% of the general California population. At the same time, they make up for 4-10% of the prison population, and an even higher percentage of those in juvenile facilities and in jails. The problem is expected to deteriorate, as the prevalence of cognitive disabilities in the general California population is said to be increasing[61].

In a 2002 report to the US Congress, The National Commission on Correctional Health Care[62] estimated that:

On any given day, between 2.3 and 3.9 percent of inmates in State prisons are estimated to have schizophrenia or other psychotic disorder, between 13.1 and 18.6 percent major depression, and between 2.1 and 4.3 percent bipolar disorder (manic episode). A substantial percentage of inmates exhibit symptoms of other disorders as well, including between 8.4 and 13.4 percent with dysthymia, between 22.0 and 30.1 percent with an anxiety disorder, and between 6.2 and 11.7 percent with posttraumatic stress disorder.

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56 Human Rights Watch. Ill-Equipped: U.S. Prisons and Offenders with Mental Illness, 2003, https://www.opensocietyfoundations.org/reports/ill-equipped-us-prisons-and-offenders-mental-illness.

57 Deane, M. et al. "Emerging partnerships between mental health and law enforcement", Psychiatric Services, vol. 50 (1), 1999, pp. 99-101.

58 Sheridan, E. and L. Teplin "Police-referred psychiatric emergencies: advantages of community treatment". Journal of Community Psychology, vol. 9, 1981, pp. 140-147.

59 Veneziano, L. & C. Veneziano. "Disabled inmates". In: M. McShane & F. Williams: Encyclopedia of American Prisons. New York: Garland Publishing, 1996.

60 American Psychiatric Association. Psychiatric Services in Jails and Prisons. Washington D.C.: American Psychiatric Association, 2000.

61 Petersilia, J. „Doing justice? Criminal offenders with developmental disabilities", CPRC Brief, vol. 12 (4), California Policy Research Center University of California, 2000, https://files.eric.ed.gov/fulltext/ED465905.pdf.

62 National Commission on Correctional Health Care, https://www.ncchc.org/.

Federal inmates are estimated to have lower rates of mental illness than State prison inmates across all diagnostic categories. Between 0.8 and 2.5 percent are estimated to have schizophrenia or other psychotic disorder, between 13.5 and 15.7 percent major depression, and between 1.5 and 2.7 percent bipolar disorder. Between 6.8 and 11.6 percent are predicted to have dysthymia, and between 18.2 and 23.0 per-cent have an anxiety disorder, not including another 4.9 to 6.8 percent with post-traumatic stress disorder.[63]

One of the latest articles published in *The Lancet*, highlights the "*crisis of mental health in prisons of the United Kingdom*"[64]: *"It is estimated that two thirds of prisoners suffer from personality disorders, about half suffer from depression and anxiety and one in twelve suffer from psychosis. The situation is deteriorating*: *120 suicides in England and Wales in 2016, almost twice compared to 2012*". Seena Fazel and others, in a 2016 publication[65] had provided slightly lower numbers on the prevalence of mental illness in prisons, basing their results on a systematic review of a whole series of studies on the mental health of prisoners carried out between 2003 and 2015[66].

Clearly, a universal pattern emerges – people with intellectual and psychosocial disabilities are much more likely to come in contact with the criminal justice system than those without. Moreover, research shows that people with severe mental illness are more likely to be imprisoned in the US than individuals without mental health problems for the same offences, and they are often held in prison for longer periods[67].

However, the available data is partial and/or outdated, which prevents us from seeing the 'full picture'. It turns out that at this point, the collection of statistical data about this particular type of vulnerable people and their interaction with the criminal justice system is wildly neglected.

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63 National Commission on Correctional Health Care. The Health Status of Soon-to-be-Released Inmates, A Report to Congress. vol. 1., 2002, https://www.ncchc.org/filebin/Health_Status_vol_1.pdf.

64 Burki, T. „Crisis in the UK Prison Mental Health", The Lancet, vol. 4 (12), 2017, p. 904.

65 Fazel, S. et al. „Mental health of prisoners: prevalence, adverse outcomes, and interventions", Lancet Psychiatry 2016.

66 Prevalence of different psychiatric diagnoses in adult prisoners based on systematic reviews.

	Men		Women	
Disorder	Prevalence	95 % CI	Prevalence	95 % CI
Psychotic Illness	4 %	3-4	4 %	3-5
Major depression	10 %	9-12	14 %	10-18
Alcohol misuse	18-30 %		10-24 %	
Drug misuse	10-48 %		30-60 %	

67 Lamberti, S. et al. "The mentally ill in jails and prisons: towards an integrated model of prevention", Psychiatric Quarterly, vol. 72 (1), 2001.

II. INTERNATIONAL AND SUPRANATIONAL STANDARDS ON RIGHTS OF PEOPLE WITH DISABILITIES

In the past few decades, the international community has given considerable attention to the rights of persons with disabilities. Apart from general human rights conventions, different international organisations have created extensive policy on issues of disability.

In 1971, the Declaration on the Rights of Mentally Retarded Persons[68] was adopted by the UN General Assembly. Apart from proclaiming that mentally retarded persons have the same rights as other human beings, the Declaration explicitly provides that mentally disabled persons have a right to protection from exploitation, abuse and degrading treatment. If prosecuted for any offence, they shall have a right to due process of law with full recognition being given to their degree of mental responsibility. Furthermore, it has been declared that there should be legal safeguards available to protect the mentally retarded from abuse.

According to Article 11 of the Declaration on the Rights of Disabled Persons[69] adopted in 1975 disabled persons shall be able to avail themselves of qualified legal aid when such aid proves indispensable for the protection of their persons and property. In case judicial proceedings are instituted against them, the legal procedure applied shall take their physical and mental condition fully into account.

Although both of these Declarations are legally non-binding, they play an important part in building the modern framework of standards on rights of people with disabilities and people with intellectual and psychosocial disabilities in particular, by outlining their right to due process of law and recognition of their individual capacities and limitations.

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68 United Nations Human Rights, Office of the High Commissioner. Declaration on the Rights of Mentally Retarded Persons. Proclaimed by General Assembly resolution 2856 (XXVI) of 20 December 1971, https://www.ohchr.org/EN/ProfessionalInterest/Pages/RightsOfMentallyRetardedPersons.aspx.

69 United Nations Human Rights, Office of the High Commissioner. Declaration on the Rights of Disabled Persons. Proclaimed by General Assembly resolution 3447 (XXX) of 9 December 1975, https://www.ohchr.org/en/professionalinterest/pages/rightsofdisabledpersons.aspx.

1. European Convention on Human Rights

The European Convention on Human Rights (ECHR)[70] was the first instrument to give effect to some of the rights stated in the Universal Declaration of Human Rights and make them binding. ECHR does not provide a definition of disability. However, its Article 1 (obligation to respect human rights) states that "*The High Contracting Parties shall secure to* ***everyone*** *within their jurisdiction the rights and freedoms defined in ... this Convention*." Although not expressly featuring in the list of protected grounds, disability has been included by the European Court of Human Rights (ECtHR) in its interpretation of 'other' grounds for discrimination under Article 14. There are a number of cases, when the Court is considering the rights of people with disabilities and granting them protection[71].

Intellectual and psychosocial disabilities in particular are most commonly detected in the ECtHR case-law, when it comes to violations of Article 3 (prohibition of inhuman or degrading treatment) and Article 6 (right to a fair trial).

ECtHR has held on many occasions that the detention of a person who is ill may raise issues under Article 3 and that the lack of appropriate medical care may amount to treatment contrary to that provision. In particular, the assessment of whether the particular conditions of detention are incompatible with the standards of Article 3 has, in the case of mentally ill persons, to take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment. Three particular elements are to be considered in relation to the compatibility of an applicant's health with his stay in detention: (a) the medical condition of the prisoner, (b) the adequacy of the medical assistance and care provided in detention, and (c) the advisability of maintaining the detention measure in view of the state of health of an applicant[72]. Moreover, detaining a person, suffering from a mental illness, in a normal prison, where he was treated as an ordinary prisoner, is also considered a violation of Article 3, because the Court found that the nature of the applicant's psychological condition (chronic paranoid schizophrenia) made him more vulnerable than the average detainee and that his detention might

70 The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, was opened for signature in Rome on 4 November 1950 and came into force in 1953. European Court of Human Rights and the Council of Europe. European Convention of Human Rights, https://www.echr.coe.int/Documents/Convention_ENG.pdf.

71 European Court of Human Rights Press Unit. Persons with disabilities and the European Convention on Human Rights Fact Sheet, 2019, https://www.echr.coe.int/Documents/FS_Disabled_ENG.pdf.

72 See European Court of Human Rights. Case of Sławomir Musiał v. Poland Judgement. Strasbourg: European Court of Human Rights, 2009, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-90783%22]}.

have exacerbated his feelings of distress, anguish and fear[73]. A violation of the substantive aspect of Article 2 (right to life) has been found in the case of a young man undergoing psychiatric treatment who had committed suicide while placed in the ordinary section of a prison[74].

ECtHR observed that prisoners with serious mental disorders and suicidal tendencies required special measures geared to their condition, regardless of the seriousness of the offence of which they had been convicted[75].

In the case of Rupa v. Romania, the applicant was suffering from psychological disorders since 1990 and registered by the public authorities as having a second degree disability on that account. He alleged that he had been detained twice (in January 1998 and between March and June 1998) in inhuman and degrading physical conditions at police stations. The Court held that there had been a violation of Article 3 of the Convention. As regards the applicant's detention from 28 to 29 January, it observed in particular that he had spent the night following his arrest in the police holding room, which was furnished only with metal benches that were manifestly unsuitable for the detention of a person with the applicant's medical problems, and that he had not undergone a medical examination on that occasion. Having regard to the applicant's vulnerability, the Court considered that the state of anxiety inevitably caused by such conditions had undoubtedly been exacerbated by the fact that he had been guarded by the same police officers who had taken part in his arrest. As further regards the applicant's detention from 11 March to 4 June, the Court considered in particular that, in view of his behavioural disorders, which had manifested themselves immediately after he was remanded in custody and which could have endangered his own person, the authorities had been under an obligation to have him examined by a psychiatrist as soon as possible in order to determine whether his psychological condition was compatible with detention, and what therapeutic measures should be taken. In the present case, the Romanian Government had not shown that the measures of restraint applied to the applicant during his detention at the police station had been necessary. This treatment had further been exacerbated by the lack of appropriate medical attention in view of the applicant's vulnerable psychological state and the fact that he had been displayed in public, before the court, with his feet in chains.

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73 See European Court of Human Rights. Case of Dybeku v. Albania Judgement. Strasbourg, European Court of Human Rights, 2007, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-84028%22]}.

74 See European Court of Human Rights. Case of De Donder and De Clippel v. Belgium Judgement. Strasbourg: European Court of Human Rights, 2011, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-107737%22]}.

75 See European Court of Human Rights. Chamber Judgement Rivière v. France. Strasbourg : Registrar, 2006, https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-1732298-1816345%22]}.

According to the Court, in cases concerning compulsory confinement, a person of unsound mind should be heard either in person or, where necessary, through some form of representation. A decision on a person's mental capacity, based purely on documentary evidence, is deemed unreasonable and in breach of the principle of adversarial proceedings enshrined in Article 6 § 1 of the Convention[76].

In the more recent case of Blokhin v. Russia a 12-year old boy, who was suffering from a mental and neurobehavioural disorder has been put in a temporary detention centre for juvenile offenders. The Grand Chamber held that there had been a violation of Article 6 §§ 1 and 3 of the Convention, finding that the applicant's defence rights had been violated because he had been questioned by the police without legal assistance and the statements of two witnesses whom he was unable to question had served as a basis for his placement in temporary detention. In this judgment the Grand Chamber underlined in particular that it was essential for adequate procedural safeguards to be in place to protect the best interest and well-being of a child when his or her liberty was at stake. Children with disabilities might moreover require additional safeguards to ensure that they were sufficiently protected. In this case the Grand Chamber also held that there had been a violation of Article 3 (prohibition of inhuman or degrading treatment) and a violation of Article 5 § 1 (right to liberty and security) of the Convention.

2. The Council of Europe's Disability Action Plan 2006-2015[77] and Disability Strategy 2017-2023[78]

The Council of Europe **Disability Action Plan** 2006-2015 was adopted by the Committee of Ministers of the Council of Europe on 5 April 2006. It is addressed to the governments of all Member States. It was meant to serve as a practical tool to guide Member States in developing strategies to bring about full participation of people with disabilities in society. The Plan focuses on fifteen areas, including legal protection. Under legal protection is meant taking measures to eliminate discrimination against people with disabilities and ultimately providing them with access to the legal system on the same basis as other citizens. As one of the key objectives are pointed

[76] See European Court of Human Rights. Chamber Judgement Shtukaturov v. Russia. Strasbourg: Registrar, 2008, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22003-2302658-2460255%22]}.

[77] Council of Europe, Committee of Ministers – Rec(2006)5 of the Committee of Ministers to Member States on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015, 2006, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680595206.

[78] Council of Europe. Disability Strategy 2017-2023, Human Rights: A Reality for all, 2017, http://rm.coe.int/doc/09000016806fe7d4.

out the protection and promotion of the enjoyment of all human rights and fundamental freedoms by persons with disabilities on an equal basis with others. The Disability Action Plan also provides a list of specific actions, which should be taken in order to achieve this objective. Member States, for example, shall ensure the provisions that discriminate against disabled people are removed from legislation; promote training on human rights and disability for law enforcement personnel, public officials and judiciary staff; and guarantee the right of people with disabilities to information and communication, that is accessible to them within the judicial system.

According to the evaluation[79] of the implementation of the Council of Europe Disability Action Plan, carried out 10 years after its adoption, poor access to legal protection mechanisms and lack of accessible information on legal protection are still challenges to overcome in most Member States. It is explicitly pointed out that the principle of non-discrimination on the grounds of disability is not observed in relation to the legal capacity of persons with intellectual and psychosocial disabilities and their access to a whole range of human rights and fundamental freedoms is impeded. As a positive impact of the implementation of the Plan is outlined that some Member States have organised training for various members of the justice professions on the ways to address cases concerning persons with disabilities, particularly those with severe forms of disabilities or intellectual and psychosocial disabilities.

In its attempts to promote and protect human rights of persons with disabilities and its endeavours to enhance equal opportunities, improve the quality of life and independence of people with disabilities, guarantee their freedom of choice, full citizenship and active participation in the life of the community, in 2016 the Council of Europe adopted the **Disability Strategy 2017-2023**. It pays special attention to legal capacity and access to justice, describing them as essential to real participation in all areas of life and full inclusion of persons with disabilities in society. Legal capacity is in fact connected to all human rights and their enjoyment. The Disability Strategy 2017-2023 points out that legal capacity continues to be denied to a part of the population on the basis of disability, particularly intellectual or psychosocial disability. Substituted decision-making, including full guardianship regimes where persons are stripped of their personhood in the eyes of the law and of the society, still prevail in many Member States. While underlining the necessity of enhancing understanding and raising awareness of the right to equal recognition before the law in cooperation with persons with disabilities, the strategy explicitly recommends to Council of Europe bodies, Member States and other relevant stakeholders to attempt to the best of their ability to identify, compile and propagate existing national legislation, policies and practices providing for appropriate and effective safeguards to protect persons with disabilities

[79] Council of Europe. Abridged Evaluation Report, 2015, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805a2a20.

from exploitation and abuse in accordance with international human rights law, including assistance and support mechanisms available to persons with disabilities in engaging those safeguards.

Again, despite the fact that they are not legally binding for the Member States of the Council of Europe, both the Action Plan 2006-2015 and the Disability strategy 2017-2023 have significant political and moral meaning, because they set the direction for policy-making in the area for all Member States.

3. Convention on the Rights of Persons with Disabilities

Soon after the adoption of the Council of Europe Disability Action Plan, the United Nations Convention on the Rights of Persons with Disabilities (CRPD) was adopted (December 2006), and entered into force (May 2008). The United Nations Convention on the Rights of Persons with Disabilities provides specific guarantees regarding access to justice for persons with disabilities. As of February 2011, the Convention had 98 State Parties and was the first Human Rights Treaty to be ratified by a regional integration organisation, the European Union. It has 165 signatories. It is probably the most important international treaty with a specific focus on rights of people with disabilities.

The Convention does not provide a closed definition of disability and that is a conscious choice. Its preamble states that disability is an evolving concept. Nevertheless, as already mentioned, the Convention does reflect a social model of disability as it clarifies that disability results from the interaction between persons with impairments and external barriers (attitudinal and environmental) that hinders their participation in society. Thanks to its fluidity, the notion of disability can be adapted to the prevailing environment in a particular society.

Article 13 of the UN CRPD provides that:

1. *States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.*

2. *In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.*

Effective access to justice is a precondition to the full enjoyment of all other rights and fundamental freedoms. It encompasses the right to legal standing to bring cases. However, the CRPD acknowledges that people with disabilities may have personal barriers to accessing legal procedures for defending their rights. As already mentioned, people with intellectual or psychosocial disabilities are particularly vulnerable during judicial proceedings. This is why the Convention calls for guarantees they can effectively participate in judicial proceedings, which may require making appropriate accommodations in the course of proceedings. Equality is an underlying principle of CRPD, closely linked with the perception that disability is a disadvantage that occurs when persons with impairments meet an inaccessible environment. It is not about creating 'separate' or 'special' rights for persons with disabilities, but about including persons with disabilities in the existing human rights discourse and tailoring existing rights to fit their needs, through a legally binding instrument. It presents a fully developed concept of equality in human rights terms. This understanding of equality has shaped the definition of discrimination, which is defined in Article 2 of the Convention:

"[any] distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation."[80]

Article 2 (4) of the CRPD specifies that:

'Reasonable accommodation' means 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." The UN Committee on the Rights of Persons with Disabilities[81] stressed that a law which is applied in a neutral manner may have a discriminatory effect when the particular circumstances of the individuals to whom it is applied are not taken into consideration.

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80 Commissioner for Human Rights. Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities. Strasbourg: Council of Europe, 2012, https://rm.coe.int/16806da5c0.

81 The Committee is a body of 18 independent experts which monitors implementation of the Convention on the Rights of Persons with Disabilities. The members of the Committee serve in their individual capacity, not as government representatives. All States parties have to submit regular reports to the Committee on how the rights enshrined in the Convention are being implemented. The Committee examines each report and makes suggestions and general recommendations on the report. It forwards these recommendations, in the form of concluding observations, to the State Party concerned.

This means that, in order not to avoid discrimination, action must be taken to ensure that legal proceedings, including criminal proceedings, are accessible also for persons with disabilities. Persons with intellectual or psychosocial disabilities may not initially understand the implications of certain interactions with state institutions, for example during criminal procedures. In such cases, the state and its institutions have an obligation to take positive measures (to the limit of disproportionate or undue burden) to accommodate the individual, to ensure that he/she is put in an equivalent position with others. Such accommodations may include additional explanation of the nature of the procedural acts or simplifying language used in the proceedings. These are examples of reasonable accommodation which does not require additional finances or resources from the state. Denying reasonable accommodation constitutes discrimination, which directly contradicts to the rights guaranteed by Article 5 of the CRPD.

Extending the requirement under Article 8 for promoting awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities, the CRPD encourages States to provide necessary training for those working with people with disabilities in the field of administration of justice, including police and prison staff. As the Mental Disability Advocacy Center suggests, such training may include training for judges and attorneys on how a particular disability affects procedural capacity and what measures are required to ensure the observance of procedural and substantive fairness in proceedings involving persons with disabilities. The active role of attorneys is crucial in ensuring that proceedings involving people with disabilities are attended by necessary accommodations[82].

4. EU Legal framework

4.1. The Charter of Fundamental Rights of the European Union[83]

In December 2009, when the Treaty of Lisbon entered into force, The Charter became legally binding on EU Member States.

The Charter often is confused with the European Convention on Human Rights. Although both contain somehow overlapping human rights provisions, they operate within separate legal frameworks. While the Charter was prepared by the EU and is

[82] Mental Disability Advocacy Center mdac. Access to Justice for People with Intellectual Disabilities and People with Psycho-Social Disabilities in Russia, http://www.mdac.info/sites/mdac.info/files/English_Access_to_Justice_for_People_with_Intellectual_Disabilities_and_People_with_Psycho-social_Disabilities_in_Russia.pdf.

[83] EUR-LEX. Charter of Fundamental Rights of the European Union, 2012, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012P/TXT&from=EN#d1e68-393-1.

interpreted by the Court of Justice of the EU, the ECHR is drafted by the Council of Europe and is interpreted by the ECtHR.

Some ECHR rights are simply copied into the Charter[84] and other rights are more or less modified and updated[85]. Lastly, there are obvious examples of Charter provisions which have broader scope and offer a more extensive protection than the ECHR. Thus, Article 21 of the Charter on non-discrimination goes further than Article 14 ECHR as the former is applicable even outside the scope of the other protected rights[86]. In its Article 52, par. 1, the Charter states that limitations on the exercise of the rights and freedoms may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. In so far as the Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection. Hence, the Charter is not a self-contained document and a copy of the ECHR needs to be at hand for the purpose of assessing the scope of the power to derogate from the rights that it guarantees[87].

Although it does not specifically mention people with intellectual and psychosocial disabilities, the Charter recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community[88]. The notion of 'disability' is not defined by the Charter itself, nor is it defined in the Treaties or in secondary law. In its case-law in the context of applying the principle of non-discrimination on the grounds of disability in employment, the Court of Justice has held that the definition of 'disability' must be understood as long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers[89].

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84 For example, Article 3 of the ECHR is replicated in Article 4 of the Charter.

85 For example, "correspondence" in Article 8 ECHR is replaced by "communications" in Article 7 of the Charter.

86 Anderson, David Q.C. and Cian C. Murphy. "The Charter of Fundamental Rights: History and Prospects in Post-Lisbon Europe", EUI Working Paper, vol. 8, 2011.

87 Ibid.

88 See Article 25 of the Charter.

89 See Joined Cases C-335/11 and C-33711 *HK Danmark* EU:C:2013:222, paragraphs 37 to 39; Case C-312/11 *Commission v Italy* EU:C:2013:446, paragraph 56; and Case C-363/12 Z EU:C:2014:159, paragraph 76.

4.2. Directive 2012/13/EU on the right to information in criminal proceedings[90]

When providing suspects or accused persons with information in accordance with this Directive, competent authorities should pay particular attention to persons who cannot understand the content or meaning of the information, for example because of their mental or physical condition.

Member States shall ensure that suspects or accused persons are provided promptly with information concerning at least the following procedural rights, as they apply under national law, in order to allow for those rights to be exercised effectively: the right of access to a lawyer; any entitlement to free legal advice and the conditions for obtaining such advice; the right to be informed of the accusation; the right to interpretation and translation and the right to remain silent.

The information concerning those rights shall be given orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons.

4.3. Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty[91]

According to the Directive, suspects or accused persons should be able to waive a right granted under this Directive provided that they have been given information about the content of the right concerned and the possible consequences of waiving that right. When providing such information, the specific conditions of the suspects or accused persons concerned should be taken into account, including their age and their mental and physical condition.

Without prejudice to national law requiring the mandatory presence or assistance of a lawyer, Member States shall ensure that, in relation to any waiver of the right of access

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90 EUR-LEX. Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, 2012, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012L0013&from=BG.

91 EUR-LEX. Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, 2013, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013L0048&from=EN.

to a lawyer in criminal proceedings or in European arrest warrant proceedings the suspect or accused person has been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it. The waiver should be given voluntarily and unequivocally.

4.4. Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings[92]

Member States should lay down practical arrangements regarding the provision of legal aid. Such arrangements could determine that legal aid is granted following a request by a suspect, an accused person or a requested person. Given in particular the needs of vulnerable persons, such a request should not, however, be a substantive condition for granting legal aid. Member States shall ensure that the particular needs of vulnerable suspects, accused persons and requested persons are taken into account in the implementation of this Directive.

4.5. Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings[93]

Although it is not legally binding, the Recommendation presents the views on the topic of the Commission and calls upon Member States to strengthen certain procedural rights of vulnerable suspects or accused persons in criminal proceedings and of vulnerable persons who are subject to European arrest warrant proceedings. The specific procedural rights of vulnerable persons should apply from the time they are suspected of having committed an offence. Such rights should apply until the conclusion of the proceedings. Vulnerable persons should be associated in accordance with their best interests to the exercise of procedural rights taking into account their ability to understand and effectively participate in the proceedings.

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92 EUR-LEX. Directive 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, 2016, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016L1919&from=BG.

93 EUR-LEX. Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, 2012/C 378/02, 2013, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013H1224(02)&from=en.

Vulnerable persons should be promptly identified and recognised as such. Member States should ensure that all competent authorities may have recourse to a medical examination by an independent expert to identify vulnerable persons, and to determine the degree of their vulnerability and their specific needs. This expert may give a reasoned opinion on the appropriateness of the measures taken or envisaged against the vulnerable person. Member States should foresee a presumption of vulnerability in particular for persons with serious psychological, intellectual, physical or sensory impairments, or mental illness or cognitive disorders, hindering them to understand and effectively participate in the proceedings. Police officers, law enforcement and judicial authorities competent in criminal proceedings conducted against vulnerable persons should receive specific training.

III. LEGAL STATUS OF INDIVIDUALS WITH PSYCHOSOCIAL OR INTELLECTUAL DISABILITIES

1. Legal capacity: definition and importance

Legal capacity is what makes a person a subject of law. As noted by the Committee on the Rights of Persons with Disabilities, legal capacity is the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency). It is the key to accessing meaningful participation in society. Legal capacity is qualified as an inherent right accorded to all people, including persons with disabilities. It means that all people have legal standing and legal agency simply by virtue of being human. Therefore, both its aspects must be recognised and cannot be separated[94]. Legal capacity protects an individual's right to make decisions for themselves, free from intervention from others[95]. Without it an individual is a non-person in the eyes of the law and his/her decisions have no legal force.

Deprivation of legal capacity continues to be a problem affecting a large group of people with intellectual or psychosocial disabilities, who are put under guardianship. The appointment of a guardian is usually based on a medical report. In EU Member States there are certain conditions, which must be met before placing a person under guardianship. The test generally consists of two elements: a certain medical condition is usually coupled with an assessment of the person's inability to manage his or her own affairs. The test's application differs only slightly from one Member State to another[96]. Most common practice is the establishing of two types of guardianship: plenary and partial. Persons under partial guardianship keep some or most of their rights and there are only certain areas, in which the guardian's consent is needed in order to make legally effective decisions. In contrast, plenary guardianship requires the guardian's permission for all legal acts[97].

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94 Official Documents Systems of the United Nations, General Comment No 1: Article 12: Equal recognition before the law (Adopted 11 April 2014), 2014, https://documentsddsny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement.

95 Beqiraj, Julinda, Lawrence McNamara and Victoria Wicks. Access to justice for persons with disabilities: From international principles to practice. International Bar Association, 2017, https://www.biicl.org/documents/1771_access_to_justice_persons_with_disabilities_report_october_2017.pdf?showdocument=1.

96 European Union Agency for Fundamental Rights. Legal capacity of persons with intellectual disabilities and persons with mental health problems. Luxembourg: Publications Office of the European Union, 2013, https://fra.europa.eu/sites/default/files/legal-capacity-intellectual-disabilities-mental-health-problems.pdf.

97 Commissioner for Human Rights and the Council of Europe. Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities, Commissioner for Human Rights, 2012, https://rm.coe.int/16806da5c0.

In all four of the studied countries, persons with mental health problems, psychosocial or intellectual disabilities might find themselves with a limited or restricted legal capacity. This does not mean that because of their functional impediments, solely because of their disability, their right to decide and participate equally is lost. Such a status-based approach, is not found in none of the examined legal frameworks. Each country sets up different regimes for protection of persons having difficulty in managing their affairs.

In **Bulgaria,** acts probably the most outdated legal framework of the four. The regulation of the general legal status of persons with psychosocial and intellectual disabilities is closely related to their legal capacity and is done in parallel with the regulation of legal capacity of children. Thus, the Persons and Family Act[98] postulates that those of 14-18 years of age (hereinafter, underage) and those over 18 years of age (hereinafter, adults), who, due to 'weakness of mind or mental illness' cannot 'take care of their dealings' have their legal capacity taken away and are put under plenary guardianship, legally equating them to persons under 14 years of age (hereinafter, minors). Like for minors, legal action on behalf of those under plenary guardianship is only taken by their guardians. Adults with such 'ailments whose condition is not that grave to be put under full guardianship' are put under partial guardianship and are legally equated to the underage. Like for the underage, people under partial guardianship take legal action with the consent of their guardians, but can themselves enter into 'petty deals for fulfilling their current needs' and dispose of what they have acquired through their own labour.

As indicated by the year of adoption of the Act (1949) and its formulations, it has little to do with international standards regulating the status of persons with psychosocial and intellectual disabilities. A number of NGOs and other social and legal professionals have been, for a number of years, criticising the outdated legal framework for seemingly 'protecting' persons' rights by taking them away[99], and advocating for the adoption of new legislation to introduce assisted decision making and related support measures in the Bulgarian legal framework. A draft Physical Persons and Support Measures Act has been developed and submitted to Parliament in 2016[100], but was never tabled for voting due to the early dissolution of the National Assembly and

98 Lex.BG. Persons and Family Act (*Закон за лицата и семейството*), 1949, https://lex.bg/laws/ldoc/2121624577.

99 Bulgarian Center for Non-for-Profit Law (*Български център за нестопанско право*). Statement on the Consultation Document (*Становище по консултационен документ*), 2018, www.strategy.bg/PublicConsultations/View.aspx?lang=bg-BG&Id=3831.

100 Bulgarian Parliament. Draft Physical Persons and Support Measures Act (*Законопроект за физическите лица и мерките за подкрепа*), 2016, www.parliament.bg/bg/bills/ID/44032.

ensuing elections. The draft is currently again up for public consultations[101] with no timeline spelled out for its ultimate adoption.

After the adoption of an Act reforming incapacity regimes and introducing a new protection status in accordance with human dignity[102] in 2013, in **Belgium**, a person of full age who, due to his or her state of health, is completely or partially incapable, even temporarily, of managing his patrimonial or non-patrimonial affairs in the normal manner without assistance of other measure of protection, may be placed under protection if and to the extent that his interests so require. None of these measures have strict time limits, but last as long as needed. There are two regimes for protection of persons having difficulty in managing their affairs: (1) extra-judicial protection and (2) judicial protection accompanied by the appointment of an administrator.

The Extra-judicial protection refers to a power of attorney or a mandate authorising a person to act on someone else's behalf in a legal or business matter. This may be used to allow a spouse or family member to manage the grantor's affairs once illness or injury renders the grantor physically incapable of acting. The new Article 490 of the Belgian Civil Code requires that a power of attorney that has, as its object, the extra-judicial protection of an individual, must be registered in a central register kept by the Royal Federation of Belgian Notaries.

The new 2013 regime of judicial protection provides for greater flexibility, because the Justice of the Peace can decide which rights the person can exercise without assistance, which acts can be exercised with the assistance of an administrator, and which acts must be carried out by an administrator. The administrator can be given powers simply to "assist" the protected person in the accomplishment of certain acts, or to carry out those acts as the "representative" of the protected person. Certain acts remain, in any event, subject to prior approval of the Justice of the Peace, or can be made subject to prior approval. Certain patrimonial rights cannot be exercised by or

[101] Minister of Justice (*Министър на правосъдието*). Consultation document on the Draft Physical Persons and Support Measures Act (*Консултационен документ по проект на Закон за физическите лица и мерките за подкрепа*), 2018, www.strategy.bg/PublicConsultations/View.aspx?lang=bg-BG&Id=3831.

[102] Loi du 17 mars 2013 réformant les régimes d'incapacité et instaurant un nouveau statut de protection conforme à la dignité humaine, M.B., 2013, p. 38132. See also : F.-J. Warlet, F-J. "La capacité protégée", in : Collections "Lois actuelles", Kluwer, 2014.

with the assistance of the administrator at all. If a person is declared incapable of exercising these rights, there is no way they can be exercised[103].

In **Italy,** protection for people, who are fully or partially incapacitated[104] can be arranged through three different forms:

- guardianship of children (who have no parents) and adults, who are completely incapable of making their own decisions due to a confirmed mental disorder;
- trusteeship to compensate legal capacity;
- tutorship.

Plenary Guardianship – The guardian represents and acts on behalf of the person but only engages in the routine management of the assets, and in actions necessary for maintenance and social life. For actions beyond routine management, authorisation by a judge is required.

Partial Guardianship (trusteeship) – It is different from guardianship in the following respects: the trustee is not a representative, but rather an assistant – their function is not to replace, but to compensate the intent of the emancipated or disabled person. The assistance of the trustee is not required for all official actions. There are two types of trustees. While an ordinary trustee takes care only of asset-related interests, a special trustee has a much wider authority (detailed by law in each case), including wider or more restricted set of representation powers and caring for personal needs. Partial guardianship is different from tutorship because it is mainly related to patrimonial protection or to integrate legal capacity of minors. After the introduction of the tutorship, the partial guardianship is a completely residual hypothesis.

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[103] These rights are: consent to marriage; petitioning for annulment of marriage, divorce or separation; determination of the conjugal domicile; consent to dispose of the family dwelling; recognition of parenthood of a child or consent to such recognition; opposition to an action to determine maternity or paternity of a child; consent to adoption; exercise of parental authority over the person's child; declarations of commencement or termination of legal cohabitation; consent to sterilisation; consent to medically assisted pro-creation; declaration of firm conviction that sex is the opposite of that stated in birth certificate; request for euthanasia; request for an abortion; consent to acts affecting one's physical integrity or intimity; consent to use of embryos in vitro for research purposes; refusal of autopsy on one's child of less than 18 years of age; consent to taking of blood or blood derivatives; making of gifts inter vivos, except presents that are proportional to the assets of the protected person; the making or revocation of testamentary dispositions; the exercise of political rights listed in Article 8 § 2 of the Constitution.

[104] For a synthetic and synoptic sheet, see Risorsa Sociale. Le forme di tutela delle persone fragili: schema riassuntivo, www.risorsasociale.it/files/pages/Amministratore_di_sostegno/Sintesi_delle_forme_di_tutela.pdf.

Tutorship – this option was introduced to protect people in difficulty, while at the same time imposing as few limitations as possible on their legal capacity. Those who – as a consequence of infirmity or of physical or psychological impairment – are even partially or temporary unable to take care of their own interests, may be supported by a tutor, appointed by a judge. The court decides which actions may be performed by the tutor in the name and on behalf of the person in difficulty, and those which the person in question may perform with the consent of the tutor. The tutor, in turn, for some important choices such as the sale of assets, needs authorisation from a judge. In any case, the person under tutorship may independently perform only actions necessary to meet daily life requirements, for example buying goods for personal use (food, clothing) or collect a monthly pension[105]. Possible recipients of the measure include: elderly people with dementia, people suffering from mental illness, people with cognitive or physical disabilities, people suffering from degenerative disease.

The most detailed framework amongst the four countries is found in **Greece.** The Greek system intervenes when needed to either substitute decision making or provide support to enhance decision-making capacity, in the spirit of Article 12[106] of the CRPD. The Greek legal framework imposes court-mandated guardianship. It allows judges the freedom to assess the facts related to the petition for placement under guardianship, and places the obligation on them to decide based on the interests of the person to be placed under the guardianship scheme, while at the same time they

[105] For a more in-depth analysis, see also Consiglio Nazionale del Notariato et al. "Dopo di oi", Amministratore di sostegno gli strumenti per sostenere le fragilità sociali, 2017, www.notariato.it/sites/default/files/Guida_Dopo_di_noi.pdf.

[106] Equal recognition before the law.

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

are mandated to demonstrate restraint in the deprivation of autonomy, imposing the minimum restrictions possible under the circumstances[107]. When guardianship proceedings are initiated, the court communicates with the person concerned, in order to formulate a first-hand opinion on their condition; the communication is private, and can take place either at the court, or in the interested person's private setting[108].

The guardianship imposed by the courts can take several forms:

General guardianship, which deprives individuals with psychosocial or intellectual disabilities of the right to enter into legal acts[109];

Special guardianship, which deprives a person of the right to enter into specific legal acts stipulated expressly and restrictively[110];

Full supportive guardianship, which does not remove the capacity to make decisions and enter into valid agreements, but establishes a form of co-decision, where the guardian's consent is mandatory for the agreement to be valid[111];

Partial supportive guardianship, which stipulates co-decision on the basis of the guardian's consent only for specific legal acts, enumerated in the guardianship order[112];

Combination of the above, where for certain legal acts a person might require partial supportive guardianship, while for others, that individual cannot perform them at all, and therefore special guardianship must be imposed[113].

The Greek Civil Code also provides for the termination of the guardianship, if the reasons that led to its imposition cease to exist. If the factors and obstacles that impaired the individual's decisions-making abilities no longer apply, the Court can restore their autonomy and full legal capacity. The process is similar to the one leading to the imposition of the guardianship: a court decision is issued based on the court's assessment of the facts. The process is initiated ex officio or following a petition for the termination of guardianship by the person concerned, their close family members or the prosecutor[114]. To safeguard the rights of the person placed under guardianship, Greek law provides that a supervisory board will be established for persons under private guardianship. This board consists of three to five members chosen among friends and

[107] Article 1676, Greek Civil Code.
[108] Article 804 of the Greek Code of Civil Procedure.
[109] Article 1676 of the Greek Civil Code.
[110] Id.
[111] Id.
[112] Id.
[113] Id.
[114] Article 1685 of the Greek Civil Code.

relatives of the person placed under the guardianship, and is assigned specific competences by the court, including supervising the actions of the guardian[115]. Finally, in cases where there is a conflict between the supervisory board and the guardian, and the latter disagrees with the decisions of the former, the court may be called to rule thereon, following the submission of a petition by the guardian, by another person with a lawful interest, or even *ex officio*[116].

It should be noted here that, in judicial practice, general guardianship, which strips the individual in question of their legal capacity and renders them co-dependent on the decisions of the guardian, is by far the most common type of guardianship ordered[117]. According to available data, in the Court of First Instance in Athens, between 2007-2011, 97.15 % of the decisions ordered concerned general guardianship, 0.72 % were special guardianship, 1.26 % was full supportive guardianship, 0.43 % was partial supportive guardianship, and only 0.43 % was temporary guardianship[118]. In the cases, when the request came from a petition from a family member or relative, 71.73 % regarded petitions for permanent guardianship, while only 10.62 % regarded temporary guardianship. In the rest of the cases where the judicial guardianship was ordered ex officio, 17.51 % was for permanent guardianship, and only 0.50 % was for temporary guardianship[119].

2. Legal status of offenders with psychosocial and intellectual disabilities in criminal law

2.1. Exemption from criminal responsibility

In all four examined countries (as in most criminal legal systems), an accused is examined towards his or her ability to "stand trial", often called "fit to plead". It is a fundamental principle, that no one may stand trial if they are unable to understand the charges, what he or she is accused of[120]. The mental capacity of the accused has two main aspects: first, in the case when an individual perpetrated an offence while in such a mental state that renders them unable to stand trial for their acts; and second, the cases when an individual accused of a crime, regardless of his mental state at the time

[115] Articles 1642 and 1682 of the Greek Civil Code.
[116] Article 1642 of the Greek Civil Code.
[117] Id., at 193-210.
[118] Id.
[119] Id.
[120] Anagnostaki, M. „The detainment of criminally unimputable offenders in public psychiatric hospitals", National Confederation of Persons with Disabilities. The Age of Autonomy: A guide to Rights in Mental Health, 2016, http://psydikaiomata.gr/wpcontent/uploads/2016/05/egxeiridio_teliko_en.pdf.

of the act, is unable to stand trial because of the mental state he or she is in during the particular time of the trial[121].

When it is determined that the mental disability has influenced or affected in any way the ability of the accused to grasp and acknowledge the wrongfulness of the acts committed, or render him incapable to act in accordance with the perception of such wrongfulness, or stand trial, the Court must examine whether the individual can be held criminally liable[122].

Despite slightly different wordings, the Criminal Codes of all four examined countries differentiate between the intellectual element (the ability to understand the significance of the committed act and its consequences) and the volitional element (the ability to control one's actions) of mental fitness. The absence of either of those elements leads to exemption from criminal responsibility. When the person has a mental condition, that does not make them unfit for trial, but nevertheless affects their actions, then a reduced sentence should be imposed.

In Bulgaria and Greece expert psychiatric and psychological opinions are always sought when there is doubt about the mental fitness of the defendant to be criminally liable, or about his/her capacity, in view of his/her physical or mental conditions, to correctly perceive the facts of significance to the case and give credible evidence about them.

2.2. Alternative measures

In **Belgium** mentally ill offenders who are deemed not criminally responsible for the offence they have committed can be placed under a compulsory treatment measure as they are simultaneously seen as a danger for society but also as persons who need treatment and care. Since 1 October 2016 a new law[123] came into force and brought several innovations in respect of the previous legal framework. It defines the "compulsory treatment measure" as "a safety measure to protect society and that simultaneously aims to ensure that the mentally ill offender is provided with the care his/her condition requires according to human dignity in view of his/her reintegration into society". The law states that persons can be subjected to compulsory treatment measure if: (1) their criminal offence harms the physical and psychological integrity of a

[121] Shah, A. „Making fitness to plead fit for purpose", International Journal of Criminal Sociology, Volume 1, 2012, pp. 176-197.
[122] Id., p. 67.
[123] The Compulsory Treatment Measures for Mentally Ill Persons Act of 5 May 2014, amended by the Potpourri III-law of 4 May 2016.

third party; (2) they have a mental illness at the time of the offence; and (3) there is a danger of committing new offences.

The new law also adopts the new terminology of "mental disorder", a notion deemed to be more in adequacy with the evolution of contemporary psychiatry. The psychiatric assessment is compulsory prior to any decision on compulsory treatment measures and has a defined minimum content. The law also sets up a panel of experts (already regularly used in practice), and provides the assistance of other experts in behavioural science (also commonly used).The doctors and the experts chosen by the defendant are allowed to comment the report of the judicial experts and these latter may address these comments in their final report. In particular, the expertise must decide on the person's "care path" by establishing "whether, where appropriate, the person can be treated and supported, and in what way, with a view to his reintegration into society". If needed, the expert can also request additional analysis from third parties or be assisted by behavioural science professionals. From 2020, the expert will be able to request observation in an institution provided for this purpose or he can obtain additional information during the two months of "observation" by a multidisciplinary team.

In response to European Court of Human Rights decisions[124], compulsory treatment measures can no longer, in principle, be served in the psychiatric wing of ordinary prisons. Compulsory treatment measures should be only served in a social defence section, in a forensic psychiatric centre for "high risk" inmates, or in a private, communal or regional institution recognised by the competent authority for 'low or moderate risk' inmates.

Another innovation is that the management and control over compulsory treatment measures is no longer attributed to the Commission for Social Defense[125] but to a Social Protection Chamber attached to the Sentence Implementation Court[126]. The chamber is made up of a sentence implementation judge, who will sit as president, an assessor specialised in social rehabilitation and a specialist assessor in clinical psychology. Once the verdict of compulsory treatment measure is pronounced by the investigating judge on the basis of a psychiatric report, it is then the Chamber that decides the details of the compulsory treatment measure. It determines the location where it

[124] See: L.B. v. Belgium (no. 22831/08) – 2 October 2012; Claes v. Belgium – 10 January 2013; Bamouhammad v. Belgium – 17 November 2015; W.D. v. Belgium (application no. 73548/13) – 6 September 2016.

[125] Commission de Défense Sociale.

[126] A Law of 17 May 2006, partially in force as from 1 February 2007 and fully in force since 1 June 2008, has introduced new principles, among which the creation of Sentences Implementation Courts *Tribunaux d'application des peines*. Most release modalities, such as semi-detention, electronic monitoring, conditional release, are now granted and revoked by these courts.

will take place or opts for another modality (electronic surveillance, probation release, early release, exit permit, leave and limited detention) in order to design a flexible "care path". The enforcement is then put in place.

Mentally ill offenders who are subject to a compulsory treatment measure are **admitted for unspecified periods** and their release depends on assessment of the risk of reoffending. Despite the new act of 2014, the compulsory treatment measures are still not limited in time, even though mentally disordered offenders may, with the assistance of a legal counsel, apply for release or conditional release to the Social Protection Chamber. Such request can be submitted every six months. When considering this request, the Chamber may seek the advice of a physician. Release, either on a trial basis or permanently, is only possible, when the mental state of the person has sufficiently improved, a reintegration plan has been drawn up and the reintegration conditions are fulfilled. Upon release, the person is sent to an open residence which meets to their specific needs, on the condition that such an establishment exists and there is a place available. So far, such cases were few and extremely unlikely. Persons were often held for a number of years and left in a permanent state of uncertainty, trapped in a cycle of anticipation and disappointment that repeats itself every six months in view of a hearing before the jurisdictional body mandated to decide on their possible (conditional) release.

It is too soon to verify and assess if the new provisions established by Compulsory Treatment Measures for Mentally Ill Persons Act have changed the balance between security and care and in allowing inmates – who oscillate between a status of patient and offender – to be less "voiceless" and mainly subjected to a managerial and risk-reduction logic that threats their reintegration into society. Certainly, this would imply a significant shift in culture within Social Protection Chambers, a larger access to the intermediate (outpatient and community) structures for inmates and probably increased resources to enable these actors responsible for intermediate housing to set up and apply appropriate care paths.

Despite its many improvements in comparison to the old legal framework, the Compulsory Treatment Measures for Mentally Ill Persons Act is still a subject to criticism and discussion, first on the transfer of competences to a body attached to Sentencing Courts which means that compulsory treatment measures – although they should not be considered as "punishment" – still falls within the remit of criminal law. Another critical aspect is the elimination of the Court of Appeal against decisions by the Sentence Implementation Court, which may now only be appealed to the Supreme Court, to which only the lawyer of the inmate may lodge an appeal, within a

very short time-frame. The CRPD[127] also raised concerns about this Act governing safety measures applicable to persons who have been deprived of legal capacity, stressing that it was not in conformity with the Convention on the Rights of Persons with Disabilities. The measures are forms of social punishment that are adopted not on the basis of the principle of proportionality, but rather in response to a person's perceived "dangerous" state. The procedure used to put in place safety measures for persons who have been deprived of legal capacity is not in accordance with the procedural guarantees established in international human rights law, such as, inter alia, the presumption of innocence, the right to a defence and the right to a fair trial[128].

In **Bulgaria** compulsory treatment measures under the Criminal Code[129] can be imposed on persons who have committed a crime while being mentally unfit to be criminally responsible, or having fallen into such condition before pronouncing the sentence or while serving it. Those can be:

- entrusting the person to his/her relatives if they commit to his/her treatment in a psychiatric establishment;
- compulsory treatment in an ordinary or specialised psychiatric establishment, in the latter case if the person is considered particularly dangerous.

Measures are imposed, terminated or amended by the court depending on the condition of the person and the needs of his/her treatment and, in any case, after six months from the person's placement in a medical establishment. Compulsory treatment may also be imposed in parallel with an imprisonment or other sentence if the (mentally fit for criminal responsibility) perpetrator suffers from alcohol or drug addiction. For those imprisoned compulsory measures take place during the serving of the sentence and the court may prolong them after the person is released from prison.

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[127] Committee on the Rights of Persons with Disabilities. Concluding observations on the initial report of Belgium, (CRPD/C/BEL/CO/1), 28 October 2014.

[128] The Committee also recommended that the Belgian State should guarantee the right to reasonable accommodation for all persons with disabilities who are detained in prison; ensure their access to health care on an equal footing with others, on the basis of their free and informed consent, and to the same level of health care as that provided in society at large; establish an independent formal complaints mechanism accessible to all persons detained in prisons or in forensic institutions; and repeal extrajudicial intervention programmes that involuntarily commit individuals to mental health establishments or force them to register with the mental health services. The provision of these services should be based on the free and informed consent of the person concerned. For more information see United Nations. Convention on the Rights of Persons with Disabilities, 2014, https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/BEL/CO/1&Lang=En.

[129] Lex.BG. Criminal Code (*Наказателен кодекс*), 1968, www.lex.bg/laws/ldoc/1589654529.

The application of compulsory treatment measures is regulated in a special section of the Criminal Procedure Code[130]. The proposal for such application is done by the prosecutor, who, before proposing, requests an expert opinion and orders an investigative authority to clarify how the person acted before and after the impugned act and whether he/she presents danger to society. The proposal is then reviewed by regional (or district, if imprisonment or probation are suspended) court, summoning the person (unless he/she is too ill), his/her parents/guardians and the victim, with the participation of the prosecutor and the person's attorney. The court also hears an expert psychiatrist and rules initially and every six months after the person is placed in hospital for compulsory treatment.

Similarly, in **Greece**, persons who are exempt from criminal responsibility by reason of mental disorder or intellectual disability may be subjected to court mandated treatment measures, including compulsory admission and involuntary treatment in a psychiatric facility. These measures are ordered when the court deems that the person may commit further criminal acts of similar gravity upon their release, and provided that the act for which they were acquitted by reason of mental disorder or intellectual disability is punishable by at least a one year prison sentence or, in the case of violent crimes[131] – if it is punishable by at least a three month prison sentence. In these cases, the prison sentence, which would ordinarily be imposed is replaced by compulsory admission to a psychiatric facility, which constitutes a "treatment measure"[132]. Specifically, these measures include: (a) admission in a special ward for offenders in a public psychiatric or general hospital, (b) admission in the general wards of a psychiatric public or general hospital, (c) mandatory treatment and psychiatric obser-

The competent Greek authorities, sporadically and in frequent intervals, now conduct emergent visits and assessment of the mental health and psychiatric facilities in which treatment measures are executed. This did not take place in the past, and is a result of the new Law 4509/2017, that enriched the duties of the prosecutor and of health and human rights authorities with regard to the quality of the treatment measure imposed to offenders, who are not criminally responsible by reason of mental disorder or intellectual disability.

130 Lex.BG Criminal Procedure Code (*Наказателно-процесуален кодекс*), 2006, www.lex.bg/en/laws/ldoc/2135512224.

131 Crimes against human life or bodily integrity.

132 See Paraskevopoulos, N. In: Margaritis, L. and N. Paraskevopoulos. Penology [Poinologia], Athens/Thessaloniki: Sakkoulas Publications, 2005, p. 44-56. Specifically on the measure of confinement to a psychiatric hospital see Paraskevolpoulos, N. „Confinement to a psychiatric clinic as a preventive measure in the Criminal Code", Tetradia Psychiatrikis, vol. 60, 1997, pp. 27-31.

vation in frequent intervals in appropriate external psychiatric or other medical facilities of a public psychiatric or general hospital.

A certification by at least one expert psychiatrist is required to order these measures. The first expert evaluation of the accused person's state of mental ability must be conducted immediately after arrest, while at least a second one should be carried out as close to the trial as possible.

If the state of the offender's mental health or intellectual ability delimits but does not altogether eliminate criminal responsibility, a reduced prison sentence is imposed to be served in a psychiatric ward, operating within the prison.

The above provisions are a result of recent reforms reflecting international standards and approaches, indicating a shift from safety measures to treatment measures.

In regard to the people, who are not criminally responsible by reason of mental disorder or intellectual disability, in the **Italian** penal system there is what is also known as "dual track"[133]: this is a mechanism in the legislation whereby those who have committed an offence as a consequence of mental disorders are acquitted and, if considered a danger to society, specific security measures may be imposed on them.

Security measures are generally divided into custodial and non-custodial.

The custodial security measures include:

1. the assignment to a farming establishment or to a work-home;
2. admission to a nursing home and custody;
3. admission to a mental asylum;
4. admission to a judicial reformatory.

[133] Considering the extent of the bibliography, reference is made only to the main monographic sources:
Caraccioli, I. I problemi generali delle misure di sicurezza, Milano, 1970;
Musco, E. La misura di sicurezza detentiva. Profili storici e costituzionali, Milano, 1978;
Fioravanti, L. Le infermità psichiche nella giurisprudenza penale, Padova, 1988;
Bertolino, M. L'imputabilità e il vizio di mente nel sistema penale italiano, Milano, 1990;
Manna, A. L'imputabilità e i nuovi modelli di sanzione. Dalle "finzioni giuridiche" alla "terapia sociale", Torino, 1997;
Collica, M.T. Vizio di mente: nozione, accertamento e prospettive, Torino, 2007;
Pelissero, M. Pericolosità sociale e doppio binario. Vecchi e nuovi modelli di incapacitazione, Torino, 2008, pp. 79 ff.
For a more in-depth analysis and further bibliography, see also Pelissero, Marco. Il doppio binario nel sistema penale italiano, www.law.unc.edu/documents/faculty/adversaryconference/doppiobinario-italiano-pelissero.pdf.

With regard to the custodial security measures applied to people with intellectual and/or psychosocial disabilities, with Law 81/30.05.2014 the judicial psychiatric hospitals and nursing homes were effectively replaced with REMS (Residences for the Execution of Security Measures). Two important rules were introduced:

1) a security measure must always have a fixed time limit;
2) the custodial security measure – an admission to REMS – should be used as a last resort, only when all other measures are not applicable.

In the 30 Italian REMS, are admitted 599 people, 54 of whom are women (9 %, almost twice the percentage of women detained in prison). The number of participations corresponds to the places available.

In 2018 the Prison Ombudsman presented an extensive report accompanied by data on mental health problems in prison facilities and on the application of custodial security measures for offenders exempted from criminal responsibility[134].

Regional distribution of patients in the REMS (residences for the implementation of safety measures) by age group – 2016-2018[135]

Regione	Fascia d'età																	
	18-25			26-35			36-45			46-55			56-65			>65		
	2016	2017	2018	2016	2017	2018	2016	2017	2018	2016	2017	2018	2016	2017	2018	2016	2017	2018
Abruzzo	–	1	2	–	2	3	–	3	8	–	2	5	–	1	1	–	1	1
Basillicata	1	0	0	4	3	3	7	4	4	6	5	5	4	3	1	0	0	0
Calabria	–	1	–	–	2		–	1	–	–	2	–	–	0	–	–	0	–
Campania	1	1	2	12	11	9	12	22	21	14	21	14	6	9	4	0	1	1
Emilia Romagna	2	3	3	6	2	1	6	6	8	4	7	3	3	5	2	1	0	0
Lazio	0	2	4	13	13	12	19	24	23	26	22	13	7	11	5	2	3	1
Liguria	–	–	2	–	–	7	–	–	2	–	–	3	–	–	1	–	–	1
Lombardia	8	8	9	47	40	53	48	42	34	37	23	30	26	10	9	12	6	4
Marche	0	2	2	3	5	4	5	2	4	4	4	3	3	5	6	0	1	0
Piemonte	0	0	2	6	14	10	5	6	7	4	10	9	1	4	1	2	4	2
Puglia	0	1	2	1	5	7	4	13	9	1	8	8	1	8	3	0	1	1
Sardegna	1	1	2	3	4	3	5	6	4	5	4	3	2	1	3	0	0	0
Sicilia	0	0	0	3	3	4	5	4	2	7	6	8	3	4	3	3	2	2
Toscana	0	1	3	1	3	7	4	5	3	1	6	6	1	3	2	0	0	0
Trentino Alto Adige	1	0	3	1	1	0	5	7	4	1	1	1	1	1	2	0	0	0
Veneto	–	7	5	–	2	5	–	9	10	–	13	14	–	3	5	–	1	0
Totali	**14**	**28**	**41**	**100**	**110**	**128**	**125**	**154**	**143**	**110**	**134**	**125**	**58**	**68**	**48**	**20**	**20**	**13**

[134] Garante Nazionale dei diritti delle persone detenute o private della libertà personale. Relazione al Parlamento, Rome: Garante Nazionale dei diritti delle persone detenute o private della libertà personale, 2018, http://www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/bbb00eb9f2e4ded380c05b72a2985184.pdf.

[135] Ibid.

The non-custodial security measures include:

1. probation;
2. prohibition of residence in one or more municipalities, or in one or more provinces;
3. prohibition of going to pubs and public alcohol outlets;
4. expulsion of the foreigner from the State.

Mental Health Departments have become fully-fledged owners of therapeutic and rehabilitation programmes in order to implement, as a rule, custodial and non-custodial treatments in territorial and residential settings.

IV. PROCEDURAL RULES AND PRACTICES APPLICABLE TO OFFENDERS WITH PSYCHOSOCIAL OR INTELLECTUAL DISABILITIES

The pre-trial stage is a crucial moment in the criminal procedure that often strongly influences and may even determine the outcome of the entire judicial proceedings. Different studies have demonstrated that psychological vulnerabilities could interfere with the outcome of an interrogation (because of lack of understanding the consequences of answers, for example). Hence, the screening of suspects and/or accused

The Police Commissioner of New South Wales, Australia has issued instructions to his officers regarding the conduct of interviews which can be taken to apply to people with an intellectual disability. In particular, some of the provisions of Instruction 31.2 are as follows:

6. ***The following instructions are designed as a guide to members of the Force conducting investigations…In addition to complying with these instructions interrogating officers should always be fair to the person who is being questioned, and scrupulously avoid any method which could be regarded as unfair or oppressive…***

6(3). ***In the case of persons with apparent infirmity, feeble understanding or special disability and of persons unfamiliar with the English language, such special measures as are practicable and appropriate shall be taken to ensure fair interrogation.***

Questions prior to arrest

7(2). ***If the person being questioned requests that any other person then in his company or in the immediate vicinity (other than a suspected accomplice) remain within hearing during the questioning, the member of the Force shall not unless the exigencies of the occasion require, prevent this, provided such other person does not hinder or obstruct the questioning.***

7(3). *If the person being questioned is suspected of being of feeble understanding, such a person shall, if reasonably practicable, be interrogated in the presence of a parent guardian, relative, friend or other responsible person not associated with the inquiry.*

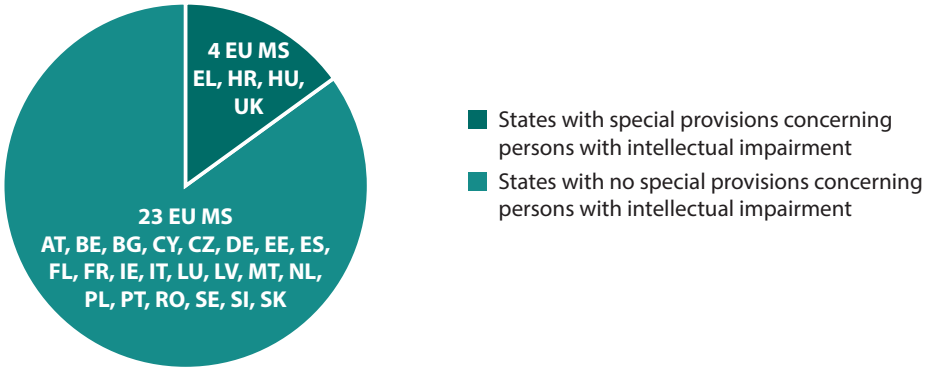
7(4). ***If a person being questioned expresses a desire to consult a legal adviser, he should be given every opportunity to do so. If he so desires, further questioning should except in special circumstances, be deferre4 but only for such short period as is reasonable necessary to enable the person to obtain legal advice by telephone or otherwise.***

Source: Australian Human Rights Commission, https://www.humanrights.gov.au/our-work/rights-people-disabilities-areas-need-increased-protection-chapter-5-criminal-justice#activity

and the timely identification of their disabilities is crucial for their adequate treatment and the appropriate accommodation of their needs[136].

According to data, provided by FRA, in 2015 only four EU Member States have specific provisions to ensure interpretation and translation for, and make crucial information accessible to people with intellectual disabilities. Legal rules in Croatia, Hungary and Greece oblige national authorities to guarantee that information has been provided and understood, specifically taking into account the suspect's or accused's intellectual abilities. In the United Kingdom, the law requires an appropriate adult whose role it is to assist a person with intellectual disabilities to also ensure that the person understands and responds accordingly. In practice, most Member States rely on the assistance of a third party – for example, a guardian who is generally present during the criminal proceedings – to facilitate providing information about rights[137].

Provision in EU Member States on informing persons with intellectual impairments about procedural rights and accusations in an appropriate manner



Note: *Pursuant to its specific opt-out regime, Denmark is not bound by either directive.*
Source: *FRA, 2015*

[136] Beqiraj, Julinda et al. Access to justice for persons with disabilities: From international principles to practice, International Bar Association, 2017, https://www.ibanet.org/PPID/Constituent/AccesstoJustice_LegalAid/disabilitiesreport-pressrelease.aspx.

[137] European Union Agency for Fundamental Rights. Rights of suspected and accused persons across the EU: translation, interpretation and information. Luxembourg: Publications Office of the European Union, 2016, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-right-to-information-translation_en.pdf.

1. Belgium

According the Federal Anti-Discrimination Act of 25 February 2003,[138] whose scope was further extended by the Acts of 10 May 2007[139] (aimed at combating certain forms of discrimination), not providing for reasonable accommodations[140] that would allow full access or participation of persons with disabilities in specific context is considered to be an act of discrimination in Belgium. The anti-discrimination legislation applies to the sector of goods and services, whether public or private, and therefore to public services such as courts and penitentiary facilities[141].

Despite this general legal framework, Belgian criminal justice procedures applied to mentally disordered defendants, both in theory and in practice, are unsatisfactory in the light of international standards to which they should abide.

When there are reasons to believe that a person is suffering from a mental disorder that could have an impact on, or nullify, the control of his/her actions, and in respect of whom there is a risk of reoffending because of this mental disorder, the Belgian prosecution authorities or courts may order a psychiatric expert report. In essence, this psychiatric report aims to establish whether or not the defendant is criminally responsible for the act(s) he/she committed. In other words, the aim of this report is to establish whether or not this individual should be referred to a (secure) forensic psychiatry setting, instead of applying the Criminal Code to his/her case.

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[138] Law of 25 February 2003 Combating Discrimination, Amending the Law of 15 February 1993 Founding the Centre for Equal Opportunities and Opposition to Racism. The Belgian Anti-Discrimination Act of 2003 broadened the concept of criminal "discrimination to every "discrimination" on the grounds of "gender, so-called race, colour, descent or national or ethnic origin, sexual preference, marital status, birth, wealth, age, religion or philosophy, present or future state of health, handicap or physical characteristic".

[139] Three new anti-discrimination laws were issued on 10 May 2007: the Racism Act, which modifies the Act of 30 July 1981 on Combating Certain Acts Inspired by Racism and Xenophobia; the Gender Act, which aims to eliminate discrimination between men and women; and the Anti-discrimination Act 2007, which aims to eliminate certain forms of discrimination. These new legislations set out prohibited grounds of discrimination as follows: nationality; racial identity; skin colour; ancestry; or national or ethnic origin; gender; age; sexual orientation; marital status; family background; financial status; religious or other belief; political opinion; language; current or future state of health; disability; physical or genetic characteristics; or social origin.

[140] The exact definition of 'reasonable accommodation' is explained in the section of this report, dedicated to the Convention on the Rights of Persons with Disabilities.

[141] The Anti-discrimination Federal Acts provide for protection in large areas of public life: the provision of goods or services when these are offered to the public; access to employment, promotion, conditions of employment, dismissal and remuneration, both in the private and in the public sector; the nomination of a public servant or his/her assignment to a service; the mention in an official document of any discriminatory provision; and access to and participation in, as well as exercise, of an economic, social, cultural or political activity normally accessible to the public.

Defendants with mental disability are now always entitled to free legal aid[142]. However, neither the identification by the police, prosecuting authorities or the courts, nor the identification by the psychiatrist, of a severe mental disorder is made with the aim of granting the defendant additional extra-legal assistance in order to be able to participate in the proceedings properly. The regulations do not mention the possibility of instigating extra-legal procedural protection involving a relative, a social worker or a healthcare professional in order to safeguard the fairness of the proceedings. Similarly, no specific provision is made to ensure appropriate access to documents for persons with cognitive disabilities. The person therefore has no other choice than to rely solely on their lawyer. In this regard, communication between the lawyer and the client is extremely important. If some lawyers are specialised in dealing with cases involving mentally ill defendants, there is no procedural guarantee that the latter would be represented by such specialists.

Lack of appropriate training of the entire justice sector

Furthermore, there is a clear lack of training – aimed at ensuring appropriate communication and interaction with mentally ill persons at all stages of the process for all justice stakeholders from the police to the judicial and prison staff: this lack of awareness concerns all types disabilities (motor, sensory and cognitive). The lack of understanding of disability among staff is nowhere as dramatic as in the prison system. Persons with disabilities in the prison system are there 24/7. Not hearing or understanding what is being said can have catastrophic consequences for the person. While the principle of reasonable accommodation has been enshrined in law, there are no measures expressly intended for persons with disabilities in the prison regulations. The training of prison staff does not include any official information or specific guidelines on this subject either. Having said that, certain actors within the prison system do promote the "natural" practice of making such accommodations, particularly in the case of staff working within prison psychiatric units. In response to the Federal Ombudsman inspections or following the intervention of the Centre for Equal

[142] It should be noted that in a procedure for an involuntary placement, a state-funded independent counsel is automatically appointed, regardless of the means of the mentally ill. There was no similar legal provision for a mentally ill offender involved in a procedure leading to his or her punishment or placing under compulsory treatment measure. However, the Constitutional Court has recognised the importance of a lawyer in such cases. Therefore, it has annulled certain parts of the Compulsory Treatment Measures for Mentally Ill Persons Act in order to assure the full assistance of a lawyer throughout the whole of the procedure (Constitutional Court, No. 154/2008, 06.11.2008). Not only the inmate, but also his or her lawyer has to automatically receive any relevant advice concerning the implementation of his or her compulsory treatment measure and they both have to have the right to receive a copy of the file, since an inmate is not always capable of handling it on his or her own.

Opportunities and Opposition to Racism[143], the prison administration solved specific problems (such as providing for an ergonomic chair in the cell). However, such way of addressing special needs of disabled inmates is neither sufficient, nor appropriate. The Belgian penitentiary administration should integrate the concept of "reasonable accommodations" organically within its policy, staff training and infrastructure design.

Contacts with the police are an important element as it constitutes the first stage of the process in which intellectually or psychosocially disabled offenders might be involved. According to Belgian law, police services have among their tasks the supervision of mentally disordered persons who seriously endanger their health and safety or who pose a serious threat to the life and physical integrity of others[144]. They can prevent their straying, seize them and immediately notify the public prosecutor[145]. Police services should also seize those who are reported as having escaped from the psychiatric ward, where they were lawfully kept for treatment or placed under observation and make them available to the competent authorities[146]. Finally, the police services are also tasked to supervise the people, that have been subjected to an compulsory treatment measure under the 2014 Act on the admission to a psychiatric facility of mentally ill persons[147].

The police intervention must, in all cases, meet the principles of legality, subsidiarity, proportionality and opportunity. Hence, priority should be given to the least coercive and radical dialogue and intervention techniques and the modalities of intervention must be adapted both to the objective and the circumstances of that intervention, which, for example, depend on the behaviour and state of vulnerability of the person to whom the police intervention is taking place. Respect for the aforementioned prin-

143 Now called UNIA; www.unia.be.

144 Article 18. (Les services de police) surveillent les malades mentaux qui mettent gravement en péril leur santé et leur sécurité ou qui constituent une menace grave pour la vie et l'intégrité physique d'autrui. (Ils) empêchent leur divagation, s'en saisissent et en avisent immédiatement le procureur du Roi, L 1998-12-07/31, art. 174, 005; En vigueur: 01-01-2001, L 1999-04-19/50, art. 23, 006; En vigueur: 01-01-2001.

145 The police services can thus inform the public prosecutor of the arrest of a person whose state suggests mental disorders, justifying the start of an emergency observation procedure. In this case, the public prosecutor invites the police to present the arrested person to the physician he has designated so that he can prepare a detailed medical report. This detailed medical report is most often drawn up by one of the doctors attached to the psychiatric emergency services of a hospital. These services operate 7 days a week and have a multidisciplinary team that can work 24 hours a day.

146 "(Ils) se saisissent de ceux qui leur sont signalés comme étant évadés du service psychiatrique où ils avaient été mis en observation ou maintenus conformément à la loi et les tiennent à la disposition des autorités compétentes. L 1998-12-07/31, art. 174, 005; En vigueur: 01-01-2001.

147 Article 19. [2 Les services de police surveillent les personnes internées à qui le tribunal de l'application des peines a octroyé une des modalités d'exécution de l'internement visées aux Articles 20, 21, 23, 24, 25 et 28 de la loi du 5 mai 2014 relative à l'internement des personnes. Ils contrôlent également le respect des conditions qui leur ont été communiquées à cet effet.] L 2014-05-05/11, art. 129, 033; En vigueur : 01-10-2016 (L 2016-05-04/03, art. 250). Dispositions transitoires: art. 134 et 135.

ciples conditions the legality of police interventions, and in particular the use of binding measures. Police who do not respect these principles incur criminal, civil and disciplinary liability.

To this purpose, the basic training of police officers includes a module dedicated to intervention in situations involving mentally ill persons. More specifically, this training covers the following aspects: the identification of the situation, the legal bases of the police intervention, the role of the various services and institutions involved in this issue, the management of a crisis situation involving a person suffering from mental/physical problems. Specific advanced trainings also address this issue (e.g. "Mental illnesses and police attitudes"[148]).

However, despite these initiatives, associations representing people with disabilities and promoting respect of their rights, consider that these training are not sufficient to ensure appropriate communication and interaction of police officers with mentally ill persons[149].

When law enforcement personnel carry out identity checks and administrative or judicial arrests, it is not uncommon for a person with a disability to be deemed a delinquent whereas a proper understanding of their experience would lead to the situation being managed with respect for the person and their mental state. For example, people are sometimes arrested on the street, not on the basis of an offense they have committed, but on the basis of a behaviour they display, or simply because they did not have the capacity to express themselves or to make themselves understood**.** Police authorities are also aware of this knowledge's gap and, given the increase in the number of cases requiring police intervention with respect to persons in a vulnerable psychological or mental state, they have taken steps to improve the situation. As communicated by the Ministry of Security and Home Affairs[150], in 2015 within the federal police has been set up a working group to address this issue by developing a training focused on: the legal framework of police interventions, the typology of the main cases of mental disorders and the symptoms detectable and identifiable by the police, modalities to avoid stigmatisation, as well as the development of appropriate dialogue and intervention techniques. This study is done in consultation with professionals

148 Formation Maladies mentales et attitudes policières (DA 3071).

149 For example, see the report initiated and coordinated by the Belgian Disability Forum (a network of associations representing persons with disabilities) on the implementation by Belgium of Convention on the rights of Persons with disabilities (20 February 2014).

150 See Question écrite n° 6-141 de Bert Anciaux (sp.a) du 23 octobre 2014 au vice-premier ministre et ministre de la Sécurité et de l'Intérieur, chargé de la Régie des bâtiments – *Police – Contact avec les personnes souffrant d'une maladie mentale*, 2014, www.senate.be/www/?MIval=/Vragen/SchriftelijkeVraag&LEG=6&NR=141&LANG=fr.

from the mental health sector and include the exchange of good practices with police services from other countries.

Perceptions of rules and measures by mentally ill offenders

The lack of appropriate procedural safeguards or the inadequacy of procedures in respect of their specific situation is also confirmed by mentally ill persons who have been subject to a compulsory treatment measure. As demonstrated by recent surveys and studies[151], they also identify many procedural difficulties regarding the compulsory treatment measure and the law it is regulated by. These procedural difficulties are related to different aspects of the compulsory treatment procedure, namely to the psychiatric expertise, the courts, and the administration of the compulsory treatment measure.

With respect to the *psychiatric expertise*, questions and concerns are raised about its quality. It is argued that the quality of the psychiatric report was hampered by the state of mind of the person at the time of the expertise as well as the way the psychiatrist performed the expertise. Participants indicate that when the psychiatric assessment was carried out, they were experiencing (severe) symptoms of mental illness or were intoxicated, which obstructed having a normal conversation or cooperating with the assessment in a serious manner. They also indicate they met only once with the court psychiatrist for a short amount of time, and that the assessment lacked scrutiny.

The circumstances that produce the low quality of the psychiatric expertise in reports in Belgium have already received a lot of attention and national criticism. These circumstances are the low remuneration for a psychiatric court assessment and the shortage of available psychiatric experts, the lack of a formal statute and training for forensic psychiatrists, the lack of quality criteria for a psychiatric court assessment report, and the lack of a forensic clinical observation centre. Magistrates call on only a small number of psychiatrists, who are already overburdened. Therefore, they cannot respond to the request within a reasonable period. The result is that, in the majority of cases, the psychiatrists only see the defendant once and can only give a short amount of time to them.

The Compulsory Treatment Measures for Mentally Ill Persons Act creates preconditions for a better quality of psychiatric court assessment reports. In April 2016, the regulation regarding the formal recognition of the special professional competence in forensic psychiatry was implemented. This formal recognition is associated with a theoreti-

[151] For a comprehensive analysis of these studies see: Wittouck, C. Persons with mental illness who offended and procedural justice giving voice to persons subjected to a compulsory treatment measure about their interactions with power holders, Ghent: Ghent University, 2019.

cal and practical training. In addition, the numeration for performing a psychiatric court assessment has been adapted to the standard rate for psychiatric consultation and a formal template for a psychiatric court assessment report has been implemented. It has been announced that a forensic clinical observation centre will probably open in 2020.

With respect to *court proceedings*, some people, who were placed under compulsory treatment measure, indicate not attending the court hearing(s). Reasons for not attending the court hearing(s) were, for example, being dissuaded by their lawyer, not being notified for the hearings or feeling uncomfortable at these hearings. When this non-attendance was primarily induced by others, participants in the study felt unsatisfied or ambiguous about it because they were not able to defend themselves. In addition, they experienced difficulties in understanding what was happening**,** in terms of not understanding certain professional language during hearings as well as in terms of not being fully aware of the seriousness of the impending compulsory treatment measure.

Finally, and contrary to the objective of the law stating that the compulsory treatment measure is a safety measure instead of a punishment, mentally ill offenders also experience the compulsory treatment measure as a punishment. Furthermore, considering its indeterminate duration, they experience is as "a maximum sentence", "a life sentence", or "a sentence to death".

2. Bulgaria

In the opinion of police, no guidelines or manuals are available for working with persons with psychosocial or intellectual disabilities. Officers can rely on general ethical norms from the respective codes of conduct of state officials and police officers on not allowing acts of torture, inhuman or degrading treatment, punishment or conduct and not allowing discrimination[152]. No guidelines are reported by judicial professionals either, while a judge interviewed pointed that many judges have nevertheless followed their own good practices in dealing with such persons[153]. All experts contacted referred to the general safeguards available to ensure the protection of defendants' rights and pointed to no special treatment of persons with psychosocial or intellectual disabilities. No obligatory recording of such persons' interviews is provided for as additional safeguard either.

[152] Ministry of the Interior.
[153] Interview with a regional court judge, 30 January 2019.

In terms of practically safeguarding the rights and interests of persons with psychosocial and intellectual disabilities during criminal proceedings, a judge interviewed[154] related a case where a defendant, later diagnosed with schizophrenia, alleged to have not received the bill of indictment and did not initially get mandatory defence, which the court appointed only when the judge personally established the defendant had trouble understanding the nature of the issues to be discussed. The person also claimed violations of his information and defence rights during the initial police checks and interviews. The court ordered an expert examination, which indeed established mental illness and unfitness for criminal responsibility. The judge signalled to the Prosecutor's Office to re-open two previous cases where the person was tried in absentia in what turned out to be an acute phase of his illness, but the prosecutor's office refused to do so.

A two-year pilot research project (2016-2018) assessing the implementation of the EC Recommendation on safeguards for vulnerable persons suspected or accused in criminal proceedings (2013/C 378/02), with the participation of a Bulgarian partner, the Bulgarian Helsinki Committee, produced the Handbook "Dignity at Trial", which contains a comparative report on partner countries' legal and practical frameworks on the matter, criteria for identifying promising and good practices, a number of recommendations for practitioners and beneficiaries, as well as legal and policy recommendations for Member States. In annexes, the project has developed a checklist on first indications for a person's potential intellectual and/or psychosocial disabilities, and documentation sheets about the rights and obligations during criminal procedure for police and judges, respectively. (1/3)

Identification and assessment of special needs

Individuals with psychosocial and intellectual disabilities are identified from a very early stage of proceedings when police and prosecution gather data on the alleged perpetrator of the crime under investigation – character traits, material and family status, level of intellectual development, mental illnesses, possible stays in a specialised psychiatric institution, etc. Much reliance is made on the personal impressions of investigative police, but expert examinations are also ordered to establish whether the person indeed has a mental illness and whether he/she can give credible evi-

[154] Interview with a regional court judge, 30 January 2019.

dence[155]. This opinion is supported by police, who, in the absence of direct access to data about such persons, or their possible legal guardianship, usually identify them via direct contact, observing visible signs of a mental disorder, posing direct and imminent danger to their own life or health or those of others. Evidence of the offender's psychosocial disability is also given by victims when they call police departments before a police patrol is sent to the scene of the offence[156].

The Checklist, developed for the 'Dignity at Trial' Handbook : First Indications for a Person's Potential Intellectual and/or Psychosocial Disabilities contains questions for screening by police, including whether the questioned person is able to comprehend complex information and express himself/herself, whether he/she has temporal and local orientation or suffers from an obvious thinking or affect disorder. Questions for the suspect are also available: whether he/she gets any kind of professional psychosocial support and whether it is possible to call a person of trust to get further information about the person questioned. Among the further indications given to police to refer to are previous deprivation of liberty in a psychiatric hospital, information about ambulant psychiatric treatment, already existing psychiatric or psychological assessments for other trials, actual medication, drug or alcohol screening, reports from police colleagues from previous actions or information from relatives, close persons or caretakers about the person's disability, suicide attempts. (2/3)

In general, lack of mental fitness to bear criminal responsibility can be established at any stage – during the pre-trial proceedings, where the prosecutor may terminate them, and even during the trial. In case of mental fitness, the person may as well be sentenced and/or committed to compulsory medical treatment. Also, after sentencing, the probation measure of 'inclusion in programmes for influence by the public' may be a penalty of choice for persons with psychosocial or intellectual disabilities[157].

Provision of information

In informing defendants, including persons with psychosocial or intellectual disabilities, about their rights, prosecutors rather rely on what is stipulated in the law and in

[155] Interview with a prosecutor, 12 February 2019.
[156] Ministry of the Interior.
[157] Interview with a prosecutor, 12 February 2019.

the decrees for bringing charges. Although no lawful, non-discriminatory way is seen to set a different regime for informing such persons, the approach of authorities is nevertheless 'adapted'[158]. General, standard procedure is also used by police who, upon detention, explain to persons their rights and have them fill in and sign a declaration enlisting those rights. If the persons are in no state to fill in the declaration, it is filled in by an officer in the presence of a witness[159].

The documentation sheets, developed for the 'Dignity at Trial' Handbook, about the rights and obligations during criminal procedure are divided into one for police and one for judges. Both contain easy to read information for the suspect/defendant about the various stages of the procedure and the actions authorities will take towards him/her. Authorities should go through the sheet with the suspect/defendant and hand out a copy of the document to him/her. Each piece of information is accompanied by an easy to understand statement by which the person can express his/her wishes and understanding, for example: I understand the reason why the police arrested me yes/no and I want to call somebody yes/no. (3/3)

Special rules are only available for people who have speaking, visual or hearing impairments and who are not in command of the Bulgarian language – those persons are accorded an interpreter/a sign interpreter. According to police[160], the appointment of sign interpreters is very much relevant for offenders with psychosocial disabilities since they often have such additional impairments. In practice, especially in smaller towns/villages relatives or caretakers are given such roles because they are in best position to explain to the offender his/her rights and assist police in carrying out their duties.

Appointment of lawyer

The existence of physical or mental disabilities which prevent the person from executing his/her own defence is one of the grounds for appointment of mandatory defence in the criminal proceedings under the Criminal Procedure Code. The existence of such disabilities, however, is a matter to prove and cannot be equated to the existence of any psychosocial or intellectual disability. Defence is also mandatory if a request is made to court for the defendant's detention in custody or if the defendant is already

[158] Interview with a prosecutor, 12 February 2019.
[159] Ministry of the Interior.
[160] Ministry of the Interior.

detained on some grounds. No waiver of that right is valid. In case of mandatory defence, the relevant authority appoints a defence attorney.

Special measures

Prosecutors do take into account the needs of persons with psychosocial and intellectual disabilities by affording them breaks to calm down, giving them refreshments, and interviewing them with more care. They attempt not to use too many professional terms and speak simply and understandably, they constantly monitor the persons' condition, because such persons are in principle very much afraid of criminal proceedings, which hinders them from expressing their statements and opinions. However, if the defendant is considered mentally fit, prosecution generally sends its indictment to court, although the person's disabilities and unfavourable family environment may be considered attenuating circumstances when pronouncing the sentence[161].

Specialised assistance and services

As support persons are not explicitly established under Bulgarian law, in the opinion of the prosecution, the presence of such persons may be refused although an assessment should be made in accordance with each particular case. A prosecutor interviewed has not had such a case, but thought that, if a doctor wants to be present at the interview of such a person, he/she would most probably be allowed[162]. In the opinion of police as well, there are no norms or guidelines on the presence of a family member or support person for such people, and each police officer should assess himself/herself whether the presence of such a person would help the investigation, or the interview[163].

Specialised training

Prosecutors in Bulgaria receive no specialised training to work with persons with psychosocial and intellectual disabilities. Such persons are only mentioned within the general practical trainings on how to conduct defendant interviews, but in no suffi-

[161] Interview with a prosecutor, 12 February 2019.
[162] Interview with a prosecutor, 12 February 2019.
[163] Ministry of the Interior.

cient depth[164]. Police, including investigative officers, has not had any specialised training either[165].

Case-law

As Bulgarian law has few specific norms on the situation of offenders with psychosocial or intellectual disabilities, more substantial bodies of case law are found in relation to those few norms. One of those is the regulation on obligatory defence. A fair differentiation is made in Bulgarian case law between lack of psychiatric fitness to bear criminal liability and mental disabilities hindering the person's ability to defend himself/herself, which would justify the appointment of an ex officio lawyer, but persons would nevertheless be prosecuted and tried with no specific treatment envisaged. Thus, defendants with, respectively, minor oligophrenia, symptomatic epilepsy or organic personality disorder, although having ex officio lawyers or not needing such because of having hired their own, have been found fit for criminally liability and pass the full cycle of criminal procedure, with no indication of specific measures to facilitate their understanding of proceedings[166]. Persons' ability to defend themselves has also been seen as affected in cases of drug addiction, for example concerning heroin[167], but, according to another court act, alcohol-related epilepsy, for example, did not fall among those cases[168]. Thus, medical criteria primarily used to define a person's disability create a conundrum of diagnoses where criteria on who should or should not get ex officio defence are difficult to establish.

In a notable exception looking at the appointment of obligatory defence as a safeguard for rights, such a lawyer was appointed for maximum guarantee of a defendant's right of defence even though expert opinions on the mental disability do not find the person unable to defend himself/herself[169].

To continue the line of safeguarding the rights of persons with psychosocial and mental disabilities during criminal proceedings, such disabilities are in many cases seen as

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164 Interview with a prosecutor, 12 February 2019.

165 Ministry of the Interior.

166 Regional Court of Lovech, Sentence No 87 of 11 December 2009 on criminal case No 623/2009; Regional Court of Dupnitsa, Sentence No 7 of 22 January 2014 on criminal case No 1510/2012; Sofia City Court (*Софийски градски съд*), Decision No 537 of 29 May 2014 on criminal case No 1587/2014.

167 Regional Court of Sofia, Sentence of 17 June 2014 oncriminal case No 10337/2013;
Regional Court of Sofia, Sentence of 28 January 2010 on criminal case No 12442/2010.

168 Gabrovo District Court, Decision No 72 of 15 October 2015 on criminal administrative case No 82/2015.

169 Regional Court of Byala, Sentence No 140 of 2 December 2010 on criminal case No 234/2010.

alleviating circumstance when deciding on the criminal penalty[170]. Interestingly, courts have also discussed how defendants with intellectual disabilities, for example one with a serious form of debility, can be suggested and led to admit a crime they have not committed. Such admissions courts did not credit[171].

3. Greece

Police are mandated to demonstrate full respect for the rights and dignity of all suspects and accused persons, in particular those with psychosocial or intellectual disabilities. The Greek legal order, including the Constitution, guarantees the protection of all persons with disabilities[172]. At the same time, the Police Code of Ethics also makes specific references and details the rights and obligations of the police in the pre-trial stage, when arresting, interrogating and detaining an individual with disabilities[173].

In Greece, the Police are trained on issues of mental health, various types of mental illnesses, disorders and disabilities, different aspects of such disorders and the aspect of self-harm for the individuals with such disabilities. Also, the police receive training to identify issues of mental disorder and possibilities of self-harm.

The Police have the obligation to uphold the law in a socially sensitive manner, without discrimination, but with objectivity and transparency, protecting the dignity of all citizens in the process. The rights of life and personal liberty are to be respected, and strict prohibitions of torture, degrading or humiliating treatment and any violations of basic human rights are guaranteed[174]. What is more, the Police have the obligation to explain to suspects and accused persons their rights and provide information on the charges against them in a manner tailored to their specific needs. During the arrest

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170 Regional Court of Lovech, Sentence No 87 of 11 December 2009 on criminal case No 623/2009; Regional Court of Pleven, Sentence No 579 of 30 September 2010 on criminal case No 1114/2008; Regional Court of Popovo (Районен съд – Попово), Sentence of 2 February 2010 on criminal case No 402/2009.

171 Bulgaria, Regional Court of Popovo Sentence of 2 February 2010 on criminal case No 402/2009.

172 Article 21 of the Greek Constitution.

173 Code of Conduct of Police (Presidential Decree. 254/2004) [Greek], www.astynomia.gr/images/stories/Attachment14238_KOD_FEK_238A_031204.pdf?fbclid=IwAR2RniZiA05KeVXGzX_OMfBW3ZIudHzxsW10Sh_Mdx6xUpJ60qY8q34uzGc.

174 Code of Conduct of Police (Presidential Decree. 254/2004) [Greek], www.astynomia.gr/images/stories/Attachment14238_KOD_FEK_238A_031204.pdf?fbclid=IwAR2RniZiA05KeVXGzX_OMfBW3ZIudHzxsW10Sh_Mdx6xUpJ60qY8q34uzGc, Article 2.

and while in police custody or pre-trial detention, the accused person has the right to communicate with third parties and to have access to a lawyer. They also have the right to have access to medical treatment throughout the pre-trial stage of the proceedings and must be informed of this right immediately upon arrest or detention[175].

Investigating officers must ensure that the investigation is carried out with the outmost respect to the dignity and presumption of innocence of the accused. In particular, the authorities must demonstrate special care to suspects and accused persons who exhibit a psychosocial, intellectual, or any other disability, and accommodate them during the interrogation process. The presence of a lawyer should be guaranteed and all communications should be conducted in a manner which is friendly and accessible to the accused[176].

The Greek legislation that ratified the CRPD contains specific provisions that clarify the need for the State to ensure effective access to justice and guarantee the compliance of the administrative and judicial systems with the requirements set out in Article 13 of the CRPD. In line with the above requirements, Law 4488/2017 mandates that the State must ensure the equal access of persons with disabilities to the physical and digital space and establishes an obligation – and the corresponding right of persons with disabilities – to friendly and accessible interactions between public services and public administration on the one hand and individuals with disabilities on the other. Greek sign language and Brail language are recognised as equal forms of communication to that end[177]. In addition, Law 4488/2017 establishes a framework for information, education and awareness of public servants working in administrative services and other government bodies on disability and the rights of persons with disabilities under the international and domestic legal framework. Judicial employees and the police undergo training on the needs of persons with psychosocial and intellectual disabilities, and on how to best accommodate them during the criminal proceedings. This is mostly carried out in the form of formal and informal training by advocacy centres and mental health groups. For example, in 2013 police employees have undergone training on issues related to mental health, suicidal tendencies, and the various types of patients with mental disorders, including borderline personality disorder, bipolar disorder, depression, schizophrenia, and other psychosocial disorders that could result to self-harm[178]. What is more, in police journals and forums relevant mate-

[175] Id., Article 3.
[176] Id., Article 4.
[177] Id.
[178] Centre for the Prevention of Suicide. Educating Police on suicidal interventions: Action for the elimination of suicides and skills to handle suicidal behavior, 2013, www.klimaka.org.gr/wp-content/uploads/2017/05/ΕΚΠΑΙΔΕΥΣΗ-ΑΣΤΥΝΟΜΙΑΣ-ΓΙΑ-ΑΥΤΟΚΤΟΝΙΑ-.pdf.

rials are often disseminated, as part of governmental research or research by police officers in the fields of mental health and involuntary admission[179].

If an individual accused of a crime is affected by a psychosocial or intellectual disability, or indicates during his or her defence that he or she is affected by such disabilities, then a determination of their mental state and capacity is required. This determination process is based on expert reports and opinions and is initiated either by the investigating judge with the concurring opinion of the prosecutor (if the investigation is still ongoing) or by the court formation the case is assigned to[180]. The process should conclude on the accused person's ability to stand trial.

The process for assessing an accused person's mental or intellectual capacity is detailed in the Greek Criminal Procedure Code, as follows[181]:

1. When the accused person is found to be in a state of disturbance of his mental functions, the court may either immediately issue an acquittal order or decide to suspend the proceedings to proceed with the evaluation of their mental state. If the accused is placed in pre-trial detention, this is replaced by compulsory admission in a judicial psychiatric facility or other public psychiatric facility.

2. An expert evaluation by a psychiatrist is ordered.

If the reasons for the suspension cease to exist, the proceedings resume.

Article 200 of the Criminal Procedure Code gives further details about the manner in which the expert evaluation is to be conducted and the conditions for the compulsory admission to a psychiatric facility[182]:

Compulsory admission is ordered following an opinion by expert psychiatrists, and after the defence is heard. If the accused does not have a defence lawyer, one is provided by the court. The accused may appeal against such order before the court's judicial council[183] within three days from the day it was issued. The appeal has suspensive effect. The judicial council's decision is final. Compulsory admission cannot continue for more than three months. In this time, pre-trial detention is suspended and the time in the psychiatric facility is deducted from any prison sentence imposed in case of conviction (in cases of limited criminal responsibility).

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179 See Lieutenant E. Diamanti. "Police and Involuntary Admission", Police Journal, 30, 2013, www.hellenicpolice.gr/images/stories/periodiko/281_2.pdf?fbclid=IwAR0XsMf86xP5l9RZDizazd1m9bTw_7746DI-7vh_i6Lw8GY1q16CjOSkozY.

180 Articles 80 and 200 Criminal Procedure Code.

181 Article 80 of the Criminal Procedure Code.

182 Article 200 of the Greek Criminal Procedure Code.

183 A three-member council of judges, which decides on appeals on the pre-trial procedures and resolves disputes between the investigating judge and the prosecutor.

Following the expert evaluation, and the conclusion of the investigation with the accused person's hearing, the case may be admitted to trial, provided that there is sufficient evidence. When the accused has been evaluated as not criminally responsible, the judicial council will enter the case to the competent Court's docket if it considers that there are grounds to exempt them from sentencing due to mental disorder or intellectual disability and to order treatment measures instead[184].

A similar process is followed during trial. The court has the right to request a third evaluation from another expert psychiatrist, if it deems that the two already provided are not convincing or in case they differ substantially[185]. The expert evaluations[186] will be submitted to the Court, and the trial may take place in a closed session to protect the defendant's privacy. The defendant has the right to be accompanied by his attorney, a psychiatrist, as well as a technical advisor of his choice. The enforcement of the treatment measures must respect the dignity of the defendant. Any issues not specifically regulated by the Criminal Code or the Code of Criminal Procedure must be interpreted and complimented by the Medical Code of Ethics, the Code of Ethics for Nurses, the Protocols pertaining to Psychiatric Care, as well as the Penitentiary Code, as long as it does not conflict with the treatment purposes of the measure.

The procedural framework to establish the existence of psychosocial or intellectual disabilities is complicated and involves the participation of many actors. It may occur in various stages of the criminal proceedings, during both the pre-trial stage and before the court[187].

The roles of the prosecutor and the police in the process are prominent. Upon the arrest of an individual and when there are indications of mental or intellectual disability that could affect the ability to stand trial, the prosecutor requests that the police transfer the individual to a Public Psychiatric Facility for an expert evaluation. In practice, the police will be entrusted with the transferring of the individual to and from the facility, and with delivering the attached mail and expert psychiatric evaluations to the prosecutor, to be part of the case file[188].

Selecting an expert psychiatrist for the evaluation is not a random process. According to Article 185 of the Code of Criminal Procedure, each year there is a process to determine and compile a list of experts in all fields, including psychiatrist, psychologists,

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[184] Articles 310, 313 Criminal Procedure Code.
[185] Id.
[186] As previously explained, at least one expert evaluation is to be conducted immediately after arrest, and at least another expert evaluation is to be carried out as closer to the court session as possible.
[187] Id.
[188] Special Report of the Ombudsman for involuntary treatment of mentally ill, 2007, pp. 20-21, www.synigoros.gr/resources/docs/206391.pdf.

etc., by the Courts in their region. The list is renewed and enriched every year, and it must be approved by the judicial council of the regional Court of Appeals to be valid[189].

NGOs and Advocacy centers are bringing together practitioners from the judicial branch, (prosecutors, judges and clerks) to discuss their practice, cases of offenders with mental disorders and what the process in their case was. Such a Seminar took place in 2012 as part of a research study and it is one practice that allows retrospective evaluation of cases and sharing of practices amongst the judicial branch.

In addition, the procedures and process during the treatment measures must be tailor made to the needs of the individual, include medical support, psychological support for said individual and for his/her family, and be outward looking towards a general rehabilitative aim of returning the individual in the society, as an active citizen[190].

4. Italy

Assessment of the state of non-compos mentis[191]

The expert assessment of the cognitive and volitional capacities of the accused is one of the fundamental junctures in which a ruling on criminal responsibility is articulated. The role of the expert is crucial. He/she is requested to introduce elements of certainty regarding human behaviour in crisis situations and how it can be subject to the control of reason.

The psychiatric examination is conditioned by the manner and circumstances of a committed crime: the more it appears "absurd" and "monstrous", the more likely it is for the judge, the prosecutor or the lawyer to request an examination. Precisely, the subjects legitimised to the request are: the judge, the prosecutor or the defence lawyer (a private one or appointed by the court).

The expert appointed by the court will generally be asked to rule on three questions: 1. "Please inform us, having examined the documents of the case, having visited (name and surname), having performed all the clinical and laboratory tests that you

189 Article 185, Criminal Procedure Code.
190 Article 9, Domestic Law 4509/2017.
191 For further information, see Saronni, C. "The psychiatric expertise in the criminal trial and the problem of the client", Crimen et Delictum VIII, International Journal of Criminological and Investigative Sciences, 2014.

consider necessary and appropriate, what were the conditions of mind at the time of the event for which it is proceeded; especially if the full possession of the subject's faculties was excluded or diminished due to illness". 2. "In case of confirmed mental disability also inform us if it is socially dangerous". 3. "Inform us, having examined the records, having performed all the clinical and laboratory tests that you consider appropriate and necessary, on the subject's current conditions of mind and, in particular, whether or not he/she is able to participate consciously in the process".

Answering the first question, the expert might find the accused mentally unfit to bear criminal responsibility. If the judge agrees with this conclusion, he/she will issue an acquittal sentence.

The second question concerns the accused's presumed dangerousness. The social dangerousness according the Criminal Code does not refer to the probability that the offender may endanger other people's or his/her life and health, but to the probability that the offender may again commit a crime. The socially dangerous persons will be subject to *a security measure* proportionate to the degree of social hazard detected. The criminally not responsible subjects, who committed the crime in conditions of total disability are placed in residences for the implementation of treatment measures (REMS).

Appointment of an expert

The expert can be appointed ex officio by the judge of the preliminary hearing[192] and later by the trial judge. An expert can also be appointed and heard in the context of the special evidentiary hearing, the *incidente probatorio*[193], during the pre-trial phase of criminal proceedings.

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[192] The judge of the preliminary hearing decides on the request of the public prosecutor to bring the suspect to trial. In Italy the criminal proceedings are generally divided into three phases: the preliminary investigation phase, under the public prosecutor's office, and coordinated for the decisions that may be necessary with the Judge for preliminary investigations (pre-trial phase), the preliminary hearing phase before the judge of the preliminary hearing and the trial phase. The judge of the preliminary hearing evaluates the evidence with a prognostic judgment, therefore if he considers the evidence gathered in the preliminary investigation phase sufficient, he orders the decree of indictment (before a different judge, the judge of the trial), otherwise he decides by sentence not to proceed.

[193] "Incidente probatorio" refers to a concept that is specific to the Italian legal system and has no exact equivalent in English. According to Italian criminal procedure law, all the evidence, gathered during the pre-trial, cannot be directly used in the trial phase and should be gathered anew. Whenever the evidence cannot be produced or gathered at a later stage, it is gathered in the pre-trial stage, under the conditions of the 'incidente probatorio' – in a preliminary hearing, before a judge, with the participation of both the prosecutor and the defence lawyer.

The expertise can be entrusted to a psychologist, a psychiatrist or a criminologist. The psychological expertise evaluates aspects of the process of the offender's physical and psychological development. The psychiatric one evaluates the existence of a pathology underway with the aim of being able to initiate appropriate treatment and to issue a judgment on the ability to stand trial. The criminologist works by using his epidemiological knowledge of crimes and profiles. To psychiatric examination are subjected all accused, about whom arise doubts about existing psychopathology; in these cases, the judge can use the expertise of a psychiatrist who will professionally assess the capacity of the accused.

Statistical studies[194] have made it possible to ascertain that mentally disturbed patients do not commit crimes significantly more often compared to the general population and it is not possible to make a direct equivalence between mental pathology and social danger.

The psychiatric examination is an assessment that can also be requested by a subject who needs advice in the psychiatric and psychopathological field or even in the medical legal field. The psychiatrist can be called to evaluate the clinical condition of a given subject by the subject himself, by the family members, by a lawyer or by a judge.

Protection of the guilty with mental illness

In Italy, the organisation and management of health care for people with mental problems of a criminal nature and affected by a restriction measure (precautionary measure, custodial and non-custodial security measure) have profoundly changed in recent years.

With a Decree of the Prime-Minister[195] of 01.04.2008 was sanctioned the passage of health care to people deprived from liberty from the Ministry of Justice to the Ministry of Health (i.e. National Health System (NHS). From October 2010, the health staff who had a contractual relationship with the Ministry of Justice was transferred to the competent Local Health Authorities.

The organisational and managerial responsibility of the health activities towards the persons responsible for the crime with a custodial and non-custodial security measure is attributed to the NHS. This reform is very important, because it established the equal conditions and quality of health treatment between detained citizens and free

[194] See Russo, Gaetana, Psicopatologia e criminalità studio criminologico su 80 soggetti, http://www.bibliotechedap.it/rassegnapenitenziaria/cop/54272.pdf.

[195] Decreto del Presidente del Consiglio dei Ministri.

citizens. There has been a shift from mere prison health check to full health care, from staff with exclusively penitentiary skills and training to the same personnel and services provided to ordinary citizens by the national health service, without distinction. A special National Fund called "Penitentiary Health Fund" has been established.

The Decree of 01.04.2008 has provided that, the assistance of persons with custodial or non-custodial security measures, is now distributed to a set of systems interacting with each other; the judicial system (courts, penitentiary administration) and the NHS. These have precise, distinct and collaborative functions, which respond to the constitutional provisions of the right to health, the right to personal safety of individuals, the overall security of citizens' rights and their underlying legal assets, in a complex social context rich in contradictions.

In 2017, the High Council of the Judiciary[196] reiterated the need for "*the courts to maintain a relationship of constant collaboration, exchange of information and* a widespread knowledge of the network of mental health services *which are part of the DSM to which Law no. 833 of 1978 assigns the responsibility for prevention, treatment and rehabilitation of mental health problems*". And this should allow the judicial authority to *"address the criminally not responsible to a therapeutic programme appropriate to the individual case, to shape the security measures from the moment of pronouncement in the criminal process, to respect the fundamental link between the territorial fabric of origin and the execution of the measure"*.

The judges and prosecutors are therefore required to adopt an approach to the subject that presupposes particular knowledge, even if not strictly 'legal', and that in this perspective, justice and health must always 'talk to one another': in essence, when a file is opened for a patient or an alleged offender patient, at that same time the magistrate must activate the mental health service and build a working group that will develop a therapeutic project and possible care pathways.

Most recently with the resolution of 24 September 2018 the High Council of the Judiciary again intervened *"in continuity with decision of 19 April 2017"* underlining once again the absolute necessity that *"the reports of the availability of therapeutic and rehabilitative shelters on the territory [...] are consistent and constantly updated"*. With this resolution, taking note of the not yet complete, effective and satisfactory degree of realisation of the system governed by the Law 81/2014 and of the principles therein

[196] The High Council of the Judiciary (Italian: *Consiglio superiore della magistratura*, or CSM) is an Italian institution of constitutional importance, which regulates the Ordinary Judiciary of Italy. The High Council is a self-governing institution in order to insure the autonomy and independence of the judiciary from the other branches of the state, particularly the executive, according to the principle of the separation of powers expressed in the Italian Constitution.

sanctioned, the High Council of the Judiciary has intended to deepen the aspect relative to the formalisation of agreements through the signature of protocols between the institutional subjects involved in the management of the security measures for the criminally not responsible, *"in order to confer to the already hoped-for collaboration between the public and private organisations involved, a stable character and a structured form"*.

The importance of a "*full integration between the mental health services on the territory and the judicial order*" and, in particular, the recognisability by the judicial bodies of the therapeutic and rehabilitative options on the territory: this is in order to allow the judicial body, from the first moment of contact with the mentally ill offender, a useful and conscious choice of measures to be taken in practice to address the social danger, while giving priority to the needs of care and social inclusion of the mentally ill offender and having in mind the undesirable effects and overall imbalance for the maintenance of the system of the mere neutralising custody.

V. CUSTODIAL AND NON-CUSTODIAL MEASURES DURING CRIMINAL PROCEEDINGS

1. Belgium

The basic principles of health care in prison are legally embedded within the law of 12 January 2005 concerning the internal legal position of prisoners (the Act on Principles of Prison Administration and Prisoners' Legal Status, commonly referred to as the "Dupont Act"[197]), which provides in its Article 88 that all prisoners must have access to health care of the same quality as in the free community and that is suited to their specific needs. Until the adoption of this law, most aspects of life in detention, including prisons, were left to the discretion of the prison authorities or based on a variety of guidelines and circulars issued by the executive power. However, several of its provisions regarding health care and health protection, medical expertise and medico-psychosocial expertise, and right to social assistance and services relating to the detention plan, so far have not been implemented. Royal Decrees have to be issued for the coming into force of several articles. In the absence of full implementation of this law, the General Regulations of the Penitentiary Institutions of 1965[198], still regulate significant aspects of the internal legal status of detainees.

Structurally and legally speaking, prison health care is a competence of the Minister of Justice as persons incarcerated in a penal institution (be it internees, pre-trial detainees, convicted inmates) are by law excluded from the benefits of the Social Security system. The Prison Health Care Service, on central level, as part of the Directorate-general of Penitentiary Institutions, is the service provider for the *"improvement, determination, preservation and improvement of physical and mental health"* (Article 87, § 1, Dupont Act of 2005)[199].

While internees as well as ordinary sentenced prisoners with mental health difficulties are entitled to appropriate care and treatment whose quality should commensurate to the type of care available for people with similar mental health difficulties in the community, these requirements are not fulfilled in Belgium. This is due to different factors.

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[197] Loi de principes du 12 janvier 2005 concernant l'administration pénitentiaire ainsi que le statut juridique des détenus, www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2005011239&table_name=loi.

[198] Royal Decree of 21 May 1965 laying down General Regulations of Penitentiary Institutions.

[199] It is responsible for the global management of health care, the medical management (cure and prevention), internal management (quality standards and inspection), staff management, educational management, financial management, development and management of electronic databases, consultation and cooperation with internal health services (service for prevention and protection at work, service for labour medicine) and external services (health promotion, control of tuberculosis, drug-aid).

Firstly, the delay in the implementation of many of the relevant health care related provisions of the Dupont Act entails that the rights afforded to prisoners in this sector are in effect more restrictive than the legislation would suppose. As a result, the principle of equivalent medical care is still not a priority among the prison management.

Secondly, the complex Belgian state structure and the consequent fragmentised division of competencies between different ministerial portfolios have an impact on the organisation of services in the Belgian prison system. This compartmentalisation has disastrous results when it comes to meeting the specific needs of people in prison with mental and psychological disabilities, particularly when persons with disabilities are held under compulsory treatment orders.

Thirdly, the situation de facto reveals organisational and practical shortcomings in the provision of health care due to an inadequate infrastructure of medical care, a lack of qualified or specifically trained staff, dilapidated and unsanitary facilities and insufficient resources. Prisoners continue to be reportedly confronted with long waiting times for specialised care, delayed medical interventions, lack of continuity of medical care and dissatisfaction with the access to minimum health care services on weekends and public holidays.

2. Bulgaria

Custodial and non-custodial measures. Grounds for detention

Firstly, suspects and accused with psychosocial and intellectual disabilities can be detained by police under the Ministry of the Interior Act[200]. Strictly speaking, only detention of a person 'on whom there is information that he/she has committed a crime' could be part of subsequent criminal proceedings. However, according to practitioners, persons could often be detained by police on other grounds and then become a defendant in subsequent criminal proceedings. Thus, other grounds under which people with psychosocial or intellectual disabilities could be detained are 'wilful obstruction of a police authority to do their official job' or 'displaying serious mental disturbance and, with his/her conduct, violating public order or putting his/her life or the life of others in clear danger', or, as will be seen from case-law below, even lack of identity documents. In practice, police state that most detentions of persons with psychosocial and intellectual disabilities are accompanied by physical force, auxiliary means, additional police forces and, in some cases, psychiatrists and orderlies from psychiatric medical establishments[201]. This can possibly be attributed to the lack of

[200] Lex.BG. Ministry of the Interior Act, 2014, www.lex.bg/laws/ldoc/2136243824.
[201] Ministry of the Interior.

specific procedures and guidelines to deal with such persons, which the police mention above in the present report.

After being detained, persons may be placed in a detention unit and 'personal security measures' may be taken with regard to them, if their conduct or the aims of detention so require. All police detainees have the right to interpretation, medical aid, to appeal their detention, right to defence, or waiver thereof, and the right to refuse to give explanations. They also have the right to notify third persons about their detention. The actual procedure for detention is regulated in a special instruction by the Minister of the Interior[202]. Few specific rules exist on persons with psychosocial or intellectual disabilities, but a number of others can be relevant to their potentially vulnerable situation:

If the detainee is not in condition to fill in the declaration about his/her rights himself/herself, it is filled in by an officer while the person dictates his/her wishes in the presence of a witness, certifying the truthfulness of the declaration by his/her signature – an option often referred to by experts as potentially allowing abuse;

Detainees are under constant guard;

Before being placed in the detention premises, the person is searched by an officer of the same gender in the presence of a witness of the same gender; all items found are kept and stored, except, among others, religious writing or fiction, medical documents, photos of family members or relatives, contact details of lawyers or relatives, personal notes if not related to the crime;

The detainee is subjected to medical examination upon his/her request or when his/her health condition so requires; a request for such examination can also be made by a parent, guardian or attorney; the detainee can also be examined by a doctor of his/her choice at his/her expense; an officer, of the same gender, can be present at the examination only upon request of the doctor; if medicines are prescribed, they are administered under the control of the guards;

Notably, persons 'in a crisis, mentally ill, having contagious diseases, in a violent state, recidivists and those suspected of serious crimes' are placed on separate detention premises from the other detainees; some detention facilities may be soundproofed and equipped in a way not to allow self-harm.

[202] Lex.BG. Instruction N 8121з-78 of 24 January 2015 on the order of executing detention, the equipment of premises for placement of detained persons and the order therein in the Ministry of the Interior, 2015, www.lex.bg/bg/laws/ldoc/2136426770.

Consultations with a psychiatrist may also be required[203] and auxiliary means under strictly defined grounds can be used if persons become violent.

Once being determined mentally fit to be criminally liable, defendants with psychosocial and intellectual disabilities can also be detained in custody under the Criminal Procedure Code[204]. No specific rules exist in the Code about the detention of such persons either. Detention, as well as the other compulsory measures under the Code (periodic appearance in front of an authority, bail and house arrest), can be ordered when there is evidence for a grounded supposition that the person has committed the crime in question and the defendant can abscond, commit another crime or hinder the execution of his/her sentence. When determining which measure to impose, authorities take into account the degree of public danger of the crime; the evidence against the defendant; notably his/her health condition; family status, profession, age and other personal details.

Specifically, detention in custody is ordered when there is a grounded supposition that the defendant has committed a crime for which imprisonment or another, more serious penalty is provided for, and the evidence shows that there is real threat for the defendant to abscond or commit a crime. It is imposed by the first instance court upon request of the prosecutor. The defendant or his/her lawyer can at any time request another compulsory measure, i.e. to be released from detention. If detention is confirmed, the court can set a time limit of not more than 2 months where another request cannot be made, unless, notably, the health condition of the defendant worsens.

Time limits of detention. Accommodation in a specialised (medical) facility

There are no specific time limits for detention of persons with psychosocial and intellectual disabilities. Detainees can be accommodated in medical establishments, if their health condition so requires. Generally speaking, compulsory and mandatory treatment in psychiatric hospitals can also be considered 'alternatives' to detention, but they are only imposed under specific conditions and procedure.

[203] Ministry of the Interior.
[204] Lex.BG. Criminal Procedure Code, 2006, www.lex.bg/en/laws/ldoc/2135512224.

Detention conditions

The conditions of police detention are regulated in the same instruction by the Minister of the Interior which regulates the procedure for detention[205]. No specific clauses are in place for persons with psychosocial or intellectual disabilities and 'special' premises are only allowed for underage persons (14-18 years of age). Some rules relevant to the situation of persons with intellectual disabilities are:

The regime of detainees is determined, taking into account the detainee's personality, the existence of illnesses or the need for a medical or dietary regime;

The person's visible health condition is noted upon his/her release and a medical examination may be done if needed or upon request of the person;

Self-harm of detainees is put among the grounds for crisis action in detention facilities;

NGOs, experts under international treaties and the Ombudsman are allowed to inspect the observance of human rights in detention facilities; independent civic monitoring is also possible;

Detention premises are equipped in a manner, suitable for the category of persons to be placed;

No handcuffs are allowed on detention premises unless the detainee can harm himself/herself or another; no sharp construction elements are allowed for danger of self-harm.

The regime and conditions of detention in custody within the criminal procedure are regulated in the Execution of Penalties and Detention in Custody Act[206]. Few specific rules are in place for detainees with psychosocial or intellectual disabilities, but a number of norms are relevant to their situation. Detainees can immediately notify their families or relatives about their detention, or sign a declaration that they should not be notified. They have the right to visits, telephone calls, correspondence, food parcels and money for personal needs. Damage risk assessment is made and their conduct is constantly monitored during the detention. If the damage risk assessment shows a high or very high risk, a compulsory psychological examination is given to the detainees. People with mental disturbances are among the vulnerable groups who can be placed separately from others for their own and others' safety. In case of

[205] Lex.BG. Instruction N 8121з-78 of 24 January 2015 on the order of executing detention, the equipment of premises for placement of detained persons and the order therein in the Ministry of the Interior, 2015, www.lex.bg/bg/laws/ldoc/2136426770.

[206] Lex.BG. Execution of Penalties and Detention in Custody Act, 2009, www.lex.bg/laws/ldoc/2135627067.

aggressive behaviour, mental disturbance or depression, as a result of which the detainee may threaten his/her or others' life and health, auxiliary means can be used against the person. However, if the person has 'visible' physical or mental disabilities, physical force and auxiliary means are only allowed in cases of sudden attacks, detention, release of hostages or group riots. If detainees' health condition so requires, they can be placed into a prison medical establishment or a general one, if the specialised ones do not have the required resources, upon a ruling by the prosecutor or the court. Detainees are visited by a doctor at least once a week or immediately in urgent cases.

Medical treatment of detainees is further detailed in a special regulation on the matter[207]. It is done by medical personnel in the detention places, in medical centres and specialised hospitals with the detention places, or, if need be, other medical establishments. The opinions of medical specialists are obligatory for the heads of detention places. Initial training of detention officers contains lectures on indications for, among others, alcohol and drug abuse withdrawal symptoms, mental disturbances, suicidal thoughts and ways to prevent self-harm. Detainees are subjected to an initial check to assess their general medical condition.

Special assistance during detention

No measures of special assistance for offenders with psychosocial and intellectual disabilities have been known in Bulgarian law and practice, except for medical treatment and psychological assessments under the general order, applicable for all detainees. Thus, the regulation on medical treatment of detainees contains a special section on psychiatric aid. In case of suspected mental disturbance of a detainee, the resident psychologist and the psychiatrist with the medical centre do checks to clarify the diagnosis. Special monitoring is done of detainees with a history of alcohol or drug abuse, or suicidal acts, and a programme is prepared for their treatment. Those subjected to compulsory medical measures due to alcohol and drug abuse are transferred to the prison hospital in the town of Lovech, as well as detainees with mental disturbance needing hospital treatment, who, until the transfer, are put in isolation in the detention facility medical centre. Importantly, if a mental disturbance is suspected which may lead to lack of mental fitness to bear criminal responsibility, the psychiatrist with the detention facility makes a proposal to the prosecutor to request a forensic psychiatric opinion. If such disturbance is established, the detention

[207] Lex.BG. Regulation N 2 of 22 March 2010 on the conditions and order of medical treatment in the places of deprivation of liberty, issued by the Minister of Health and the Minister of Justice, 2010, www.lex.bg/laws/ldoc/2135675773.

of custody may be substituted and the person is placed in a specialised psychiatric establishment.

The regulation on medical treatment also regulated medical measures during problematic situations in detention facilities. Compulsory medical measures are imposed against detainees to prevent acts against his/her own life and health or those of others, for which the prosecutor is notified. In cases of hunger strikes detainees are consulted by the psychiatrist or psychologists. Medical aid is immediately given in cases of self-harm or suicide attempts.

Case-law

Regarding custodial and non-custodial measures imposed upon persons with psychosocial and intellectual disabilities, case-law has discussed at length police detention on various grounds, mostly with regard to appeals of detention orders. In discussing various cases of detention, court decisions have clearly revealed situations, where police neither had sufficient information on the suspects' mental status, nor had at their disposal a risk assessment tool or expert assistance.

By way of example, a decision was reviewed[208] where police officers had to visit several times a person with previous history of aggressive behaviour towards uniformed officers. At some point the suspect hit them and police had no choice but arrest and send him to a psychiatric ward. The person was later found to be psychiatrically unfit for criminal liability.

In another case[209], police were called to a restaurant where a person was breaking objects aggressively, had to let him ride a taxi with a friend of his, with a promise from both to appear at the precinct, and, after the suspect tried to escape, had to point guns at him in order to detain him and take him to police custody. This could be seen as a prolonged situation where police had to resort only to standard techniques, without a previous risk assessment to point to a need for a more specialised approach.

In a very indicative decision[210], police were once called to what was reported as a family row, established that the man, living at the address, was 'drunk' and very aggressive, and made quite a difficult arrest, where one of the officers sustained bodily injuries. The person was never charged for his actions, because he turned out mentally ill and not fit to bear criminal responsibility. Thus, police was clearly unable to get

[208] Regional Court of Svishtov, Ruling No 220 of 30 August 2013 on private criminal case No 371/2013.
[209] District Court of Shumen, Sentence No 13 of 27 March 2017 on criminal case No 38/2017.
[210] Sofia Administrative Court, Decision No 3276 of 12 May 2015 on administrative case No 12397/2014.

advance information about the suspect's mental state, nor was risk assessment applied to potentially call for specialised help.

Decisions have also been reviewed, where persons with psychosocial and mental disabilities have been, wrongfully, formally detained on suspicions of a crime committed and inability of police to establish their identity. Both grounds were pronounced unlawful. In addition, detention documentation was drafted in violation of persons' information rights, due to which their detention orders were later revoked[211]. Thus, in the absence of specific rules governing the detention of such persons, potential avenues for abuse could be present.

3. Greece

During criminal proceedings, accused persons may be placed in pre-trial detention and in-house arrest with electronic monitoring, or they may be released on restrictive conditions. Pre-trial detention and house arrest are reserved only for the most serious crimes, when there are serious indications of guilt and there is a risk that the accused will abscond or commit further crimes. The above measures are ordered by the investigating judge with the concurring opinion of the prosecutor, after they hear the defendant. Disagreements between them are resolved by the judicial council.

When defendants are found not criminally responsible due to the fact that they lack the ability to understand the significance of the act they have committed and its consequences or the ability to control their actions, the judicial council is obligated to order one of the following measures, included in Article 69A (3) of the Criminal Code: (a) admission to and treatment in a separate wing of a public psychiatric or general hospital; (b) admission to and treatment in a psychiatric ward of a public psychiatric or general hospital; (c) mandatory treatment and regular psychiatric observation in an appropriate external Mental Health Unit of outpatient clinics of a public psychiatric or general hospital. If pre-trial detention is already in place, the council is obligated to replace it with one of the above measures as soon as psychosocial or intellectual disability is confirmed[212].

The separate wings of public psychiatric or general hospitals where treatment measures are carried out must fulfil certain requirements: they should have a limited number of rooms, comply with appropriate technical specifications, and be fully equipped to accommodate the patients' needs. Furthermore, they must employ an

[211] Supreme Administrative Court, Decision No 4231 of 2 April 2018 on administrative case No 8122/2017, 5th division.

[212] Article 315 of the Greek Code of Criminal Procedure.

adequate number of specialised professionals. Psychiatric wards of public psychiatric or general hospitals must provide care equivalent to that provided to other involuntarily admitted patients who have not been placed there as a consequence of criminal proceedings. Finally, external Mental Health Units include mobile units offering mental health services in primary health care facilities or making house calls in remote areas[213]. The specific psychiatric facility where the treatment will be administered is selected by order of the prosecutor from a list of accredited facilities, compiled by the Ministry of Justice and the Ministry of Health. The prosecutor must pick the facility which is closer to the defendant's residence or the one which is more suitable for the treatment of their condition[214]. The prosecutor's office is responsible for monitoring all the above facilities. In exercising this duty, they may consult with the attending physician and hear all interested parties. They may also request the official opinion of the facility's scientific committee regarding the course of medical treatment pursued and the need for intense psychiatric treatment and security measures[215].

When the defendant is admitted to a psychiatric facility the following process takes place:

- An admission slip is issued;
- Personal information is recorded (ID details, last place of residence, legal representative or contact person, religious beliefs, et al.);
- Money and documents found on the admitted person are recorded and placed in safekeeping (e.g. ID card, social security documents, documents denoting that the person concerned is a refugee or asylum seeker etc.);
- A medical and psychiatric examination is conducted;
- The patient's electronic or manual file is created;
- An interview with a social worker is conducted;
- Social Services create a record of the case.

Immediately after the admission, the facility must provide the patient with a letter of rights, as established in the Criminal Code, Criminal Procedure Code, Code of Medical Ethics, Code of Ethics for Nurses, the Penitentiary Code, and the Psychiatric Care Protocols. The document must be in a language which the patient understands[216].

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213 Article 11 of Law 4509/2017.
214 Article 12 "Initiation of measure", Domestic Law 4509/2017.
215 Article 18 Law 4509/2017.
216 Article 13 "Admission to the special or non-special facility", Domestic Law 4509/2017.

Treatment measures imposed at the pre-trial stage may be in place for a maximum of six months[217] and until a decision is issued in the first instance, at which point they are replaced with the measures ordered in the sentencing or lifted entirely. The measures may also be terminated during the proceedings whenever the investigating judge, either ex officio, following a request by the prosecutor or a petition by the offender or their legal representative, deems that the grounds for imposing the measures no longer apply[218]. This decision should be reached following consultation with the attending physician, confirming that the therapeutic reason for which they have been imposed no longer applies[219].

The practical reality in Greece is that the detention of defendants with mental and intellectual disabilities is a frequent practice, which only uses the basis of public safety as a justification, disregarding the need for treatment. In addition, in Greece, the specialised public facilities mentioned in the Criminal Code, do not meet proper treatment standards, and instead mostly function as detention facilities. As such, it is often the case that accused persons with psychosocial and intellectual disabilities will be hospitalised along with other patients in the various departments of the psychiatric facilities, without any significant differentiation[220].

4. Italy

In the case of social danger, the judge responsible for examining the legal case, can choose[221] the most suitable security measure also on a provisional (precautionary) basis, in the awareness of the length of the process, and the impossibility of keeping in prison a subject recognised as completely incapacitated or with partial capacity (in this case only when he has fully served the criminal sanction despite the reduction due to the mitigating factor of the semi-infirmity)[222].

The precautionary measures are the same as those applied in the "double track" at the end of the trial phase, with the only difference that in this case they are anticipated during the investigation. The judge can apply the measures during the pre-trial phase and also during the course of preliminary investigations when the state of mental distress is established and/or evident.

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217 Article 200 CCP.
218 Article 287 of the Criminal Procedure Code.
219 By analogous application of Article 20 of Law 4509/2017.
220 Id.
221 For an extensive study and bibliography see Argenio, M. „The uncertain foundation of social danger in Criminal law", Law & Rights, 2018 www.diritto.it/fondamento-incerto-della-pericolosita-sociale/.
222 Article 211 of the Criminal Code.

In the event that the state of mental distress is not obvious, it will be possible to use the standart tools of custodial and non-custodial measures during criminal proceedings, pending a possible psychiatric examination by specialised personnel.

If the assessment establishes a mental disorder or incapacity, the pre-trial measure can be converted into compulsory treatment measures. In any case, healthcare professionals will be called upon to elaborate, in collaboration with the jurisdictional authorities, in order to apply the most appropriate measure to the case.

Up to now some Italian Regions have already developed operative protocols between the judiciary, Law Enforcements, the Administrative Authorities and Penitentiary Executive Offices for the application of custodial and non-custodial measures during criminal proceedings[223].

In the event that there is no danger of the accused, no precautionary measure can be applied: the accused will remain free but obviously will be followed under the medical and socio-assistance profile by the National Health Service.

[223] In particular for indications on different field of application see the operative scheme at the following link: Regione Emilia-Romagna Atti Amministativi giunta regionale. Delibera Num. 767 del 21/05/2018, Seduta Num. 22, 2018, pp. 7, 56, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjw48fDw8XiAhUCjqQKHY-gACkQFjAAegQIAhAC&url=https%3A%2F%2Fwww.ausl.pr.it%2Fdownload_allegato_824.pdf%3Fh%3D45586e616faa2b7b6d029b8ff218bd51b3b74a34&usg=AOvVaw3_40CH_53vbw9piB_Pin4l.

CONCLUSION

Protecting the human rights of individuals, subject to criminal proceedings is an essential element of the rule of law. Mental illness can impair people's ability to communicate with criminal justice professionals, such as police officers, prosecutors, lawyers, judges and correction officers, which is why people with psychosocial disabilities or intellectual disabilities undoubtedly face barriers to accessing justice, especially when it comes to being an accused or a defendant in criminal proceedings. This can be due to lack of information and understanding of the special needs of such people, amongst the police and judicial officers, or because of missing support or advocacy for people with diminished functional capacity to advocate for themselves, etc. Despite the specific reason, the results are frightening – such offenders are more likely to have problems obtaining good legal representation and they are generally more likely to receive custodial sentences than non-disabled offenders, and these sentences are likely to be of a longer duration[224]. All else being equal, people with psychosocial disabilities are less likely than other offenders to receive a conditional release from custody. This may be due to, among other things, problems communicating with correctional and parole board staff, as well as to the lack of adequate aftercare in the community[225].

The inability of a criminal justice system to meet the needs of persons with disabilities substantially jeopardises their right to equal treatment, inclusion and fair trial. Therefore, making criminal proceedings accessible in the widest possible sense to persons with disabilities requires utilising professional tools, methods, know-how and approaches that can be combined to assist people with disabilities to fully realise their rights in the criminal system[226].

The most effective response to individuals with mental health issues is often an appropriate balance of supervision, accountability, and community treatment and support and in many ways the modern justice systems are attempting to adopt strategies, focusing precisely on that[227]. The principles of normalisation and integration of people

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[224] Hayes, Susan C. and Robert Hayes. Simply Criminal. Sydney: The Law Book Company Limited, 1984, http://crg.aic.gov.au/reports/20-81.pdf.

[225] Hart, Stephen D. "Where tolerance breaks down...", Visions Journal, vol 2(8), 2005, p. 4-5, https://www.heretohelp.bc.ca/visions-criminal-justice-vol2/mental-illness-and-criminal-justice.

[226] Primor, Sharon and Na'ama Lerner. The Right of Persons with Intellectual, Psychosocial and Communication Disabilities to Access to Justice in the Criminal Process. Bizchut: The Israel Human Rights Center for People with Disabilities, 2015, http://bizchut.org.il/he/wp-content/uploads/2015/01/Booklet-The-right-of-persons-with-disabilities-to-access-to-justice.pdf.

[227] Center for Health and Justice at TASC. A National Survey of Criminal Justice Diversion Programs and Initiatives, 2013.

with intellectual and/or psychosocial disabilities into the mainstream of society are beginning to be applied in the criminal justice context – first on a policy level and then, gradually, into practice.

To this end, it is essential that both the legal community (the judiciary, lawyers, police officers, probation officers and criminologists) and the medical community (mental health professionals, medical practitioners, rehabilitation staff) realise that they play an important role in the empowerment of these vulnerable groups. Important steps in this direction are raising awareness of the high base rate of different psychological vulnerabilities in accused and defendants, and appealing to police officers and magistrates to take precautions when interrogating vulnerable accused/defendants[228].

[228] Geijsen, Koren, Corine de Ruiter and Nicolien Kop. „Identifying psychological vulnerabilities: Studies on police suspects' mental health issues and police officers' views" in: Geijsen et al. Cogent Psychology, 2018, https://www.cogentoa.com/article/10.1080/23311908.2018.1462133.