

 JUST CLOSER 

# National Report on the youth justice system

PORTUGAL



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## Introduction: an overview of the Portuguese juvenile justice system

This report has been conducted as a part of JUST CLOSER project, which aim is to strengthen the respect of the procedural rights of children and youth in conflict with the justice system by valuing their voices and recommendations and promoting their active participation.

Within this project, it has been identified that there is a practical gap between children's rights, needs and views and the operation of juvenile justice, largely connected with the inability of adults to inform and hear children and to take their views into full consideration. That is why its main objective is to identify gaps and strengths of the existing legal framework at EU as well as at national levels and at the same time contribute to the harmonisation of practices.

To achieve this general objective, the object of this report is to analyse the juvenile system in Portugal from a children's rights based approach. In order to do so, the methodology of this report has been to verify the effective implementation Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for minors suspected or accused in criminal proceedings<sup>1</sup> (hereafter Directive (EU) 2016/800) in light of the Child-friendly Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice<sup>2</sup>, adopted in 2011. After this analysis, best practices and gaps will be identified and it will contribute to the identification of the main challenges that European countries are dealing when facing the juvenile justice systems.

The first thing to bear in mind is that, in Portugal, a child suspect can be dealt with under different legal regimes, depending on age:

- a) until the age of 12 years old the child is referred to the system of promotion and protection<sup>3</sup>, and thus considered to need protection;
- b) between 12 and 16 years old the child will be the subject of an educational guardianship procedure regulated in the Educational Tutelary Law<sup>4</sup>; Children between 12 and 16 years old, if they commit and act qualified as crime by the criminal law, the Public Prosecutor will institute an

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<sup>1</sup> Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, in OJ L 132, 21.5.2016.

<sup>2</sup> COUNCIL OF EUROPE, "Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice", Council of Europe Publishing, Strasbourg, 2011. Available at: <https://rm.coe.int/16804b2cf3>, last access 21.01.2024.

<sup>3</sup> Law 147/99, adopted on September 1, on the protection of children and young people in danger, Diário da República n.º 204/1999, Série I-A de 1.9.1999, pp. 6115 -6132. Available at: <https://diariodarepublica.pt/dr/detalhe/lei/147-1999-581619>, last access 17.12.2023.

<sup>4</sup> Educational Tutelary Law, Lei Tutelar Educativa, Lei n.º 166/99, Diário da República n.º 215/1999, Série I-A de 14.9.1999. Available at: <https://diariodarepublica.pt/dr/legislacao-consolidada/lei/1999-34539875>, last access 19.7.2023. See SANTOS DIAS, C., RUI DO MARGARIDA, C., Lei Tutelar Educativa Anotada, Universidade do Minho, Almedina, 2018.

educational tutelary process governed by the Educational Tutelary Law after an investigation phase<sup>5</sup>.

c) from 16 to 21 years old the child will be treated as an adult but specific rules should apply.

This is because 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 penal 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 21<sup>6</sup>.

Precisely, the Portuguese juvenile regime was recently modified by Law n.º 33/2019, adopted on May 2022<sup>7</sup>, 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 Act is the thirty-third amendment to Code of Criminal Procedure<sup>8</sup>. 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<sup>9</sup>.

In the Portuguese system, the notion of “young adult” is understood as the individuals who, having left adolescence, have not yet acquired the personal autonomy and maturity involved in the

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<sup>5</sup> MARQUES BORGES, B., “Child Participation in Juvenile Justice in Portugal. National report for AIMJF’s comparative and collaborative research”, *The Chronicle – AIMJF’s Journal on Justice and Children’s Rights*, v. 1, N. II, 2023, pp. 1-15. Available at: <https://chronicle.aimjf.info/index.php/files/article/view/88>, last entrance 20.12.2023.

<sup>6</sup> 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.

<sup>7</sup> 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.

<sup>8</sup> 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.

<sup>9</sup> In spite of this express transposition of Directive 2016/800, the 7<sup>th</sup> of February 2024 the European Commission has published the information regarding an infringement procedure by sending a letter of formal notice to Portugal (INFR(2023)2091) for failing to fully transpose into its national law the Directive. The Commission considers that “Portugal failed to transpose the Directive’s requirements regarding the right to information, the right to a medical examination, specific treatment in the case of deprivation of liberty, training of law enforcement and detention facilities staff who handle cases involving children and the attribution of costs resulting from the application of certain rights enshrined in the Directive”. Information available at: [https://ec.europa.eu/commission/presscorner/detail/en/inf\\_24\\_301](https://ec.europa.eu/commission/presscorner/detail/en/inf_24_301), last seen 1.3.2024.

insertion and social interaction that reflect adult life<sup>10</sup>. Therefore, they have been qualified by legal doctrine as "emerging adult" or "adult in transition"<sup>11</sup>.

The need to create a special penal regime for those charged with offences over the age of 16 and under the age of 21 is expressly stated by the legislator in the Preamble of the Portuguese Criminal Code, Decree-Law no. 400/82<sup>12</sup>:

*"(...) This idea corresponds, on the one hand, to the realisation of what is arbitrary - but not intrinsically unjust - in determining a certain age as the formal limit for distinguishing the imputable from the inimputable. It is precisely in order to mitigate the effects of this dogmatic and practically indispensable cut-off that we welcome a juvenile law that aims to fulfil the purposes of juvenile law in its principles and protective and reeducational measures...other motivations and reasons... Not only those stemming from the less stigmatising effects that this right brings, but also... the greater capacity for re-socialisation of the young person, who opens up to areas that have not been traumatised, and as such is perfectly lucid and understanding of the just and appropriate demands of the legal system (...)"<sup>13</sup>*

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, especially when the perpetrator is still on the threshold of maturity<sup>14</sup>.

However, the proposed measures do not rule out the application - as an *ultima ratio* - of prison sentences to those charged with offences over the age of 16, when this becomes necessary for

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<sup>10</sup> Free translation, original text: "Todos os indivíduos que, tendo deixado a adolescência, não adquiriram ainda a autonomia e maturidade pessoais implicadas na inserção e interação social que traduzem a vida adulta". DUARTE FONSECA, A., "Interatividade entre penas e medidas tutelares – contributo para a (re)definição da política criminal relativamente a jovens adultos", Revista Portuguesa de Ciência Criminal, nº 11, 2001, pp. 252-253.

<sup>11</sup> LEOTE DE CARVALHO M. J., "Uma realidade invisível: os jovens adultos condenados em Tribunais Judiciais de 1ª Instância em Portugal (1993-2018)", Revista do Ministério Público, nº 162, 2020, p. 124.

<sup>12</sup> Decreto-Lei n.º 400/82 Aprova o Código Penal, Diário da República n.º 221/1982, 1º Suplemento, Série I de 23.9.1982. Available at: <https://diariodarepublica.pt/dr/legislacao-consolidada/decreto-lei/1982-34473075>, last access 17.7.2023.

<sup>13</sup> Free translation, original text: "(...) Esta ideia corresponde, por um lado, à consciencialização do que há de arbitrário - mas não intrinsecamente injusto - na determinação de certa idade como limite formal para distinguir o imputável do inimputável. É justamente para atenuar os efeitos deste corte dogmático e praticamente imprescindível que se vê com bons olhos um direito de jovens imputáveis que vise paredes meias, nos princípios e nas medidas protetivas e reeducadoras, os fins do direito de menores...outras motivações e razões.... Salientem-se não só as que decorrem dos efeitos menos estigmatizantes que este direito acarreta como também... a maior capacidade de ressocialização do jovem que se abre ainda para zonas não traumatizadas, como tal perfeitamente lúcido e compreensivo às solicitações justas e adequadas da ordem jurídica (...)". Point 6 of the Preamble to Decree-Law no. 400/82 (Criminal Code).

<sup>14</sup> Notes from Professor Maria da Conceição Ferreira da Cunha.

the adequate and firm defence of society and the prevention of crime, and this will be the case if the sentence applied is imprisonment for more than two years<sup>15</sup>.

## THE IMPLEMENTATION OF DIRECTIVE (EU) 2016/800 AND THE APPLICATION OF THE PRINCIPLES OF CHILD-FRIENDLY JUSTICE IN THE PORTUGUESE JUVENILE JUSTICE SYSTEM

### Accessible justice: right to information<sup>16</sup>

Justice must be accessible for all children. Any barriers to access to justice must be removed and children shall be provided adequate information about their rights. Justice must be free of charge and legal aid must be guaranteed, and so must be access to support services and remedies.

The related articles of Directive (EU) 2016/800 are, basically, Article 4, on the Right to Information; and article 18 on the right to legal aid. Additionally, the following European Directives are also related: Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings (art. 2 and 3); Directive 2012/13/EU on the right to information in criminal proceedings; Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings (art. 3).

To begin with, children between 12 and 16 years old, in the educational guardianship procedure, are constantly informed of the situation. For instance, in the preliminary hearing, the judge exposes the object and purpose of the act, in simple and clear language, in order to be understood by the minor, taking into account his age and degree of development<sup>17</sup>. Moreover, the presence of the child is mandatory at the session when the final decision (sentence) is communicated by the Judge, so that this decision is explained to the child<sup>18</sup>. Additionally, there are some materials adapted to child to explain them the information about the hearing<sup>19</sup>.

For young persons between 16 and 21 years old, article 61 of the Code of Criminal Procedure (Procedural rights and duties) provides for the general statement of the defendant's rights at all stages of the proceedings including the right to be informed of their rights every time they appear before a judicial authority or the police<sup>20</sup>.

Whenever a suspect becomes a defendant, the authority in charge must mention and, if necessary, explain the procedural rights and duties of a defendant<sup>21</sup>. In practice, a document is handed to the

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<sup>15</sup> Notes from Professor Maria da Conceição Ferreira da Cunha.

<sup>16</sup> Information provided by the Portuguese Ombudsperson's Office.

<sup>17</sup> MARQUES BORGES, B., "Child Participation in Juvenile Justice in Portugal...", cit., p. 20.

<sup>18</sup> MARQUES BORGES, B., "Child Participation in Juvenile Justice in Portugal...", cit., p. 21.

<sup>19</sup> See <https://iacrianca.pt/justice-youthopia/recursos-para-download/>

<sup>20</sup> Code of Criminal Procedure, Article 7(1)(h).

<sup>21</sup> Code of Criminal Procedure, Article 58(2).



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. During the first judicial questioning of a detained defendant, the pre-trial judge must provide information to the defendant. The pre-trial judge must inform the defendant his rights as referred to in Article 61 of the Code of Criminal Procedure, explaining, if necessary, the right to remain silent and of the consequences should they choose not to remain silent.

The pre-trial judge has also to inform the defendant of the reasons behind their detention, of the acts that are the basis of the charges, including, if known, the circumstances of time, place, and method, and the evidence obtained. Information on the evidence obtained is only provided whenever the communication of such information does not jeopardize the investigation, does not hamper the discovery of the truth, and does not endanger the life, the physical or psychological integrity, or the freedom of the parties to the case or of the victims of the crime<sup>22</sup>.

A defendant in pre-trial detention or an individual serving time in prison, immediately after admission to prison, is entitled to be personally informed of their rights and duties and the rules in force, which are explained and translated, if necessary<sup>23</sup>. They should be handed a leaflet setting out their rights, duties, and the rules in force that are relevant to the execution of the sentence or measure. This leaflet should include the information necessary for their integration into the prison establishment, particularly on the services and activities available to them and their opening hours, as well as the place where the legislation and regulations relevant to the execution of the sentence or measure may be consulted<sup>24</sup>.

Therefore, the general rules to adults also apply to children between 16 and 18 in conflict with the law. Taking a look specifically on the situation of children, 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 to the holders of parental responsibilities, their legal representative, or the person who has their de facto custody<sup>25</sup>.

It has been suggested that the information provided to children could be more clear and adapted to them.

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<sup>22</sup> Code of Criminal Procedure, Article 141(4).

<sup>23</sup> Code of Enforcement of Prison Sentences or Measures involving the deprivation of liberty), Law 115/2009, adopted on October 12. Last amended by Law 27/2019, adopted on March 28. Articles 7(1)(j) and 16(2).

<sup>24</sup> See Article 9 of the General Rules on Prison Establishments, Decree-Law 51/2011, adopted on April 11. Last amended by Decree-Law 70/2019, adopted on May 24, Diário da República n.º 71/2011, Série I de 4.11.2011, pp. 2180 – 2225. Available at: <https://diariodarepublica.pt/dr/detalhe/decreto-lei/51-2011-276858>, last access 20.1.2024.

<sup>25</sup> Code of Criminal Procedure, Article 58(9).



Regarding the right to an interpreter, in procedural acts, when the defendant who does not know or master the Portuguese language has to intervene in the process, a suitable interpreter is appointed, at no cost. The entity responsible for the procedural act provides the defendant who does not know or master the Portuguese language, within a reasonable period, with a written translation of the necessary documents.

An interpreter is also appointed when the translation of a document into a foreign language is necessary and is not accompanied by a sworn translation.

A judicial authority or criminal police authority appoints the interpreter<sup>26</sup>.

Persons with oral or hearing disabilities are appointed with the best-suited interpreter to the situation of the person concerned. The lack of an interpreter results in the procedure being postponed<sup>27</sup>.

Besides the defense lawyer, the Portuguese system does not foresee reference persons to whom children can ask questions.

## Age-appropriate justice

At all stages of the proceedings, juveniles must be treated according to their age, their specific needs, their degree of maturity and level of understanding. Everything must be explained in a language they can understand.

The main related articles of Directive (EU) 2016/800 are: Article 7, on the Individual assessment of the child; and Article 2, regarding Age responsibility. It should also be mentioned Directive 2012/13/EU on the right to information in criminal proceedings.

### *The Individual assessment of the child<sup>28</sup>*

Domestic Portuguese legislation enshrines a mandatory child defendants' right to an individual assessment<sup>29</sup> as more than one assessment is typically conducted during different stages of proceedings.

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<sup>26</sup> Code of Criminal Procedure, Article 92.

<sup>27</sup> Code of Criminal Procedure, Article 93.

<sup>28</sup> Information provided by the Portuguese Ombudsperson's Office.

<sup>29</sup> Law 33/2019.

In this regard, Law 33/2019 introduced two new provisions on individual assessment of defendants under the age of 18.

Firstly, in the bill of indictment produced at the end of an investigation against a defendant under 18, the public prosecution must attach a social report or information on the defendant produced by the social rehabilitation services, except when these documents are not yet available and are considered dispensable to the best interests of the underage defendant<sup>30</sup>.

Secondly, during the trial phase, when the defendant is under 18 and the social report or the information on the defendant produced by the social rehabilitation services has not yet been incorporated into the file, the court shall order it to be drafted and incorporated into the court file, unless, reasonably, the relevant exemption is justified given the circumstances of the case and provided that it is compatible with the best interests of the child<sup>31</sup>.

This social report or the information on the defendant produced by the social rehabilitation services is taken into account in determining the sanction that may be applied<sup>32</sup>.

All teams have specialists with social work, psychology, and law degrees. Depending on the type of crime and the child, the coordinator leans towards one specialist or another. When there are more complicated cases in terms of personality, a psychologist is appointed who has greater expertise to deal with these cases. For example, driving under the influence of alcohol or without a license can be allocated to a specialist with a law degree<sup>33</sup>. However, it has been suggested that perhaps it should have been better to include in the individual assessment of the child necessarily a psychological assessment<sup>34</sup>.

The 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<sup>35</sup>. 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<sup>36</sup>.

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<sup>30</sup> Code of Criminal Procedure, Article 283(3)(h).

<sup>31</sup> Code of Criminal Procedure, Article 370(2). CASALEIRO, P. ET. AL, "Social Fieldwork Research (FRANET) Procedural safeguards for children who are suspects or accused persons in criminal proceedings", cit., pp. 2 and 3.

<sup>32</sup> Young Adult's Special Penal Regime, Article 6.

<sup>33</sup> See the 2022 report of EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (FRA), "Children as Suspects or accused persons in Criminal Proceedings – Procedural Safeguards", 2022 p. 80. Available at: [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2022-children-procedural-safeguards\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2022-children-procedural-safeguards_en.pdf), last access 20.1.2024.

<sup>34</sup> Following Prof. Maria da Conceição Ferreira da Cunha.

<sup>35</sup> MARQUES BORGES, B., "Child Participation in Juvenile Justice in Portugal...", cit., p. 82.

<sup>36</sup> MARQUES BORGES, B., "Child Participation in Juvenile Justice in Portugal...", cit., p. 115.

The proceedings adopted are adequate in respect of the study/working activities, but legal provisions are not specifically established for this purpose. In one of the interviews it has been suggested that the national justice system is not inspired by an individual assessment of the child and that the proceedings are not adequate to respect study or working activities.

### *Age responsibility*

The Portuguese system has a graduated system depending on the age of the child. As mentioned in the introduction, in Portugal the minimum age of criminal responsibility is 16 years old.

Therefore, children between under 16 are not subject to Criminal Law. 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<sup>37</sup>. Inside this group, a differentiation is also made:

- a. Decisions regarding children until the age of 12 years old are made following the process of promotion and protection of children in danger.
- b. Children between the age of 12 and 16 years old are subject to the Educational Guardianship Act<sup>38</sup>.

Children between the age of 16 and 18 years old are subject to the Criminal Code<sup>39</sup>. 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)<sup>40</sup>.

However, as it has already mentioned, young people between 16 and 21 years old have a special criminal regime regulated in Decree-Law no. 400/82<sup>41</sup>. Legal doctrine has expressed the need to revise this legislation, arguing that it is out of date and that it is little applied<sup>42</sup>.

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<sup>43</sup>. This is because Directive (EU) 2016/800 does not standardise the age of

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<sup>37</sup> In Portugal there were 46 courts installed and in operation. “The Family and Juvenile Courts also have jurisdiction for other matters, such as: Regulation of parental responsibilities (non-compliance; changes; limitations; inhibition); Promotion and protection of children and young people in danger; Adoptions; Investigation and challenge of paternity/maternity; Maintenance for older student children (up to 25 years old); Guardianship; Civil sponsorship; Divorces; Declarations of non-existence or annulment of marriage; Homestay; division of property following separation or divorce; rolling of common goods; maintenance to spouses”. MARQUES BORGES, B., “Child Participation in Juvenile Justice in Portugal...”, cit., p. 17.

<sup>38</sup> Lei Tutelar Educativa, Lei n.º 166/99, Diário da República n.º 215/1999, Série I-A de 14.9.1999. Available at: <https://diariodarepublica.pt/dr/legislacao-consolidada/lei/1999-34539875>, last accessed 19.12.2023.

<sup>39</sup> Art. 19 of the Portuguese Criminal Code.

<sup>40</sup> MARQUES BORGES, B., “Child Participation in Juvenile Justice in Portugal...”, cit., p. 17.

<sup>41</sup> See also art. 9 of the Portuguese Criminal Code.

<sup>42</sup> In this sense Prof. Maria da Conceição Ferreira da Cunha.

<sup>43</sup> In 2022, there were 50 inmates of 16 to 18 years old (out of 885). See SISTEMA DE SEGURANÇA INTERNA, “Relatório Anual de segurança interna Ano 2022”, 2022, p. 88. Available at: <https://www.portugal.gov.pt/download->

criminal responsibility so in Portugal it has been maintained in 16 years old<sup>44</sup>. That is why it has been suggested the need to raise the age of criminal responsibility to 18 years old, harmonizing it with the age of civil majority<sup>45</sup>.

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 minors (at the time, the age of majority was 21), based on the idea of the incomplete physical and moral development of the agent, and it was unfair to impose the same degree of responsibility, as the same degree of reflection and discernment was not required<sup>46</sup>.

In the current system, this figure is contained in Article 4 of Decree Law 401/82: “*If imprisonment is applicable, the judge must specially mitigate the sentence under the terms of articles 73 and 74, when he has serious reasons to believe that the mitigation will result in advantages for the social reintegration of the convicted young person*”<sup>47</sup>. However, this mitigation does not operate automatically but it has to be appreciated and justified in the concrete case on the basis of social re-socialisation, among other criteria<sup>48</sup>.

According to Taipa de Carvalho, “the underlying political-criminal philosophy...indicates that the court *should opt, as a rule, for special mitigation*, and that the refusal of special mitigation should be duly substantiated...even though the legal text seems to suggest otherwise, when it makes mitigation dependent on there being serious reasons to believe that mitigation will result in advantages for the social reintegration of the young convict”<sup>49</sup>.

In one of the interviews, it has been suggested that the behavior of police officers and other professionals is generally adequate to the age of the child but not always. The same answer has been given when asked if the proceedings take into account the age and maturity of the child.

Regarding the environment in which interviews take place, it has been outlined by one professional that sometimes the building where the Family and Juvenile Court is located is the same for the Court of Criminal Investigation. Therefore, children and their families might encounter prisoners or

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<sup>44</sup> In this sense Prof. Maria da Conceição Ferreira da Cunha.

<sup>45</sup> For this issue see RODRIGUES, MIRANDA A., “Jovens e delinquentes – a revisão urgente da idade da imputabilidade penal”, Estudos em Homenagem a António Henriques Gaspar, 2019, Almedina, Coimbra, pp. 53-74.

<sup>46</sup> CORREIA, E., Direito Criminal, Volume II, Almedina, Coimbra, 2000, p. 264.

<sup>47</sup> Free translation.

<sup>48</sup> See STJ ruling of 29/4/2009.

<sup>49</sup> TAIPA DE CARVALHO, A., Direito Penal – Parte Geral, 4ª edição, UCE, Porto, 2022, 476.

persons being investigated in those proceedings. That is why it has been suggested to install family courts in separate buildings<sup>50</sup>.

## Speedy justice

The principle of urgency must be applied in order to provide a quick response, in the light of the child's best interest. Preliminary decisions must be reviewed.

The main disposition that addresses this principle would be Article 13 of the Directive (EU) 2016/800, which is focused on Timely and diligent treatment of cases.

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<sup>51</sup>. 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<sup>52</sup>.

Article 103(2)(b) of Law 33/2019, which transposes Directive (EU) 2017/800, mandates the urgent processing of cases involving children, even if there are no prisoners.

Following the opinion of the Portuguese Ombudsperson's Office, 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.

## Diligent justice: the training of professionals<sup>53</sup>

Diligence is the quality in which commitment, care, thoroughness and zeal converge. Juvenile-friendly justice must encompass all of these qualities, respecting the rights of juveniles and always in acting best interests.

Regarding the diligent justice principle, the main related articles of Directive (EU) 2016/800 are Article 13, on timely and diligent treatment of cases; as well as Article 20, focused on the Training of professionals.

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<sup>50</sup> MARQUES BORGES, B., "Child Participation in Juvenile Justice in Portugal...", cit., p. 31.

<sup>51</sup> Code of Criminal Procedure, Article 276(1)(2)(3).

<sup>52</sup> Information provided by the Portuguese Ombudsperson's Office.

<sup>53</sup> Information provided by the Portuguese Ombudsperson's Office.

Focusing on the Portuguese system, initial and ongoing training of judges and public prosecutors is mainly provided by the Centre for Judicial Studies (CEJ)<sup>54</sup> – 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.

For instance, in November 2018, the CEJ organized a specific seminar on procedural safeguards for suspects and defendants in light of the changes produced by European Law. Ninety judges and public prosecutors attended this seminar<sup>55</sup>.

Moreover, the Training Department of the Court Officials' Trade Union issued an informative text with notes and comments on Law 33/2019, which transposed Directive 2016/800, on procedural guarantees for children who are suspects or accused persons in criminal proceedings<sup>56</sup>.

Regarding this principle, 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<sup>57</sup>.

Finally, it should be outlined that in one of the interviews it has been suggested that there is not a proper coordination between the professionals involved, especially for lawyers.

## Adapted and focused on the rights of the child

The whole proceedings must be carried out with the child's needs and rights in mind. Any form of deprivation of a child's freedom must be a measure of last resort and of the shortest length possible. Alternative means must be encouraged if they are in the best interests of the child.

As for the Directive (EU) 2016/800, this principle could be linked to different articles, in particular: Article 8, which contains the Right to a medical examination; Article 10, which deals with the limitation of deprivation of liberty measures; Article 11, on Alternative measures; and Article 12, which focuses on the specific treatment in the case of deprivation of liberty.

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<sup>54</sup> For more information see: <https://cej.justica.gov.pt>

<sup>55</sup> CENTRE FOR JUDICIAL STUDIES, "Relatório de Atividades 2018.2019", Centro de Estudos Judiciários, Lisbon, 2019. Available at: [https://cej.justica.gov.pt/Portals/30/Ficheiros/instrumentos\\_de\\_gestao/relatorio\\_de\\_atividades/Relatorio\\_atividades\\_2018\\_2019%20final.pdf?ver=OnetSE75OAaGk5Ek9EblHA%3d%3d](https://cej.justica.gov.pt/Portals/30/Ficheiros/instrumentos_de_gestao/relatorio_de_atividades/Relatorio_atividades_2018_2019%20final.pdf?ver=OnetSE75OAaGk5Ek9EblHA%3d%3d), last access 20.1.2024, pp. 41 and 48.

<sup>56</sup> <https://sfj.pt/71-departamento-de-formacao/processual-penal.html>.

<sup>57</sup> CASALEIRO, P. ET. AL, "Social Fieldwork Research (FRANET) Procedural safeguards for children who are suspects or accused persons in criminal proceedings", cit., p. 117.

## ***Right to a medical examination***<sup>58</sup>

The Code on Enforcement of Prison Sentences or Measures involving the deprivation of liberty guarantees the right to access health care under good conditions to any person deprived of their liberty just like any other citizen<sup>59</sup>. The General Rules on Prison Establishments stipulates that a person deprived of their liberty, when entering the prison facility, has the right to immediate medical care to be examined by a nurse within 24 hours, and to undergo a medical examination within 72 hours that must be performed by a medical doctor<sup>60</sup>. There are no special rules on the invasive or non-invasive nature of the medical examination. Underage defendants deprived of their liberty or underage inmates have the same healthcare rights as adults.

The medical examination is conducted upon entering the prison facility, when it is mandatory, and, afterwards, whenever required by the child, the lawyer, or the holder of parental responsibility<sup>61</sup>.

For example, 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. There are doctors every day and psychiatrists once a week. Usually, the medical examination of the physical as well as mental condition is conducted on the same day of the request<sup>62</sup>.

The results of the medical examination are taken into account for the individual rehabilitation plan mandatory for inmates under 21, namely when there is any information of addictive behavior or when there is a report of need for mental health support. Furthermore, if the child has some kind of mental illness, the court may ask for a medical report to assess the measures imposed.

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<sup>63</sup>.

When asked about the rules of medical examination to children, one of the entities interviewed affirmed that they are often badly applied.

## ***Limitation of deprivation of liberty and alternative measures***<sup>64</sup>

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<sup>58</sup> Information provided by the Portuguese Ombudsperson's Office.

<sup>59</sup> Article 32(1).

<sup>60</sup> Articles 10 and 53.

<sup>61</sup> CASALEIRO, P. ET. AL, "Social Fieldwork Research (FRANET) Procedural safeguards for children who are suspects or accused persons in criminal proceedings", cit., p. 100.

<sup>62</sup> For further information on the conditions at the Prison-School of Leiria, see the annual report of the National Prevention Mechanism, 2019. PROVIDOR DE JUSTIÇA INSTITUIÇÃO NACIONAL DE DIREITOS HUMANOS, "Mecanismo Nacional de Prevenção Relatório à Assembleia da República – 2019", Lisbon, 2019, p. 30 and following. Available at: [https://www.provedor-jus.pt/documentos/MNP\\_2019\\_web.pdf](https://www.provedor-jus.pt/documentos/MNP_2019_web.pdf), last access 20.1.2024.

<sup>63</sup> In this sense Prof. Maria da Conceição Ferreira da Cunha.

<sup>64</sup> Information provided by the Portuguese Ombudsperson's Office.



When children between 12 and 16 years are caught committing a crime, they cannot normally be arrested, but only identified, and they can only remain in the police station for a maximum of 3 hours<sup>65</sup>. Only in some cases of *fragante delicto* the child may be detained by law. In this case, the child must be presented to the judge as soon as possible, never exceeding forty-eight hours. If it is not a *fragante delicto*, the detention can only be ordered by a judge if certain conditions are met<sup>66</sup>.

If we now move on to young persons between 16 and 21 years old, the general rules of the Code of Criminal Procedure are applied to the pre-trial detention of persons under 18 in the situations stipulated in Article 202.

Under the principle of proportionality<sup>67</sup>, children are not arrested, and pre-trial detention is not imposed or maintained if less severe measures can achieve or have achieved the same goal. Alternatives include home arrest, accommodation in an assisted living facility, and changing the adult with parental responsibility, if necessary. These are combined with temporary probation assistance<sup>68</sup>.

Rules regarding the duration and the periodic review of pre-trial detention are the same for adults and defendants under 18. Pre-trial detention shall be over after 4 months if a bill of indictment is not served; after 8 months if there is no judicial decision to indict; after one year and two months without a conviction in the first instance; and after one year and six months without a conviction in *res judicatam*<sup>69</sup>.

These maximum deadlines for pre-trial detention can, however, be extended in particular cases, according to the type of crime and complexity of each case. In particularly complex cases, due to the number of defendants or victims or because it involves highly organized crime, the pre-trial detention can be extended, respectively, for one year, one year and four months, two years and six months, and three years and four months. The pre-trial detention must be reviewed every three months<sup>70</sup>.

As for prison sentences, the Young Adult's Special Penal 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<sup>71</sup>. However, there are doubts of the applicable regime for corrective measures for children between

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<sup>65</sup> Educational Tutelary Law, Art. 50 (b).

<sup>66</sup> MARQUES BORGES, B., "Child Participation in Juvenile Justice in Portugal...", cit., p. 19.

<sup>67</sup> Code of Criminal Procedure, Article 193

<sup>68</sup> CASALEIRO, P. ET. AL, "Social Fieldwork Research (FRANET) Procedural safeguards for children who are suspects or accused persons in criminal proceedings", cit., p. 92.

<sup>69</sup> Code of Criminal Procedure, Article 215.

<sup>70</sup> Code of Criminal Procedure, Article 213.

<sup>71</sup> Decree-Law 401/82, adopted on September 23, Articles 4 and 6.

16 and 18 years old, as the law is not up to date<sup>72</sup>. More worryingly, it has been stated that detention centers were never created and that corrective measures have not been applied in practice<sup>73</sup>.

In one of the interviews, it has been suggested that the deprivation of liberty measures to children should be a last resort, but unfortunately they are not. And that the system provide for alternative means, but normally they do not take into account children's rights. However, this answer was not completed with more concrete information or statistics.

In 2022, 9,7% of children subject to the guardianship procedure where interned in an educational center<sup>74</sup>.

## **Respecting the right to a due process: assistance by a lawyer and right to a legal aid**

Children, like adults, must be guaranteed all the principles of due process (principle of legality and proportionality, presumption of innocence, right to a fair trial, right to legal assistance, right of access to justice).

Several articles of Directive (EU) 2016/800 should be mentioned when it comes to the right to a due process in juvenile justice cases: Article 6, which regulates the assistance by a lawyer; Article 18, containing the Right to a legal aid; and Article 19, on remedies.

Regarding this fundamental right, we should also mention other European Directives: Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings (art. 3); Directive 2016/1919/EU on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings; and Directive 2016/343/EU on the presumption of innocence.

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<sup>75</sup>. Whenever a suspect becomes a defendant, the authority that presides over the act informs the defendant of this right<sup>76</sup>. This information is also

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<sup>72</sup> Decree-Law 401/82, Article 5. In this sense Prof. Maria da Conceição Ferreira da Cunha.

<sup>73</sup> In this sense Prof. Maria da Conceição Ferreira da Cunha.

<sup>74</sup> In total, there where 119 children in educational centers. It is also interesting to point out that the 82% of this children where male; the main age was 15 and 16 years old; and that the main nationalities were from Brazil, Cabo Verde and Angola. The semi-open regime remained predominant (62.2%) and, by legal status, the measure of internment in an educational centre stood out (87.4%). SISTEMA DE SEGURANÇA INTERNA, "Relatório Annual de segurança interna Ano 2022", cit., p. 107.

<sup>75</sup> Code of Criminal Procedure, Article 61(1)(e).

<sup>76</sup> Code of Criminal Procedure, Article 58(4).

given at the beginning of the first judicial questioning of a detained defendant<sup>77</sup> and the beginning of the questioning before a public prosecutor during investigations<sup>78</sup>.

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<sup>79</sup>.

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*<sup>80</sup>. This appointment is made under the free legal aid system and the assistance is provided by a lawyer appointed by the Bar Association from the list of registered lawyers in the legal aid system according to their preferred areas of practice.

To benefit from free legal aid, the person must apply for social security services, and meet the requirements of means-testing based on their household income<sup>81</sup>. When a defendant is subject to the statement of identity and residence, the defendant issues a statement regarding their household's income, assets, and permanent expenditure, which may lead to a provisional granting of free legal aid<sup>82</sup>.

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.

The mandatory presence of a defense lawyer of a defendant under 21 in every procedural act is a guarantee that all other rights of these defendants are ensured and, particularly, that the right to information of these defendants is guaranteed.

Finally, in the educational tutelary process for children between 12 and 16 years old, the assistance of a defender is compulsory at all procedural acts. Therefore, the child will have appointed an unofficial defender who will accompany him or her in all the phases of the proceeding<sup>83</sup>.

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<sup>77</sup> Code of Criminal Procedure, Article 141(4).

<sup>78</sup> Code of Criminal Procedure, Article 143(2).

<sup>79</sup> Code of Criminal Procedure, Article 64(d).

<sup>80</sup> 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.

<sup>81</sup> Legal Aid Act, cit., Article 8-B.

<sup>82</sup> Legal Aid Act, cit., Article 25(1).

<sup>83</sup> Education Tutelary Law, Art. 46-A.

## Respecting the right to participate in and understanding the proceedings

Children must be informed in a language they can understand about their rights and about all judgments and decisions that affect them. They must understand how the situation may or will evolve, what options they have and what the consequences will be. They have the right to be heard and to give their opinion in all matters that affect them.

In this regard, the main related rights of Directive (EU) 2016/800 would be the following: the right to information (Article 4); the right of the child to have the holder of parental responsibility informed (Article 5); and the right of children to appear in person at, and participate in, their trial (Article 16). In addition, there are two more general European Directives that are related with this child-friendly principle, which are Directive 2012/13/EU on the right to information in criminal proceedings; as well as Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings (art. 5-6).

### ***Right of the child to have the holder of parental responsibility informed<sup>84</sup>***

On the right to be accompanied by the holder of parental responsibilities or a support person, Law 33/2019 introduced three new provisions:

- a) When a child suspect formally becomes a defendant, this act is duly communicated to the holders of parental responsibilities, their legal representative, or the person who has *de facto* custody of them<sup>85</sup>;
- b) A defendant under 18 has the right to be accompanied during the procedural acts in which they take part by the persons mentioned above or by another suitable person indicated by the defendant and accepted by the competent judicial authority<sup>86</sup>;
- c) When a coercive or patrimonial guarantee measure (other than the statement of identity and residence) is imposed on a child defendant, the decision is communicated to the holders of parental responsibilities, their legal representative, or the person who has *de facto* custody of them.

### ***Right of children to appear in person at, and participate in, their trial<sup>87</sup>***

Starting with the educational tutelary process for children between 12 and 16 years old, their participation in the court hearing is mandatory and they are always summoned<sup>88</sup>. The child is heard in all stages of the process. The hearing of the child is always conducted by a judicial authority –

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<sup>84</sup> Information provided by the Portuguese Ombudsperson's Office.

<sup>85</sup> Code of Criminal Procedure, Article 58(7).

<sup>86</sup> Code of Criminal Procedure, Article 194 (11).

<sup>87</sup> Information provided by the Portuguese Ombudsperson's Office.

<sup>88</sup> MARQUES BORGES, B., "Child Participation in Juvenile Justice in Portugal...", cit., p. 22.

the Public Prosecutor or the Judge-. Moreover, the Judge have 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<sup>89</sup>.

During the proceeding, the child is normally hear in the office of the Judge or the Public Prosecutor. Only in the final hearing (trial), when the most serious cases arrive, the child is heard in the courtroom<sup>90</sup>.

Moving on to young 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, they have to make a statement about their identity and residence<sup>91</sup>.

Defendants have the right to be present and participate in the trial. However, the trial can go ahead if they are properly notified<sup>92</sup>. If the defendant is notified of the date of the trial at the address given in the statement of identity and residence, the defendant is presumed to be aware of the trial and the trial can be conducted in their absence, unless their presence is necessary to the discovery of the truth. The defendant can refute that presumption and if the trial was held in their absence, it is considered irremediably null<sup>93</sup>.

The defendant has the right to attend all procedural acts that directly affect them and the right to be heard by the court. At the beginning of the trial, the judge must inform the defendant of the right to make statements at any time during the trial, as long as they refer to the subject of the proceedings, without, however, being obliged to do so, and that if they choose to remain silent, it will not be held against them<sup>94</sup>.

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.

As mentioned, the only difference between a trial of child defendants and adult defendants is the presence of the holder of the responsibilities or of a person designated for that purpose. There is no change in the layout of the trial room or the way the accused is heard. However, special care is taken to adapt the language used when dealing with vulnerable defendants regardless of their age. Defendants are free to confer with their lawyers at any time. Judges usually ask them to explain to the defendant what is happening in court, particularly when it comes to the sentence<sup>95</sup>.

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<sup>89</sup> Educational Tutelary Law, Art. 47. See also MARQUES BORGES, B., "Child Participation in Juvenile Justice in Portugal...", cit., p. 19.

<sup>90</sup> MARQUES BORGES, B., "Child Participation in Juvenile Justice in Portugal...", cit., p. 24.

<sup>91</sup> Code of Criminal Procedure, Article 61(6)(c).

<sup>92</sup> Code of Criminal Procedure, Article 300.

<sup>93</sup> Code of Criminal Procedure, Articles 333, 119(c).

<sup>94</sup> Code of Criminal Procedure, Article 343(1).

<sup>95</sup> Judges usually tell the defendant, after reading the sentence, that the lawyer will later explain better what was said. See CASALEIRO, P. ET. AL, "Social Fieldwork Research (FRANET) Procedural safeguards for children who are suspects or accused persons in criminal proceedings", cit., p. 70.

Based on the standards for child-friendly justice adopted by the Council of Europe in 2010, and by the UN Convention on the Rights of the Child, particularly Article 12 (right to participation), Portugal has developed «Jus Project/Project 12- Justice for Children».

«Project JUS /Project 12» was coordinated by the National Commission for the Promotion of the Rights and the Protection of Children and Young People, aiming to contribute to a child-friendly justice in Portugal and to strengthen the importance of a justice system that should be adapted to children and to their best interests, guaranteeing that children's rights are respected in judicial and non-judicial procedures and ensuring measures for child victims and child witnesses of violence.

Concerning these objectives, a Guide “The hearing process of children and youth: A Guide to Best Practices for Professionals” was published<sup>96</sup>. However, in this guide there are not specific provisions for the juvenile justice proceedings.

Having said that, it should also be pointed out that one of the interviewed entities stated that a lot of times juveniles do not receive adequate explanations about their situation, rights or future scenarios. In addition, when asked about the use of child-friendly language, it was said that there are good judges who use it, but that most of them do not. And that the technicians do not have and adequate legal preparation to make that kind of explanation to children.

## Respecting the right to a private and family life: the right to protection of privacy

The private life and personal data of children who are or have been involved in any proceedings should be protected. No information, images or data that could directly or indirectly allow the identification of the child may be disclosed. The authorities should provide limited access to records or documents, and all proceedings involving minors should take place behind closed doors.

When it comes to Directive (EU) 2016/800, this child-friendly principle is directly reflected on Article 14, centred on the Right to protection of privacy. Moreover, we could mention Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings (art. 4).

In the Portuguese system, starting with the educational guardianship process for children in conflict with the law from 12 to 16 years old, the first thing to be said is that is secret, so that only the young person, parents (legal representatives, de facto guardian) and defender can be present at the hearings that take place at the inquiry stage. At the judicial stage the proceedings are public, so

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<sup>96</sup> ALEXANDRE, J., AGULHAS R., & ISCTE (LISBON UNIVERSITY INSTITUTE), “The hearing process of children and youth: A Guide to Best Practices for Professionals”, Projeto12 Justiça para crianças, EU Project – 878559 – REC-AG-2019/REC-RCHI-PROF-AG-2019, 2022. Available at: [https://projeto12.pt/wp-content/uploads/2022/08/Actionplan\\_GuideBestPractices\\_AlexandreAgulhas2022\\_1.pdf](https://projeto12.pt/wp-content/uploads/2022/08/Actionplan_GuideBestPractices_AlexandreAgulhas2022_1.pdf), last access 20.1.2024.

any person may attend the hearings, but they are publicised with respect for the personality of the child and his or her private life, and his or her identity must, as far as possible, be preserved<sup>97</sup>.

In the general regime, where children between 16 and 18 years old are included, article 87 of the Code of Criminal Procedure establishes that any person can attend any proceeding that is declared to be public, namely court hearings<sup>98</sup>. Nevertheless, the Code of Criminal Procedure allows for the judge to conduct the hearing away from the public because they need to protect the dignity of a person, public morality, or the normal course of the proceedings<sup>99</sup>. Law 33/2019 states that when the case involves a defendant under 18, procedural acts should be as a rule conducted without being made public<sup>100</sup>. In addition, Law 33(2019 has introduced the prohibition of third-party access to interrogation records involving children<sup>101</sup>.

There are no special rules for defendants under 18 as to the audio-visual recording of statements. The only specific rule is, as mentioned, the mandatory assistance of a defense lawyer in every procedural act (other than the formal declaration as a defendant) for defendants under 21<sup>102</sup>. Trials are, as a rule, always audio-recorded and courts are equipped with an audio recording system<sup>103</sup>. The law also allows for audio-visual recording, but most courts are not equipped accordingly.<sup>104</sup>

In the other phases of the criminal procedure, for example, the questioning of the defendant during the investigation phase, the general rule is to make use of written minutes. Nonetheless, audio or audiovisual recording may also be used where available<sup>105</sup>.

As for the educational guardianship procedure, the hearings are recorded in audio. And the Judge can order that the media does not reproduce or narrate certain parts of the process or disclose the identity of the child<sup>106</sup>.

The national system allows detained children to maintain contact with their families<sup>107</sup>.

While in police custody, children have the right to one phone call to the family during the 48 hours that they may be detained.

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<sup>97</sup> Educational Tutelary Law, Article 41. See also MARQUES BORGES, B., "Child Participation in Juvenile Justice in Portugal...", cit., p. 26.

<sup>98</sup> Code of Criminal Procedure, Article 87(1)(3).

<sup>99</sup> Code of Criminal Procedure, Article 87(1)(2).

<sup>100</sup> Code of Criminal Procedure, Articles 87 (3) and 90(2).

<sup>101</sup> Law 33/2019, Article 90(2).

<sup>102</sup> Code of Criminal Procedure, Article 64(d).

<sup>103</sup> Code of Criminal Procedure, Article 364.

<sup>104</sup> General Rules on Prison Establishments, Decree-Law 51/2011, adopted on April 11. Articles 107 and 132.

<sup>105</sup> Code of Criminal Procedure, Articles 99 and 101. CASALEIRO, P. ET. AL, "Social Fieldwork Research (FRANET) Procedural safeguards for children who are suspects or accused persons in criminal proceedings", cit., p. 87.

<sup>106</sup> MARQUES BORGES, B., "Child Participation in Juvenile Justice in Portugal...", cit., p. 22 and 24.

<sup>107</sup> Code of Enforcement of Prison Sentences or Measures involving the deprivation of liberty), Law 115/2009, adopted on October 12., Article 20.



About the child's contact with family members during deprivation of liberty in pre-trial or post-trial detention, all defendants deprived of their liberty have the right to make one phone call right after the detention and up to 3 phone calls per day (with a total time limit of 15 minutes) and receive regular visits in person from family members<sup>108</sup>.

For instance, in the Leiria Prison for Juveniles, children can contact their families by telephone on the first day of admission to the prison and have the right to make three calls a day to their family members. The phone calls are prepaid. Furthermore, there is a big visiting room, where children can meet with their family members<sup>109</sup>.

Contrasting with this experience, one of the interviewed entities, replied a firm "no" when asked whether children have the possibility to maintain regular contact with their parents and relatives during detention or alternative means.

## Respecting the right to integrity and dignity<sup>110</sup>

Children must be protected from harm, including intimidation, reprisals and secondary victimisation. They must always be treated with care, sensitivity, fairness and respect, and with full respect for their physical and psychological integrity. Special protection and care must be provided for the children in special conditions vulnerability. If deprived of their liberty, they must be separated from adults. Children must not be subject to torture or inhuman and degrading treatment or punishment.

The child-friendly principle regarding the respect of the right to integrity and dignity has some manifestations in Directive (EU) 2016/800: we should include the Right to a medical examination (Article 8); but also topics such as the Audiovisual recording of questioning (Article 9); as well as the specific treatment in the case of deprivation of liberty (Article 12).

In Portugal, directly related to this principle, in 2022, the National Prevention Mechanism (NPM)<sup>111</sup> focused part of its activity on detention conditions and procedures in Commands, Police Stations, and other units of the Public Security Police, having prepared a thematic report<sup>112</sup>. In this study,

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<sup>108</sup> Code of Criminal Procedure, Article 370(2). CASALEIRO, P. ET. AL, "Social Fieldwork Research (FRANET) Procedural safeguards for children who are suspects or accused persons in criminal proceedings", cit., p. 31.

<sup>109</sup> PROVIDOR DE JUSTIÇA INSTITUIÇÃO NACIONAL DE DIREITOS HUMANOS, "Mecanismo Nacional de Prevenção Relatório à Assembleia da República – 2021", Lisbon, 2021, p. 24 and following. Available at: [https://www.provedor-jus.pt/documentos/MNP\\_2021\\_final.pdf](https://www.provedor-jus.pt/documentos/MNP_2021_final.pdf), last access 20.1.2024.

<sup>110</sup> Information provided by the Portuguese Ombudsperson's Office.

<sup>111</sup> In 2013, following the ratification by the Portuguese State of the Optional Protocol to the United Nations Convention against Torture and other Cruel, Degrading or Inhuman Treatment or Punishment (PFCAT), the Portuguese Ombudsperson was designated as National Preventive Mechanism.

<sup>112</sup> MECANISMO NACIONAL DE PREVENÇÃO, "Relatório Temático sobre a Polícia de Segurança Pública", 2022. Available at: <https://www.provedor-jus.pt/documentos/Relatório%20Temático%20sobre%20a%20PSP.pdf>, last access 20.1.2024.

material conditions, as well as detention procedures, were analyzed, including police officers' conduct at the time of the arrest.

The NPM found that among police officers there is no unequivocal and widespread awareness that they must communicate all evidence or allegations of ill-treatment of detainees to the Public Prosecutor's Office, even if these may seem unfounded.

Ill-treatment allegations perpetrated by police officers and the process of taking detainees (including young offenders) to detention spaces are also investigated by the Ombudsperson, namely in reaction to complaints received<sup>113</sup>.

Following the presentation, in 2018, of an Alternative Report to Portugal's 5th and 6th Periodic Reports to the Convention on the Rights of the Child, which accepted 40 suggestions from the Ombudsperson, the need for training of all professionals involved was highlighted<sup>114</sup>.

Regarding detention conditions, the Code on Enforcement of Prison Sentences or Measures involving deprivation of liberty establishes that prisons shall be made up of one or more units, differentiated according to the following factors: penal situation, sex, age, physical and mental health, and other factors that tend to require specialized or individualized prison treatment for inmates; security requirements; available programs; sentencing regimes. Nevertheless, Portuguese law establishes that there should be prisons or units specially dedicated to the execution of sentences and custodial measures applied to pretrial detainees; inmates serving a prison sentence for the first time; young people up to 21 years old or, whenever it proves beneficial for their prison treatment, up to 25 years old; women; and inmates in need of special protection<sup>115</sup>.

Children in Portugal are separated from adults in police custody but not in detention: in police stations, both adult and child defendants are detained in a single room/cell.

The situation is different for pre-trial detention or a prison sentence. In regular prisons, cells are used for groups of inmates and separation between children and adults is not guaranteed.

For example, in the School Prison of Leiria, children are held separately in individual detention cells in seven pavilions. They are split according to age, and depending on whether they are serving a sentence or detained before trial<sup>116</sup>.

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<sup>113</sup> Information provided by the Portuguese Ombudsperson's Office.

<sup>114</sup> See the annual report of the Portuguese Ombudsperson 2019. PROVIDOR DE JUSTIÇA INSTITUIÇÃO NACIONAL DE DIREITOS HUMANOS, "Mecanismo Nacional de Prevenção Relatório à Assembleia da República – 2019", cit., p. 162. See also CASALEIRO, P. ET. AL, "Social Fieldwork Research (FRANET) Procedural safeguards for children who are suspects or accused persons in criminal proceedings", cit., p. 116.

<sup>115</sup> Code of Enforcement of Prison Sentences or Measures involving the deprivation of liberty), Article 9.

<sup>116</sup> See the annual report of the National Prevention Mechanism, 2021. PROVIDOR DE JUSTIÇA INSTITUIÇÃO NACIONAL DE DIREITOS HUMANOS, "Mecanismo Nacional de Prevenção Relatório à Assembleia da República – 2021", cit. p. 24 and following.

## CONCLUSIONS

1. 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. 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 to the holders of parental responsibilities, their legal representative, or the person who has their de facto custody.
2. 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.

Therefore, it is concluded that the 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.

3. 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 minors (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.

4. As for the speedy justice principle, 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.
5. 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. 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.
6. 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.
7. 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 Penal 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.
8. 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*<sup>117</sup>. The mandatory right

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<sup>117</sup> 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.

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.

9. 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 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 summoned<sup>118</sup>. 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 have 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.

10. 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.
11. 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: in police stations, both adult and child defendants are detained in a single room/cell.

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<sup>118</sup> MARQUES BORGES, B., "Child Participation in Juvenile Justice in Portugal...", cit., p. 22.

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