

 JUST CLOSER 

EXECUTIVE SUMMARY

NATIONAL REPORT ON THE YOUTH JUSTICE
SYSTEM - PORTUGAL



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Introduction

In Portugal the minimum age of criminal responsibility is 16 years old. Therefore, the Criminal Code is applied to children between the ages of 16 and 18 years old. However, there is a special criminal regime for young people between 16 and 21 years old. This regime is regulated in Decree Law no. 401/82, of 23 of September of 1982, which establishes the regime applicable in criminal matters to young people between the ages of 16 and 21¹.

Precisely, the Portuguese juvenile regime was recently modified by Law n.º 33/2019, adopted on May 2022², that transposes Directive (EU) 2016/800 of the European Parliament and the Council of 11 May 2016 on procedural safeguards of children suspected or accused in criminal proceedings. This Act is the thirty-third amendment to Code of Criminal Procedure³. As the minimum age of criminal responsibility in Portugal is established in 16 years old, the subjective scope of application of Directive (EU) 2016/800 has been considered to be in Portugal to children between 16 to 18 years old.

Following this mandate, the abovementioned Decree Law no. 401/82 establishes a special criminal regime for juveniles, which is based on the principles and rules of juvenile re-education law. That is why the ability to re-socialise is a necessary prerequisite,

Accessibility

Regarding the principle of accessible justice, and, in particular, the right to information, there is a clear difference between the Educational Guardianship Procedure, for children between 12 and 16 years old, and the juvenile justice, in which the general rules for adults apply to children between 16 and 18 years old. Therefore, whenever a suspect becomes a defendant, the authority in charge must mention and, if necessary, explain the procedural rights and duties of a defendant. In practice, a document is handed to the defendant specifying their rights and duties, by transcribing Article 61 of the Code of Criminal Procedure. This document therefore includes the list of rights described above. The right to be informed is also provided for in other stages of the criminal proceedings.

That is why it is suggested that it has been suggested that the information provided to children could be more clear and adapted to them. However, as a step forward it should be mentioned that one of the most significant amendments to the Code of Criminal Procedure operated by Law 33/2019 was the inclusion of the participation of the holder of parental responsibilities when the defendant has not reached the age of 18. When an underage suspect formally becomes a defendant, this act is immediately communicated

¹ Decreto-Lei n.º 401/82, de 23 de setembro, Institui o regime aplicável em matéria penal aos jovens com idade compreendida entre os 16 e os 21 anos, Diário da República n.º 221/1982, 1º Suplemento, Série I de 23.9.1982, pp. 64 – 66. Available at: <https://diariodarepublica.pt/dr/detalhe/decreto-lei/401-1982-319742>, last access 18.12.2023.

² Law n.º 33/2019, of May 2022, Diário da República n.º 98/2019, Série I de 22.5.2019, pp. 2543 – 2544. Available at: <https://diariodarepublica.pt/dr/detalhe/lei/33-2019-122373680>, last seen 20.12.2023.

³ Code of Criminal Procedure, operated by Decree-Law 78/87, adopted on February 17, Diário da República n.º 40/1987, Série I de 17.2.1987. Last amended by Law 52/2023, adopted on August 28. Article 7(1)(h). Available at: <https://diariodarepublica.pt/dr/legislacao-consolidada/decreto-lei/1987-34570075>, last access 20.7.2023.

to the holders of parental responsibilities, their legal representative, or the person who has their de facto custody.

Age-appropriate

In general terms, the Portuguese system is in compliance with the age-appropriate justice principle. In particular, the Portuguese legislation enshrines a mandatory child defendant's right to and individual assessment. And most importantly, Law 33/2019 has introduced two new provisions on individual assessment of defendants under the age of 18: one at the phase of investigation as an obligation for the public prosecution; and other during the trial phase, where the court shall order if it has not yet been incorporated in the file.

Procedures for the individual assessment are effective but the lack of human resources available for conducting individual assessments might be a challenge. This can compromise the quality of or cause delays in the assessment. Another challenge might be the lack of suitable hearing spaces for children, especially the courts' lack of physical conditions to respond to a child's needs. Finally, all national authorities and institutions involved in criminal proceedings against children should be trained and prepared to properly communicate the rights and procedural safeguards for children and the procedural stages so that children feel safe.

Additionally, one of the main identified problems of the Portuguese Juvenile Justice system is related to the age responsibility principle. In this regard, it has been outlined that the Portuguese system is not fully child friendly and age-appropriate, precisely due to the application for the "adults" criminal legislation. Therefore, one of the main concerns regarding the Portuguese juvenile system is the presence of children and young adults in adult prisons. This is because Directive (EU) 2016/800 does not standardise the age of criminal responsibility so in Portugal it has been maintained in 16 years old. That is why it is suggested the need to raise the age of criminal responsibility to 18 years old, harmonizing it with the age of civil majority.

Moreover, regarding the principle of age-appropriate justice, there is an interesting measure in the Portuguese system, the so-called "penalty mitigation" ("atenuação da pena"). This measure has its origins in the Criminal Code of 1886 (as amended on 5 June 1954), in which, if the perpetrator was under 21, there was an automatic mitigation of the penalty. The basis was the principle of proportionality for the punishment of children (at the time, the age of majority was 21), based on the idea of the incomplete physical and moral development of the agent. Currently it is still present in the Portuguese system but it does not operate automatically. This is a useful tool to ensure the age-appropriate principle that other jurisdictions may consider.

Speedy procedures

As for the speedy justice principle, under the Code of Criminal Procedure, the maximum timeframe of an investigation against a defendant is six months. This period may be extended in certain situations, particularly depending on the particular complexity of the case, up to a maximum of 18 months. However,

there are no specific legal provisions for timeframes in juvenile criminal proceedings, as there are no official statistics with disaggregated data, concerning this matter.

The main gap identified has been the absence of official statistics with disaggregated data specifically for cases of children involved in criminal proceedings. It has also been suggested that the lack of human resources, as well as the delay in completing procedures (e.g., delays in the assessment elaboration), might lead to decisions that might be, at times, inconsistent with the best interests of the child.

Diligence

Regarding the principle of diligent justice, and focusing on the training of professionals, the Portuguese system has initial and ongoing trainings of judges and public prosecutors provided by the Centre for Judicial Studies -CEJ– a judicial school under the responsibility of the Ministry of Justice, although with legal personality and administrative autonomy-. The ongoing training plan (that also includes children's rights) is drafted yearly by the CEJ in cooperation with the High Councils of Judges and Public Prosecutors.

A further good practice to be mentioned is that rehabilitation professionals receive written guidelines on the drafting of assessment reports of children who are suspected or accused of a crime, internally provided by the Directorate-General for Rehabilitation and Prison Services. These guidelines are focused on the rights of children who are suspected or accused of a crime, specifically on the right to information and on the right of the child to be accompanied by the holder of parental responsibility or a legal representative.

Adapted and focused on the rights of children

Moving on to the principle of a system adapted and focused on the rights of the child, it has been identified that Law 33/2019, which transposes Directive (EU) 2016/800, has not expressly provided for the right of children deprived of their liberty to be examined by a doctor. Therefore, children in prison are subject to the same rules as adults. However, at Leiria Prison for Juveniles, there are daily medical services with a doctor and a nurse, and external medical specialties or hospital treatment are required if needed.

Continuing with the principle of a system adapted and focused on the rights of the child, the general rules of the Code of Criminal Procedure are applied to the pre-trial detention of children between 16 and 18 years old. As for prison sentences, the Young Adult's Special Criminal Regime, applicable to children and young adults who were over 16 and below 21 years of age at the time of the crime, allows the application of reduced sentences and corrective measures as an alternative to an up to two-year prison sentence, such as a warning, imposition of obligations, fine and detention in a detention center. However, there are doubts of the applicable regime for corrective measures for children between 16 and 18 years old, as the law is not up to date. More worryingly, it has been stated that detention centers were never created and that corrective measures have not been applied in practice.

Respecting the right to a due process

As far as the principle of respecting the right to a due process is concerned, and in particular, the right to be assisted by a lawyer and the right to a legal aid, it should be stated that in the Portuguese system every defendant, regardless of their age, has the right to choose a lawyer or ask the court to appoint a defense lawyer. During the investigation phase, defendants may waive their right to have a lawyer present during statements. There is, nevertheless, an exception for defendants with disabilities who are under 21, or unfamiliar with the Portuguese language. In these cases, the assistance of a defense lawyer in every procedural act (other than the formal declaration as a defendant) is compulsory. Thus, if the defendant, in these cases, does not choose or appoint a lawyer, the presiding authority of the procedural act proceeds with the appointment of a lawyer to the defendant *ex officio*⁴. The mandatory right of defendants under 21 to be assisted by a lawyer in every procedural act is effectively respected: since non-compliance with this rule entails the nullity of the procedural act, the appointment of an *ex officio* lawyer to a defendant under 21 who does not choose their lawyer is an automatic procedure. Underage defendants are, thus, always accompanied by a defense lawyer in every procedural act.

Respecting the right to participate in and understand the proceedings

When it comes to the principle of respecting the right to participate in and understanding the proceedings, Law 33/2019 has introduced important developments on the right to be accompanied by the holder of parental responsibilities or a support person. However, there are still improvements to be made in the Portuguese system for the practice of the right of children to appear in person at, and participate in, their trials.

In the educational tutelary process for children between 12 and 16 years old, the system is quite advanced and child-friendly. Their participation in the court hearing is mandatory and they are always summoned⁵. The child is heard in all stages of the process. The hearing of the child is always conducted by a judicial authority – the Public Prosecutor or the Judge-. Moreover, the Judge has the faculty to appoint a social service technician or other qualified professional who may accompany the child in the procedural act, including, when necessary, psychological support.

However, in the system for persons between 16 and 21, the rules of the Code of Criminal Procedure apply to defendants under 18 in this regard. For instance, when a suspect under 18 formally becomes a defendant in a criminal case. Defendants have the right to be present and participate in the trial. However, the trial can go ahead if they are properly notified. There are no specific rules on the effects of the child's opinion in the judge's final decision, as the latter is not affected if the opinion of the child is not formalized in the proceeding.

⁴ Art. 39, Legal Aid Act, approved by Law 34/2004, adopted on July 29, last amended by Law 2/2020, adopted on March 31, *Diário da República* n.º 177/2004, Série I-A de 29.7.2004, pp. 4802 – 4810. Available at: <https://diariodarepublica.pt/dr/detalhe/lei/34-2004-502394>, last access 20.1.2024.

⁵ MARQUES BORGES, B., "Child Participation in Juvenile Justice in Portugal...", *cit.*, p. 22.

Respecting the right to a private and family life

In the Portuguese system, the principle of respecting the right to a private and family life, notably, the right to protection of privacy, is respected, both in the educational guardianship process and in the general regime, where children between 16 and 18 years old are included. This is another area where Law 33/2019 has introduced important developments, establishing the development of procedural acts without being public when the defendant is under 18 years old.

Respecting the right to integrity and dignity

Finally, regarding the principle of respecting the right to integrity and dignity, there are important challenges for the Portuguese system. Mainly, the Ombudsperson is investigating some complaints regarding ill-treatment allegations perpetrated by police officers when taking detainees (including young offenders) to detention spaces. Moreover, children in Portugal are separated from adults in police custody but not in detention: so, it might be the case that, in police stations, both adult and child defendants are detained in a single room/cell.

Final comments

The Portuguese system has a graduated system depending on the age of the child. The main concern is in Portugal the minimum age of criminal responsibility is 16 years old. Therefore, children between under 16 are not subject to Criminal Law, and they are subject to a specific child-friendly system. Notably Children between the age of 12 and 16 years old are subject to the Educational Guardianship Act. The Court with jurisdiction to hear and decide on illegal acts committed by children and young people (between 0-16 years of age) is the District Court, Family and Juvenile Court.

Children between the age of 16 and 18 years old are subject to the Criminal Code. This implies that if they commit and act classified as a crime in the Criminal Code, they are judged by the Criminal Court (the same that judges adult perpetrators of crimes). In this regard, it has been outlined that the Portuguese system is not fully child friendly and age-appropriate, precisely due to the application for the “adults” criminal legislation. Therefore, one of the main concerns regarding the Portuguese juvenile system is the presence of children and young adults in adult prisons

However, young people between 16 and 21 years old have a special criminal regime regulated in Decree-Law no. 400/82. This regime has been improved by Law n.º 33/2019, adopted on May 2022, that transposes Directive (EU) 2016/800 of the European Parliament and the Council of 11 May 2016 on procedural safeguards of minors suspected or accused in criminal proceedings. This new act has introduced important developments in the legislation of children between 16 and 18 years old, but still there are important gaps that should be rethought in the Portuguese system.



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