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III.4. ACCESSIBLE AND SUSTAINABLE CRIMINAL JUSTICE: THE RIGHT OF AN INCAPACITED ACCUSED PERSON TO BE PRESENT AT A COURT HEARING

Empowering an accused person with mental disabilities in the criminal trial – towards a more sustainable criminal procedure

Protecting and empowering people with disabilities means ensuring their full enjoyment of civil and political rights, as well as economic, social and cultural rights. Empowering people with disabilities means enabling them to reach their full potential as equal and active members of society. However, all over the world, people with disabilities face a range of challenges every day, including an inability to access justice. The right of persons with disabilities to access justice and its implementation should be seen as an important factor in the sustainable development of society. As stated in Resolution of the United Nations General Assembly 70/1 of September 25, 2015, "Transforming Our World: The 2030 Agenda for Sustainable Development," for sustainable development it is necessary promote and enforce non-discriminatory laws and policies (Resolution 70/1 2015, 16b). One of the goals of UN sustainable development is to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels (Resolution 70/1 2015, 16). This directly determines the need to improve access to justice for one of the most vulnerable groups in society – persons with disabilities. It is accepted that access to justice is not only integral to achieving the Sustainable Development Goals (SDGs) and inclusive growth, but is also crucial to implementing many of the other SDGs (Leveraging the SDGs for Inclusive Growth 2016, pp. 2–3). Thus, access to criminal justice is also one of the most important factors in building a sustainable society. Criminal justice and its accessibility are particularly important for people with mental disabilities who are suspected/accused of a criminal offence. They have a reasonable expectation that they will be able to understand the essence of the allegations against them and participate effectively in the criminal proceedings. However, criminal

justice is often made difficult for people with mental disabilities when they are denied the right to participate in the process and/or when they are unable to participate.

The very concept of "persons with disabilities," according to the United Nations Convention on the Rights of Persons with Disabilities (hereinafter – the CRPD) of 13 December 2006, is defined broadly: "those who have long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others" (Article 1) (CRPD 2006). Under the Convention, persons with disabilities are not social or treatment "objects," but subjects with rights, capable of exercising those rights and making decisions freely. Persons with disabilities are also entitled, on an equal basis with others, to enjoy and exercise all the rights guaranteed by the European Convention on Human Rights (hereinafter – ECHR, Convention) (ECHR 1950), the European Social Charter (European Social Charter 1961) and in other international and European Union (hereinafter – EU) human rights standards.

According to Article 13, the CPRD recognizes that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life (CRPD, 2006). Persons with disabilities have the right to participate in court proceedings as direct or indirect participants and witnesses. In this respect, the very right to apply to court encompasses much more: "(…) the concept of access to justice encompasses not only procedural access (i.e. effectively engaging in and using the established legal system), but also substantive access (i.e. equitable and beneficial judicial outcomes) and promotional access (i.e. promotion of citizens' belonging and empowerment)" (Beqiraj *et al.* 2017, p. 14).

With regard to criminal proceedings and the right to a fair trial of persons suspected/accused of having committed a criminal offence, it is noted that the CRPD moves from the question of whether a person is able to understand the process to the question of what support such persons need to receive in the process in order to be able to become an active participant in the proceedings. In this respect, the idea is to move away from "tailor-made" types of criminal proceedings and to ensure that the general criminal process is responsive to the needs of persons with disabilities and is accessible to them (Gooding and O'Mahony 2016, pp. 122–145). According to some scientists, "unfitness to stand trial laws seek to remove a person from the criminal justice system where there is a risk that the person will not receive a fair trial. The CRPD Committee have not condemned this objective explicitly, although its reiteration of the aims of Article 9 to make mainstream legal processes accessible rather than creating "special" alternative measures appears to imply as such. Principally, the Committee has expressed its concern with the consequential loss of liberty flowing from a determination of unfitness to stand trial" (Gooding and O'Mahony 2016, p. 138).

As a general rule, additional procedural safeguards are put in place in general criminal proceedings concerning an accused person with a mental disability. Such procedural safeguards may include the involvement of a defence counsel, legal representatives, family members or close relatives, special procedures for interviews and other procedural steps, etc. However, in some European countries, the "legal fate" of an alleged incapacitated person is shaped by introducing a specific type of criminal procedure, viz., a Coercive Medical Measures Procedure. For example, this specific type is provided for in the Code of Criminal Procedure of the Republic of Lithuania (hereinafter – CCP) and Bulgaria (Chapter 29 of the CCP, Chapter 34 of the Code of Criminal Procedure Code of the Republic

Bulgaria). However, independent of the procedures laid down in the law, the alleged incapacitated person must have an effective opportunity to be part of the proceedings.

Within the framework of international law, legal capacity is understood as encompassing two constitutional elements. The first element is legal standing, where a person is considered to be a subject of law capable of having rights and obligations. The second element is legal agency, where a person is considered to be the subject of a legal relationship, capable of exercising rights, duties, or of entering into and/or terminating legal transactions (Commissioner for Human Rights 2012, p. 22 cited McSherry 2012, p. 22). Unfitness to stand trial assumes that defendants with mental disabilities are not capable of participating meaningfully in court proceedings because of their special needs. The law on unfitness to stand trial relates to the period of the trial, not to the person's state of mind at the time of the offence (timing of the offence). On the contrary, the insanity defence relates to a person's state of mind at the time of commission of the offence and their capacity to be held criminally responsible. Both unfitness to stand trial and the insanity defence constitute a long-standing means of defence of defendants with mental disabilities (Gooding and O'Mahony 2016, p. 135).

There is a large body of research on non-discrimination against persons with disabilities, the grounds for their legal status, and the right to a judicial remedy (Gooding and O'Mahony 2016, McSherry 2012, Beqiraj *et al.* 2017, Verbeke *et al.* 2015, Arstein-Kerslake *et al.* 2017 etc.). Such research findings constituted the basis for the present study when analyzing the legal status of individuals with mental disabilities. However, such studies do not usually distinguish between the rights of persons who suffer from mental disorders but are fit to stand trial, those involved as defendants in ordinary criminal proceedings (seeking to determine their liability and punishment), and persons who cannot be punished (because they have committed criminal offence in a state of insanity, and because of their mental state they may be a danger to themselves or others).

It should be noted that compulsory committal to a psychiatric hospital is one of the most severe measures. The European Court of Human Rights (hereinafter – the ECtHR) has on a number of occasions insisted that individuals suffering from a mental illness constitute a particularly vulnerable group and therefore any interference with their rights must be subject to strict scrutiny, and only "very weighty reasons" can justify a restriction of their rights (see *Alajos Kiss v. Hungary* 2010, § 42, *D.R. v. Lithuania* 2018, §§ 87–88). The detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained (see *O.G. v. Latvia* 2014, § 81, *D.R. v. Lithuania* 2018, §§ 87–88). Therefore, when deciding whether an accused person with a mental disorder should be admitted to hospital, it is also important to determine whether the person diagnosed with the mental disorder is socially dangerous, and whether the person's mental state poses a real threat to themselves and to others. When addressing such a serious matter, the procedural rights of the accused person must be safeguarded, taking into account the fact that, due to their mental health condition, they are only able to exercise such rights to a limited extent, or are completely unable to do so.

The aim of this study is to analyze the issue of the fitness to stand trial of alleged incapacitated persons on the basis of the law of non-discrimination and the principles of criminal procedure law. Scholars that study the rights of accused persons with mental disabilities and criminal proceedings maintain that the pre-trial stage is a crucial moment in the criminal procedure that often strongly

influences and may even determine the outcome of the entire judicial proceedings (Beqiraj *et al.* 2017, p. 29), but the present study focuses on the right to participate in court proceedings. This present paper also does not analyze the problems of incapacity as a substantive category of criminal law.

Referring to the methods of systematic analysis and case study analysis, the research aims to achieve the following objectives: 1) to analyze the impact of the concept of the legal status of a person with a mental disability on the status of an alleged incapacitated person; and 2) to examine the right of such a person to participate effectively in a court proceeding, either in-person or through a representative, in the adjudication of the question of whether or not they have committed a criminal offence being mentally disabled, and thus the issues relating to their compulsory medical treatment, including their involuntary hospitalization if that is the case.

The impact of the concept of the legal status of a person with a mental disability on the status of an incapacitated accused person

As already mentioned, the CRPD establishes that persons with disabilities should enjoy legal capacity on an equal basis with others. The CRPD focuses on persons with disabilities and does not approach disability from a "vulnerability" perspective, but rather a human rights-based approach (Council Conclusions on the Protection of Vulnerable Adults 2021, § 7).

The Committee on the Rights of Persons with Disabilities (hereinafter – the CmtRPD) has repeatedly pointed out, "(…) that under Article 12 (3) of the Convention, States parties have an obligation to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity." It also recalls that, under Article 13 (1), "States parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages" (CmtRPD No. 30/2015 2017, §B – 7.6). Ensuring that justice is accessible to all, as emphasized by the UN in the context of sustainable development, is inseparable from the pursuit of a peaceful and inclusive society (Resolution 70/1 2015, 16b). In addition, while States have some discretion in imposing the procedural conditions set out above, the rights of a person with a disability must be respected (CmtRPD No. 30/2015 2017, §B – 7.6). For instance, the CmtRPD concluded that a State violated the rights of a participant of proceedings according to Article 12 (3) and Article 13(1) of the Convention, i.e., failed to properly apply the relevant procedural conditions, when a person wanted to be heard at a hearing but could not attend the hearing because of their disability. The person, who suffered from a mental disability, informed the court of this and asked the court to represent them at first instance and at the appeal court. However, the request was not granted, and the necessary assistance was not provided (CmtRPD No. 30/2015 2017, §B – 7.6).

Articles 6 and 13 of the ECHR "(…) guarantee the right to a fair trial and to an effective remedy, as interpreted by the European Court of Human Rights (ECtHR) (…)" (Handbook on European law relating to access to justice 2016, p. 17). The term *right to a fair trial* under Article 6 of the

Convention is treated in the academic literature as a composite right "consisting of the following elements: the right to a trial, the principle of equality, and the adversarial principle, the right to remain silent, the right not to be compelled to incriminate oneself, the right to have access to one's own lawyer, the right to participate in the proceedings in a personal and effective manner, and the right to a reasonable judgement of the tribunal" (Štarienė 2006, p. 40). The composite content of this right means that "the disregard or improper exercise of any element of its content raises doubts as to whether a person's right to a fair trial is not being violated or impeded at all" (Jurka *et al.* 2009, p. 56). Relatively new ECtHR case law explains that Article 6 of the ECHR guarantees the suspect and the accused the right to participate effectively in the criminal proceedings from the earliest stages, i.e., from the first interviews at the police station. Different types of mental disability may mean that a person's right to participate effectively in proceedings, including court proceedings, may not be fully realized. Such a person's ability to "participate effectively" may be limited or even impossible. In criminal proceedings, people with mental disabilities can be affected by additional stress factors such as detention, interrogation, court appearances, etc. For example, people with emotional disorders (e.g., depression, post-traumatic stress disorder) and/or behavioral disorders (e.g., hyperactivity with attention deficit, severe drug or alcohol withdrawal) are at risk not only of failing to fully grasp the importance of the court proceedings or the implications of the proceedings, but also of failing to participate effectively in the proceedings. Appropriate measures must therefore be taken to enable the person with a mental disability to exercise their right to participate effectively in the proceedings, either directly or through representatives (Verbeke *et al.* 2015, p. 69).

The EU legal framework on the rights of persons with disabilities is based on the CRPD and its principles. The Charter of Fundamental Rights of the European Union (hereinafter – the Charter) maintains that "Everyone is equal before the law" (Article 20) and that "Any discrimination based on disability shall be prohibited" (Article 21) (Charter 2012). The prohibition of discrimination requires EU Member States to take positive action and measures to ensure that people with disabilities can effectively exercise their rights. Secondary EU legislation sets out specific rights for people with disabilities. The EU has adopted directives to strengthen the procedural rights of all suspects or accused persons, including specific safeguards for vulnerable suspects or accused persons. For instance, according to Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (hereinafter – Directive 2013/48/EU), Member States shall ensure that the particular needs of vulnerable suspects and vulnerable accused persons are taken into account in the application of this Directive (Directive 2013/48/EU, Article 13). Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (hereinafter – Directive 2012/13/EU) requires Member States to ensure that information shall be given orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons (Directive 2012/13/EU, Article 3(2)). The requirement to provide appropriate assistance for persons with hearing or speech impediments is established in Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (Article 2(3)).

Furthermore, the Court of Justice of the EU (hereinafter – the CJEU) has indicated that the concept of "criminal proceedings" is to be regarded as also covering proceedings which, although they do not lead to a "sentence" in the strict sense, nevertheless result in a measure involving the deprivation of liberty in respect of persons who have committed acts constituting a criminal offence. The CJEU concluded that Directives 2012/13 and 2013/48 cannot be interpreted as excluding from their scope judicial proceedings in which an order may be made for the compulsory committal to a psychiatric hospital of a person who has committed a criminal offence in a state of insanity. Any compulsory medical measure is based not only on therapeutic grounds, but also on safety grounds (Judgment of the Court (Third Chamber) of 19 September 2019, §§ 55–63). The CJEU also recognized that, on account of its penal purpose, the procedure falls within the scope of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (hereinafter – Directive 2016/343). "Article 3 of Directive 2016/343 requires Member States to ensure that suspects and accused persons are presumed innocent until proved guilty according to law. That obligation must be respected by the competent authorities in a procedure for committal to a psychiatric hospital, such as that at issue in the main proceedings. In accordance with Article 6 of that directive, the Public Prosecutor's Office bears the burden of proof for establishing that the criteria laid down by law for authorizing the committal of a person to a psychiatric hospital are met" (Judgment of the Court (Third Chamber) of 19 September 2019, § 72).

Finally, the Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings (Commission Recommendation 2013) encourages Member States to strengthen the procedural rights of all suspects or accused persons who are not able to understand and to participate effectively in criminal proceedings due to age, mental or physical condition or disabilities. This legal measure "objectifies the general understanding that specific attention should be given to vulnerable defendants in order to safeguard the fairness of the proceedings, because individuals who are not capable of fully understanding or fully participating in the proceedings are a special category of defendants and, therefore, require a higher degree of protection. This is a logical consequence of the equality of arms concept, which requires a fair balance between the parties in court proceedings" (Verbeke *et al.* 2015, p. 69).

Historical patterns: from the "status approach" to a sustainable, "people--centric" approach?

To begin with, the contents of "legal capacity" and "mental capacity" are different (McSherry 2012, pp. 22–27; Devi 2013, p. 794). The status of mental capacity is based on various cognitive research methods. In the most general sense, "mental capacity" means the ability to make decisions. For the purpose of assessing mental capacity, most jurisdictions currently use the so-called "functional approach." Functional assessment is carried out with a view to establishing the ability to make decisions when performing certain tasks. The "functional approach" is believed to have replaced the previously prevailing "status approach" model, according to which individuals were considered either globally capable or incapable based on clinical diagnoses (Gooding and O'Mahony 2016, p. 135).

As claimed by Booth Glen (2012, p. 115), in terms of the "functional approach" people are perceived as a "bundle of capacities." As a rule, functional mental capacity is assessed as a criterion for the so-called "understand and appreciate test" (Gooding and O'Mahony 2016, p. 135). "This test requires that a person can demonstrate 'independent' capacity to: (i) consider a range of options when deciding; (ii) consider the consequences of different options; and (iii) communicate a choice" (Gooding and O'Mahony 2016, p. 135). Although this model of functional mental capacity is highly controversial, it is still used in the jurisdictions of the cited authors, as well as in a number of other jurisdictions.

Added to the "status approach" and "functional approach" models is the "outcome approach" model and the newly emerging disability-neutral doctrines. "(…) the 'outcomes approach' grants or withholds legal capacity based on the 'reasonableness' of an individual's decision-making, rather than on a disability *per se*" (Beqiraj *et al.* 2017, p. 17). Disability-neutral doctrines are promoted in the field of criminal law, eliminating defences that justify the denial of criminal responsibility on the grounds of mental or intellectual disability. The subjective elements of the offence should be assessed on the basis of the disability-neutral doctrine, which takes into account the situation of the individual accused. Accordingly, the legal framework for both pre-trial and trial proceedings should be reviewed in order to address the participation of such an accused in criminal proceedings (Gooding and O'Mahony 2016, p. 137).

The "fitness to stand trial" concept is based on the right of each defendant to a fair trial. Different countries use different counterparts of the term *fitness to stand trial*. For instance, "competency to stand trial" is used in the United States of America, "fitness to plead" in Australia, England and India, and "capacity to defend" in Canada (Houidi and Paruk 2021). Obviously, it is difficult to ensure justice if a person does not (or seems not to) understand court procedures. The "fitness to stand" concept is, in addition, based on other important principles. For example, a person who is severally mentally ill should be provided the required medical assistance, rather than punished; where such persons are not able to participate at the court hearing, they must be represented (Rogers *et al.* 2008, p. 576). If a person is not able to understand the court process, and is nevertheless forced to endure it, that is an abuse of the law. Moreover, there is a risk of convicting an innocent person, as a person who is not aware of the nature of the proceedings cannot deny their guilt (Law Commission 2010, pp. 3–4). In a cultural context, the "fitness to stand trial" concept is based on the assumption that "(…) accused persons are treated fairly and have an opportunity to defend themselves, and that this fairness is compromised when the accused is not capable of standing trial" (Mossman *et al.* 2007, p. S29).

Thus, the authors of the present study hold the position that the issue of a person's fitness to stand trial should be addressed by referring to the functional model with some respective "adjustments." The content of "fitness to stand trial" itself is therefore further analyzed – in particular, by indicating how it is perceived in the jurisdiction of the civil law tradition of the authors of the work.

The ability to make a conscious choice of conduct, to foresee the results and consequences of a particular act, and to assess the most appropriate means of defence, is the basis of the fitness of the accused to stand trial. Any defendant has procedural rights conferred on them by the law on criminal procedure – they can exercise them independently, assume procedural obligations and

be held liable for exercising the rights improperly. An accused person can participate independently and effectively in the proceedings only if they correctly and accurately understand the substance of the charge, the content of their procedural rights, the significance of the procedural steps to be carried out, and the significance of the evidence gathered in the criminal case, and if they can, without the help of others, give explanations, draw up complaints and applications, select the documents necessary for their defence, etc. In some cases, a mental disability may limit the defendant's ability to perceive, comprehend, remember and retrieve the facts relevant to the case, and to participate in the proceedings independently and without the help of others, i.e., to use the full range of means and methods of defence. Therefore, the fitness of an accused person to stand trial may be limited in some cases due to mental disability, while in other cases it may be completely abolished and the person may be declared unfit to stand trial (Ažubalytė *et al.* 2011, pp. 314–317).

The content of the fitness to stand trial encompasses the criteria of intellect and will. Intelligence is the ability of a person to grasp the nature and significance of the offence and their procedural position. All legal norms, including those of criminal procedure, are of a normative, evaluative nature, so defendants must not only be aware of the social significance of legal events (circumstances), but at the same time must assign to them some personal meaning. In other words, a person must be aware of the normative evaluative nature of the legal events (circumstances) that are the subject matter of criminal proceedings (including the circumstances of the commission of a criminal offence) and of the legal norms that regulate the entire criminal proceedings. The criterion of will is defined as the ability to implement, independently, one's own legal rights and duties. This capacity can be affected by both perceptual impairments (a criterion of intelligence) and various types of psychopathological disorders of will. Memory should be specifically distinguished as another structural portion of this criterion. The latter refers to possible memory disorders, which may cause the defendant to forget the circumstances of the commission of the offence or the circumstances of the pre-trial investigation or trial (Ažubalytė *et al.* 2011, p. 316).

This reasoning of fitness to stand trial allows us to distinguish cases where a defendant with a mental disability has sufficient capacity to correctly understand the relevant facts of the case and to testify/not testify about them, but is not fully able to defend their own rights and legitimate interests on their own (limited fitness to stand trial). In this case, the criminal proceedings must be made accessible to the defendant by providing them with additional procedural safeguards, i.e., by empowering them to participate effectively in the criminal proceedings in-person. In other cases, where it is shown that a person's mental disability renders them incapable of understanding the substance of their own actions and decisions or of controlling their own actions during the course of the criminal proceedings, such a person should be recognized as unfit to stand trial. In such cases, the criminal process would be made accessible to the person with a mental disability through mandatory legal representation and other additional fair trial procedural safeguards.

The above justification of "fitness to stand trial" through the criteria of intellect and will has certain points of contact with the common law tradition.

The "fitness to plead test" in common law, otherwise referred to as the "Pritchard test," comes from the 1836 case of *R. v. Pritchard* in England. "The judge directed that in order to be fit to stand trial a defendant must be capable of performing the following six things: (1) understanding the charges; (2) deciding whether to plead guilty or not; (3) exercising his right to challenge jurors;

(4) instructing solicitors and counsel; (5) following the course of the proceedings; (6) giving evidence in his own defence" (Gooding and O'Mahony 2016, p. 125). The Pritchard test was further developed in the cases of *R v. Davies* and *R v. M (John)*, etc. (Arstein-Kerslake *et al.* 2017, p. 401). Over the years, the Pritchard test has attracted a lot of criticism from those who argue that the criteria it established did not meet proper legal scrutiny and that the threshold for unfitness to plead was set too high. With the problems of the Pritchard test in mind, and based on the concept of effective participation in a trial developed according to Article 6 of the ECHR, in 2016 the Law Commission proposed a new test of capacity for effective participation in a trial. This test considers the defendant's decision-making capacity – i.e., from a functional point of view, decision-making capacity is the ability to make decisions at a specific relevant point in time, rather than a person's overall decision-making capacity (Law Commission 2016).

In the US, competency to stand trial refers to the ability to participate only in the guilt determination stage of a trial. Furthermore, other "competences" are distinguished in the USA. Thus, the term *competency to proceed* is a broader term, encompassing both the competency to stand trial as well as the competency to participate in the sentencing proceeding. The decisional competency of the defendant is singled out, as it encompasses competency to plead guilty, competency to wave an attorney, competency to wave the right to remain silent, etc. (Reisner *et al.* 1999, p. 933).

A standard definition of *competency to stand trial* was provided in the case of *Dusky v. United States*. The Supreme Court pointed out that even if the defendant is oriented to the time and place and has some recollection of events, that does not constitute their competency to stand trial. The competency to stand trial encompasses both the ability of the defendant to consult with their lawyer and to possess a reasonable degree of rational understanding of the proceedings against them. Subsequently, some States specified further criteria. For example, the Florida Rules of Criminal Procedure state that a defendant is deemed competent to stand trial based on the following six criteria: (1) understands the charges against them and other allegations against them; (2) appreciates the extent and nature of the possible punishment; (3) understands the adversarial nature of the trial; (4) is able to consult with their attorney regarding matters before the court; (5) demonstrates adequate behavior in the courtroom; and (6) testifies in a manner relevant to the case (Zajančkauskienė 2010, p. 253 cited Reisner *et al.* 1999, p. 933). The first three criteria relate to the ability to perceive what is happening during the trial and to understand the trial itself. The other three criteria focus on the ability of the accused to "function," i.e., to participate effectively in the trial. These criteria have some points of contact with the fitness to stand trial criteria of intelligence and will as described earlier.

Although different legal traditions may interpret and assess the content of "fitness to stand trial" differently, it is nevertheless universally accepted. The overall concept is that it is not enough for a person with a mental disability to have the "capacity to understand the process," but the defendant must be able to participate effectively in the process. In such cases, the criminal justice process must therefore be made accessible, with sufficient empowerment for the individual to participate effectively in the process. In cases where a person is unfit to stand trial, suspending proceedings until a person's mental health improves sufficiently to enable them to stand trial, or resolving a criminal case by diverting the person out of the criminal justice system and providing them with the medical and other assistance that they need, are considered to be just decisions. The

continuation of proceedings in the context of "unfitness to stand trial" – i.e., forcing a person to do what they are incapable of doing or to endure a process that they do not understand the meaning of – is incompatible with a civilized legal system (Verbeke *et al.* 2015, pp. 67–75, 70–71). According to the authors, this approach does not contradict the paradigm of a sustainable society, which is focused on the people-centric approach (Leveraging the SDGs for Inclusive Growth 2016, p. 12).

The subsequent sections of this paper will explore the prerequisites for the effective and direct participation in court proceedings of accused persons with mental disabilities who have committed an offence prohibited by criminal law and who are alleged to be legally incapacitated.

The right of a defendant with a mental disability to be present in court and to give explanations (testimony): international and national case-law

General legal prerequisites for the right of an accused person with a mental disability to be present in court: towards inclusive and participatory criminal trials

A prerequisite for the development of a sustainable society, including persons involved in criminal proceedings, is responsive, inclusive, participatory and representative decision making at all levels (Resolution 70/1 2015, 16.7). It is recognized that in ensuring sustainable development, legal empowerment is one of the people-focused innovations in access to justice (Leveraging the SDGs for Inclusive Growth 2016, p. 12). In the context of criminal proceedings, this becomes an especially important legal and factual prerequisite for a fair trial. The well-established case law of the ECtHR states that "Article 6, read as a whole, guarantees the right of an accused to participate effectively in a criminal trial (*Murtazaliyeva v. Russia* [GC] 2018, § 91). In general, this includes, inter alia, not only his or her right to be present, but also to hear and follow the proceedings. Such rights are implicit in the very notion of an adversarial procedure and can also be derived from the guarantees contained in sub-paragraphs (c), (d) and (e) of paragraph 3 of Article 6" (*Colozza v. Italy* 1985, § 27; *Stanford v. the United Kingdom* 1994, § 26). Individuals suffering from a mental illness constitute a particularly vulnerable group and therefore any interference with their rights must be subject to strict scrutiny, and only "very weighty reasons" can justify a restriction of their rights (*Alajos Kiss v. Hungary* 2010, § 42; *Anatoliy Rudenko v. Ukraine* 2014, § 104). However, an issue concerning lack of effective participation in the proceedings may arise with regard to the failure of domestic authorities to accommodate the needs of vulnerable defendants, including defendants with intellectual impairments (*Hasáliková v. Slovakia* 2021, § 69).

As was noted earlier, defendants have the right to participate effectively in criminal proceedings from the earliest stage of police interrogation. However, the aim of this study is to analyze the legal prerequisites for the direct participation of an accused person with a mental disability in court. Therefore, the identification of the possible mental impairment of a person suspected of commit-

ting a criminal offence in a timely manner, in order to enable such a person to benefit from additional procedural guarantees, is outside the scope of this study.

In analyzing the prerequisites for an alleged incapacitated accused person's participation in a criminal proceeding, in which, *inter alia*, the question of their compulsory committal to a psychiatric hospital is at issue, several relatively different procedural situations can be identified. This is the case, firstly, when it comes to deciding whether such a person should be present at the hearing; secondly, when it comes to deciding whether an accused person with a mental disability should be able to participate effectively in court; and thirdly, when it comes to deciding on the legal significance of the accused's statements at the hearing.

The authors of the present study took the position that the right to be present in-person at a court hearing should be guaranteed to an accused person with a mental disability in the context of criminal proceedings (or, rather, it should be a matter of deciding whether they are able to take part in such proceedings): (1) in the case of deprivation of liberty for the purpose of conducting a psychiatric assessment and, subsequently, in the case of appeals against a decision to commit a person to an expert/treatment institution; and (2) when examining the case on its merits, viz., in proceedings concerning the commission of an criminal offence, the accused person's incapacity and the imposition of coercive medical measures (in particular, compulsory committal to a psychiatric hospital), as well as examining the appeals in the instance proceedings. Thus, when examining a person's right to participate in such hearings, Articles 5 and 6 of the ECHR, and the ECtHR jurisprudence developed on the basis of them, become particularly relevant. Although the procedural guarantees set forth in the relevant Articles are similar, the content of the right of a person to be present at the trial of a criminal charge (treated by the ECtHR as part of the guarantee provided for in Article 6(1) of the Convention) and of the right of a person to be brought before a judge (Article 5(4) of the Convention) are not the same. The ECtHR has previously accepted that deprivation of liberty for the purpose of conducting a psychiatric assessment ordered by a court fell under the provisions of Article 5 (*Trutko v. Russia* 2016, § 33). However, as the ECtHR noted in the *Winterwerp v. the Netherlands* case, "the judicial proceedings referred to in Article 5(4) (art. 5-4) need not, it is true, always be attended by the same guarantees as those required under Article 6(1) (Art. 6-1) for civil or criminal litigation (*De Wilde, Ooms and Versyp ("VAGRANCY") v. Belgium* 1971, § 78). Nonetheless, it is essential that the person concerned should have access to a court and the opportunity to be heard either in-person or, where necessary, through some form of representation, failing which he will not have been afforded "the fundamental guarantees of procedure applied in matters of deprivation of liberty" (*De Wilde, Ooms and Versyp ("VAGRANCY") v. Belgium* 1971, § 76; *Winterwerp v. the Netherlands* 1979, § 60).

A second important premise of the research is that modifications (peculiarities) in the exercise of the right to be present at a hearing due to an accused person's mental state (in particular illness) can be, and are, justified. In relation to the participation of defendants with mental disabilities in criminal proceedings, it is not even discussed that "all substantive and procedural safeguards recognized in international law, whether in criminal, civil or administrative procedures, including the presumption of innocence and the right to remain silent, are afforded to all persons with disabilities, on an equal basis with others. Procedural accommodations, when needed, must be available to all persons with disabilities, including suspects and accused persons, who require assistance to participate

effectively in investigations and judicial proceedings" (International Principles and Guidelines on Access to Justice for Persons with Disabilities 2020, p. 19). States shall: (a) ensure that all suspects and accused persons with disabilities are presumed innocent until proven guilty under the law; and (b) ensure that suspects or accused persons with disabilities are provided with accessible and understandable information about their rights, including the right not to incriminate oneself (International Principles and Guidelines on Access to Justice for Persons with Disabilities 2020, p. 19).

However, when a person is involved in criminal proceedings to decide whether they have committed a criminal offence while incapacitated and whether they need to be forcefully hospitalized, it is necessary to take into account the legal consequences of the accused person's participation and testifying in courts. In such a case, without additional (special) procedural safeguards, and without special rules for the evaluation of the accused's explanations, the participation of an accused person with a mental disability may not guarantee their right to a fair trial, but may rather negate it. The ECtHR has noted that "mental illness may entail restricting or modifying the manner of exercise of such a right (see, as regards Article 6 para. 1 (Art. 6-1), *Golder v. the United Kingdom* 1975, § 39), but it cannot justify impairing the very essence of the right. Indeed, special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves" (*Winterwerp v. the Netherlands* 1979, § 60). The Supreme Court of Lithuania also takes the same view: the court's observance of the special rules governing the process of prescribing forced medical measures to a mentally incapacitated person who has committed a criminal offence does not violate the principle of equal treatment – on the contrary, it provides them with additional procedural safeguards (Decision of the Supreme Court of Lithuania of 3 February 2021 in Criminal Case No 2K-5-976/2021). Established mental health disorders and their nature and degree determine not only the recognition of an accused person's insanity and the selection of a specific compulsory medical measure, but also the manner in which the procedural rights of the accused person are exercised in the criminal proceedings (Decision of the Supreme Court of Lithuania of 7 January 2020 in Criminal Case No. 2K-55-222/2020).

In cases regarding the deprivation of freedom by imposing the compulsory hospitalization of mentally disturbed individuals (Article 5(1)(e) of the Convention), the ECtHR has indicated that the lawfulness of deprivation of liberty under this provision presupposes a fair and proper procedural order; in this context, national proceedings must afford the individual sufficient protection against potentially arbitrary deprivation of liberty (*D.R. v. Lithuania* 2018, §§ 87–88). In the *Winterwerp v. the Netherlands* case, the ECtHR concluded that failing to provide to a person concerned access to a court and the opportunity to be heard either in-person or, where necessary, through some form of representation, would constitute a violation of Article 5 of the Convention. In the case concerned, it was established that "the applicant was never associated, either personally or through a representative, in the proceedings leading to the various detention orders made against him: he was never notified of the proceedings or of their outcome; neither was he heard by the courts or given the opportunity to argue his case. In this fundamental respect, the guarantees demanded by Article 5 para. 4 (Art. 5-4) of the Convention were lacking both in law and in practice" (*Winterwerp v. the Netherlands* 1979, § 61).

The case law of the ECtHR regarding Article 6 of the Convention indicates that "there can be no justification for interpreting the guarantees of the Convention restrictively," and that in cases

related to mentally ill defendants their very weakness (vulnerability) should enhance the need for supporting their rights. The domestic authorities must show requisite diligence in ensuring their effective participation in the proceedings and must act particularly carefully when limiting that right (*Hodžić v. Croatia* 2019, § 57).

All of the guarantees referred to above not only determine meaningful participation in court, but also have an impact on the final judgement. As has been rightly pointed out in literature sources, to establish whether the effects of mental disorders could genuinely obstruct the fairness of the proceedings in the light of the ECtHR case law, however, it is first necessary to explore the legal boundaries of the concept of effective participation (Verbeke *et al.* 2015, p. 69).

It should be noted that effective participation normally presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for them, including the significance of any penalty which may be imposed. This means that they should be able – if necessary, with the assistance of, for example, an interpreter, lawyer, social worker or friend – to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to their own lawyers their version of events, point out any statements with which they disagree and make their representative(s) aware of any facts which should be put forward in their defence (*S.C. v. The United Kingdom* 2004, § 29). The ECtHR, however, also stated that Article 6 of the ECHR does not require defendants to understand or to be capable of understanding every point of law or evidential detail (*S.C. v. The United Kingdom* 2004, § 29). The authors of the present paper support the position that given the sophistication of modern legal systems, many adults of normal intelligence are unable to fully comprehend all the intricacies and exchanges that take place during proceedings. This is why the ECHR, in Article 6(3) (c), emphasizes the importance of the right to legal representation (Mowbray 2012, p. 426 cited Verbeke *et al.* p. 70).

Although the ECtHR case law is clear on the fact that this principle (effective participation) is to be followed during both the pre-trial and the trial phase, the court has not yet set clear-cut conditions as to when (and which) measures need to be instigated in order to assist defendants with mental disorders in participating in proceedings. There is some logic to this, in the light of the many ways in which psychiatric disorders may externalize and impact an individual's cognitive abilities. As a result, assessments on a case-by-case basis will have to be made in order to determine whether or not defendants will need to be granted measures, other than the mere assistance of a legal representative, to be able to participate effectively in the proceedings (Verbeke *et al.* 2015).

Thus, according to the established case-law of the ECtHR, in proceedings relating to the compulsory hospitalization of a mentally ill person, the accused person must, as a general rule, be given the opportunity to be heard, either in-person or, where necessary, through some form of representation. This guarantee is, in fact, necessary not only as an intrinsically important procedural element of a person's right to a trial. An accused person's immediate participation in judicial proceedings is also important to ensure a substantively fair judgement. Both the procedural and the material aspects of the realization of the right have been acknowledged by the case law of the ECtHR: "the proceedings in question concerned the assessment of the applicant's mental condition, and thus he (she) is not only an interested party, but also the main object of the court's examination. His (her) participation was therefore necessary not only to enable him (her) to present his (her) own case,

but also to allow the judge to form a personal opinion about his (her) mental capacity" (*Shtukaturov v. Russia* 2008, § 72; *Mifobova v. Russia* 2015, § 57; *A.N. v. Lithuania* 2016, § 96; *D.R. v. Lithuania* 2018, §§ 90–91; Recommendation Rec(2004)10 of the Committee of Ministers to member States concerning the protection of the human rights and dignity of persons with mental disorders). Should such measures be found insufficient, other measures to compensate for the inability to participate effectively in the proceedings may also be considered.

In view of the scope of the present paper, the following analysis will be limited to what the authors consider to be the most important aspects of the right of an alleged incapacitated accused to participate effectively in a criminal trial: the right to participate in-person, the right to participate through a representative, and the right to make a statement in court.

The right of a mentally impaired person to participate in the court hearing personally as the background for legal empowerment

Both international and national case law maintain that where proceedings involve an assessment of the personality and character of the accused and their state of mind at the time of the offence, and where their outcome could be of major detriment to the accused (for instance, the court may recognize that the person has committed a criminal offence and impose compulsory medical measures), it is essential to the fairness of the proceedings that the accused be present at the hearing and afforded the opportunity to participate in it (during trial and during the hearing of the appeals) together with their counsel (*Pobornikoff v. Austria* 2000, § 31; *Zana v. Turkey* 1997, §§ 71–73; *Kremzow v. Austria* 1993, § 67; *Vasenin v. Russia* 2016, § 135). In such cases, taking into account the importance of the case for the individual, the courts cannot, in the interests of the fairness of criminal procedure, decide the case without direct observation of the accused individual's behaviour or direct assessment of their testimony (unless this would be objectively impossible owing to the individual's state of health, as will be discussed later). According to the ECtHR, the mere fact that an accused person suffers from a mental illness or has been declared legally incapacitated cannot automatically lead to the exclusion of the exercise of the right of being heard. In this context, the authorities must show requisite diligence in ensuring the accused's right to be present in an effective manner and must act particularly carefully when infringing upon that right, so as not to place the mentally ill at a disadvantage compared to other defendants who do enjoy such a right (*Valeriy Lopata v. Russia* 2012, § 125; *Vasenin v. Russia* 2016, § 139).

It should be noted that the presence of defence counsel and the applicant's legal guardian cannot compensate for the applicant's inability to state their own case by appearing before the court (*Valeriy Lopata v. Russia* 2012, § 128; *Mamedova v. Russia* 2006; *Duda v. Poland* 2006; *Vasenin v. Russia* 2016, § 140). Thus, Article 399 § 2 of the CCP of Lithuania provides that in proceedings concerning compulsory medical treatment the judge examining the case has the right to request the presence of the person concerned if, according to the conclusion of a psychiatric expert, this is not precluded by their mental disorder. According to the established case law, courts should take advantage of this opportunity despite the fact that the person concerned is represented by a lawyer (Decision of the Supreme Court of Lithuania of 7 January 2020 in Criminal Case No. 2K-55-222/2020).

In this context, circumstances where such an accused person had submitted to the court requests to participate in the hearing, or other rational arguments on the merits of the case or on the procedure, but the court did not respond adequately to these requests, can be seen as a violation of the rights of the person in question. For example, the unjustified denial of access to the hearings of the courts to a person who had been subjected to a compulsory medical measure in a specialized mental health institution, ignoring the relevant requests of the person concerned, was one of the grounds for finding a violation of Article 5 § 1 of the Convention in the *D.R. v. Lithuania* (2018, §§ 92–93) case. It was concluded that the decision was passed without ensuring guarantees for the accused against arbitrariness. Courts must make a proper assessment of the accused person's ability to participate usefully in the criminal proceedings against them: the court must assess the evidence and convincingly demonstrate that the accused person's behavior or mental condition precluded them stating their case in open court. A situation where the accused person's inability to participate in the proceedings in-person seems to have resulted not from the seriousness of their mental condition, but rather from the lack of a legal provision in domestic law which recognized their right to attend the court hearings even in a limited number of situations, is inadmissible (*Vasenin v. Russia* 2016, § 139).

In the context of the present case, it is also necessary to mention the possibility to hear the accused person remotely. In order to achieve the goals of sustainable development, new technologies are identified as a means to revolutionize legal services, thereby providing more opportunities to ensure access to justice (Leveraging the SDGs for Inclusive Growth 2016, p. 17). In the opinion of the authors of the present study (Ažubalytė 2022; Ažubalytė and Titko 2022; Zajančkauskienė and Jurka 2021), as well as of many other researchers in criminal proceedings, such a possibility by itself is recognized as not violating the principles of a fair process. However, in the case of a vulnerable person, including a suspect / accused person with a mental disability, this possibility is treated with caution (Byrom 2020). The case law of the ECtHR is being developed in a similar direction: "Similarly, as regards the use of a video link in the proceedings, the Court has held that this form of participation in proceedings is not, as such, incompatible with the notion of a fair and public hearing. However, recourse to this measure in any given case must serve a legitimate aim and the arrangements for the giving of evidence must be compatible with the requirements of respect for due process, as laid down in Article 6. In particular, it must be ensured that the applicant is able to follow the proceedings and to be heard without technical impediments, and that effective and confidential communication with a lawyer is provided for" (*Marcello Viola v. Italy*, §§ 63–67; *Asciutto v. Italy*, §§ 62–73; *Sakhnovskiy v. Russia* [GC], § 98). In the case of accused persons with mental disabilities, their participation in a remote hearing may not be effective, which is why the court needs to assess this alternative to participation in court with particular care.

Similar guarantees for such a person are set out in the context of the right to lodge a complaint against the deprivation of liberty and to participate in the proceedings. The Court reiterates that the existence of the remedy required by Article 5 § 4 of the Convention must be sufficiently certain, not only in theory but also in practice, failing which it will lack the accessibility and effectiveness required for the purposes of that provision (see *Hadi v. Croatia* 2010, § 41, with further references). In this regard, the Court has previously held that a patient compulsorily detained for psychiatric treatment must have the right to seek judicial review of their own motion (*Gorshkov v. Ukraine* 2005,

§ 44, *Rakevich v. Russia* 2003, §§ 43–44; *Raudevs v. Latvia* 2013, § 82; *O.G. v. Latvia* 2014, § 62). More generally, the Court has indicated that it would be inconceivable that Article 5 § 4 of the Convention should afford procedural guarantees to a party whose detention matter is pending before a court without also protecting that which in fact makes it possible to benefit from such guarantees – that is, the possibility to access the court by making an application to review the lawfulness of the detention (*Proshkin v. Russia* 2012, § 92; *O.G. v. Latvia* 2014, § 62). It is beyond doubt that situations can be envisaged where a detainee's mental state or other circumstances would render their personal involvement in detention proceedings impossible. However, the Court has been unwilling to accept the state of mind of a detained person, on its own, as an implied and blanket limitation on their right to institute judicial review proceedings for the purpose of Article 5 § 4 of the Convention, particularly when no assessment of their ability to be personally involved in the proceedings leading to their detention has been performed by the court (*Proshkin v. Russia* 2012, § 92; *O.G. v. Latvia* 2014, § 62).

Nor can an accused person be deprived of the opportunity to participate in criminal proceedings to present their own arguments and other procedural rights (in the context of Article 6 of the Convention) on the sole ground that the person suffers from a mental illness or has been declared incapacitated. These procedural rights can only be limited or deprived where the objective and exhaustive evidence in the case establishes that the accused person's state of mind prevents them from exercising the rights in-person for a significant period of time, which would make the person's participation meaningless.

Thus, in cases of compulsory medical measures, the participation of the person whose case is pending may be limited or eliminated altogether, but only if it is established, on the basis of the evidence, that such participation is not possible due to the accused person's mental health condition in one way or the other, and on the basis of the adequacy of the person's defence (representation) (*Vasenin v. Russia* 2016, § 135). In that case, it must be established that at the relevant time the accused person's mental condition was of such a degree that their personal participation in the proceedings would have been meaningless (*D.D. v. Lithuania* 2012, § 122; *D.R. v. Lithuania* 2018, § 91). In any case, valid reasons must be provided by the domestic court to justify the accused person's exclusion from the proceedings (*M. v. Ukraine* 2012, § 60; *Anatoliy Rudenko v. Ukraine* 2014, § 114; *D.R. v. Lithuania* 2018, § 92). The decision to exclude the accused person must be based on the evidence and arguments pertaining to the current case, rather than any other. The ECtHR has indicated that it would not have been appropriate for the judge to base the decision concerning the person's compulsory hospitalization on an opinion which they had formed in different proceedings (*D.R. v. Lithuania* 2018, § 92).

Scholars have reasonably indicated that determining whether or not a defendant with a mental disorder is able to participate effectively in the proceedings, and the additional procedural measures that need to be instigated, will depend on how the defendant's mental condition manifests itself during the criminal investigation and trial. The mere diagnosis of a mental disorder or disability does not imply that the person involved is unable to participate actively in the proceedings. Whether extra procedural protection measures are taken will therefore depend on the presence of thorough screening mechanisms to evaluate whether or not the mental state of the defendant warrants additional procedural aid. Although it is of crucial importance that these mental states are identified

as early as possible, screening mechanisms should be available throughout the proceedings (since it is possible that, over time, the mental condition of the defendant could evolve, for better or worse) (Verbeke *et al.* 2015, pp. 70–71).

It should be noted that the ECtHR has found violations of Article 6(1) and (3)(c) and Article 5(1) of the Convention in cases of a person with a mental disorder who may have committed a criminal offence not being allowed to participate (present their case) in a trial: without the court having properly assessed their capacity to participate usefully in the criminal proceedings; without reasoned findings as to the need to limit such participation; and without compelling evidence of their behaviour or mental state to support such findings (*Vasenin v. Russia* 2016, § 139; *D.R. v. Lithuania* 2018, §§ 91–95). Inter alia, the case law of the ECtHR shows that any recommendations from experts not to invite a defendant with a mental disability to a court hearing without having provided specific motives do not by themselves justify the person's removal from the process (see, *D.R. v. Lithuania*, §§ 93–95). As has been indicated by the ECtHR, with all respect to the professional expertise of the psychiatrists, the broad powers vested in healthcare professionals are to be counterbalanced by procedures aimed at preventing indiscriminate compulsory hospitalisation (*L.M. v. Latvia* 2011, § 51, *I.N. v. Ukraine* 2016, § 81, *D.R. v. Lithuania* 2018, § 96).

The Supreme Court of Lithuania also notes that, although forensic expert opinions on the person's (non-)attendance at the hearing or the type of compulsory medical measure to be recommended are of particular importance in cases of this kind, their mere existence does not relieve the court of its obligation to assess all the circumstances of the case – namely, the nature of the illness and its treatment, the seriousness of the criminal acts committed, the person's own state of health and the changes in that state of health, and their social dangerousness (Decision of the Supreme Court of Lithuania of 19 May 2021 in Criminal Case No. 2K-121-976/2021). Importantly, when deciding whether an accused person is fit to stand trial in-person, the court must be in possession of information about their condition that is as up-to-date as possible at the time of the trial. For example, the Supreme Court of Lithuania pointed out that the court, without taking into account the fact that almost a year had elapsed since the expert examination of a person's mental health condition, did not have and did not request any information about the person's state of mental health (its possible change) during the period of time in question, did not investigate whether the condition of the person's mental health condition was such as to prevent them from being able to give an explanation and to be heard before the court, and failed to consider at all the person's request for their participation in the case during the hearing of the appellate proceedings (Decision of the Supreme Court of Lithuania of 7 January 2020 in Criminal Case No. 2K-55-222/2020). Such case law of national courts is in line with the position of the ECtHR. Courts must, firstly, consider the reasoned requests of the defence for a new expert examination and, secondly, state the reasons why they are satisfied that the person's mental state is such that they are unfit to stand trial or that they need to be subjected to compulsory medical measures. The domestic courts in their decisions have to address the issue of the applicant's subsequent treatment at all stages and provide valid reasons for dismissing the request for a new psychiatric assessment. In a contrasting case, the ECtHR recognized that domestic courts in their decisions did not adequately demonstrate that at the time when the decision to hospitalize an applicant was adopted, their condition was such as to require compulsory treatment (*M. v. Ukraine* 2012, § 80, *D.R. v. Lithuania* 2018, § 93).

At the same time, attention should also be drawn to the fact that circular reasoning is not uncommon in such cases, according to which a person's reluctance to undergo psychiatric hospitalization demonstrates their inability to appreciate their condition and thereby yields yet another reason for compulsory hospitalization. Such circular reasoning is incompatible with the principle of the effective protection of Convention rights (*Plesó v. Hungary* 2012, § 67; *D.R. v. Lithuania* 2018, § 95).

In conclusion, the right of an accused person to be present in court cannot be restricted or denied on the sole ground that they are involved in proceedings of a criminal nature in which the question of their compulsory hospitalization is being discussed. In any case, that participation must be meaningful. An accused person with an expert-diagnosed mental disorder can only participate effectively in a court hearing involving criminal charges and compulsory treatment (including compulsory hospitalization) if they are able to grasp the substance of the charges and the nature of the proceedings and avail themselves of third-party assistance, including legal assistance. Therefore, a fundamental prerequisite for the exercise of these rights is the person's right to know what they are charged with.

The ECtHR has indicated that the right to be informed of the nature and the cause of an accusation must be considered in the light of the accused's right to prepare their defence (*Pélissier and Sassi v. France* [GC] 1999, § 54; *Dallos v. Hungary* 2001, § 47). Article 6 § 3 (a) points to the need for special attention to be paid to the notification of the "accusation" to the defendant. The particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on written notice of the factual and legal basis of the charges against them (*Pélissier and Sassi v. France* [GC] 1999, § 51; *Kamasinski v. Austria* 1989, § 79). In the case of an accused person with mental difficulties, the authorities are required to take additional steps to enable the person to be informed in detail of the nature and cause of the accusation against them (*Vaudelle v. France* 2001, § 65).

Within EU law, it is generally considered that the right to be informed must also be implemented in the case of a defendant with disabilities. However, the content of the right must be modified with regard to the health condition of the vulnerable defendant. Most importantly, the person to whom the information is intended must be able receive it and understand it (Resolution of the Council of 30 November 2009). In case C-467/1, the General Council emphasized that the term *vulnerable defendant* covers persons suffering from serious mental disorders who may have virtually no understanding of the information presented to them. That the prescribed information, which must be provided to the suspect or accused person regarding their rights, may be subject to certain modifications on account of the suspect or accused person's psychiatric state is another matter. Thus, it is the mental state of the suspected or accused person that may lead to adjustments in the information on their rights that must be provided. In the case of certain mental disorders, it would be redundant to give the person concerned a printed sheet setting out their rights because that person would not be capable of understanding them, and both that formality and the notification of the charges against the accused must be carried out vis-à-vis their defence counsel, because the right of access to a lawyer is absolutely irreplaceable (Opinion of Advocate General Campos Sánchez-Bordona. C 467/18, 2019, §§ 66–67).

The participation of a defendant with mental disabilities in a criminal court through a representative: sustainable support in the exercise of legal capacity

As was mentioned earlier, in research papers the essence of Article 12 of the CRPD is presented as a prohibition of the discriminatory denial of legal capacity, and at the same time the requirement that support be provided in the exercise of legal capacity where needed (Beqiraj *et al.* 2017, p. 17). This model is frequently referred to as "supported decision-making" (Jeste *et al.* 2018, pp. 28–40). It recognizes that a person with disabilities should remain the primary decision-maker, and simultaneously acknowledges that improving support from multiple sources can bolster the autonomy of persons with disabilities (Beqiraj *et al.* 2017, p. 17). The Committee on the Rights of Persons with Disabilities points out that support in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making. Article 12(3) does not specify the form that the support should take. *Support* is a broad term that encompasses both informal and formal support arrangements, of varying types and intensity (Committee on the Rights of Persons with Disabilities. General comment No. 1, 2014, § 17). Support can be provided in different degrees (e.g., translation services or peer advocacy) and from different people or institutions (e.g., a trusted friend or legal counsel). Support also includes: measures relating to universal design and accessibility (i.e., when public and private actors (e.g., banks) provide information in an understandable format or provide professional sign language interpretation); the recognition of diverse, nonconventional communication methods (e.g., nonverbal communication); and the possibility for persons with disabilities to engage in advance planning (i.e., stating their will and preferences in advance), which will be followed at a later date when they may not be in a position to communicate their intentions (Beqiraj *et al.* 2017, pp. 17–18; see Committee on the Rights of Persons with Disabilities. General comment No. 1 2014, § 17).

All of the above mechanisms are therefore relevant to the general right of persons with disabilities to a judicial remedy. Concerns have been raised in research papers as to the effect that the legal capacity of persons with disabilities is most often denied or restricted through guardianship arrangements, under which they may lose some or all of their civil rights (Legal Capacity in Europe 2013, p. 18, Beqiraj *et al.* 2017, p. 18). However, the authors of the present research hold the view that when dealing with the issue of compulsory hospitalization (or other coercive medical treatment) of a person in a criminal court, it is essential to ensure that the alleged incapacitated accused person receives adequate legal representation. This is one of the fundamental procedural rights of a person, and is particularly important in cases where a lawyer represents a person who lacks legal capacity. All other mechanisms for the participation of any representatives of such persons including an appropriate adult (the AA) – a relative, guardian or other person responsible for the defendant's care or custody (Verbeke *et al.* 2015, p. 72) – should be subsidiary (supplementary).

Thus, in cases of this kind, it is often the case that, on the basis of the experts' reports, the court has to decide that it is not possible, without additional measures, to ensure the provision of information to such a person, or to hear them in-person in court. In that case, when additional measures are needed, it is up to the member states, and not the defendant, to provide the necessary assistance (*G. v. France*, § 52). Researchers indicate that this mirrors the concept of reasonable

accommodation stemming from the UN Convention on the Rights of Persons with Disabilities (Verbeke *et al.* 2015, p. 70).

In this context, the ECtHR specifically notes the importance of proper information about the charges: in case the person concerned has a mental disorder, the national authorities should take additional steps so that the person can be properly informed about the nature and the cause of the charges against them, i.e., they could order the person to attend an appointment with a psychiatrist, or arrange for them to be represented by a supervisor or a lawyer (*Vaudelle v. France* 2001, § 65). In the context of the application of the EU directives on procedural safeguards for individuals, it should also be noted that where a person suffers from a mental illness which results in severe mental disability, it may be appropriate to make use of a third party acting on their behalf for the purposes of the transmission of information (Opinion of Advocate General Campos Sánchez-Bordona. Case C 467/18, 2019, § 69). The recommendations of the Commissions note that accused persons with disabilities should receive upon request information concerning their procedural rights in a format accessible to them. At the same time, it has been noted that vulnerable persons, and, if necessary, their legal representative or an appropriate adult, should be informed of their specific procedural rights (Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, §§ 8– 9).

In any event, national criminal procedural law must provide for solutions to supplement the procedural capacity of persons who cannot act in their own name. The algorithm of the CCP of the Republic of Lithuania is as follows: the presence of a defence counsel is mandatory if the accused has a physical or mental disability that prevents them from defending themselves (limited fitness to stand trial). In this case, the person is presumed to be competent and the criminal proceedings may result in a conviction. If the person's mental disability is such that they were incapacitated at the time of the offence, or if they have fallen ill during the trial and are completely incapable of understanding the proceedings (unfitness to stand trial), they must be appointed a lawyer without delay, and a close relative or family member may also be present. In this case, the process may result in the prescription of compulsory medical measures, including compulsory hospitalization. In criminal proceedings concerning the imposition of compulsory medical measures, the legal representative, family members or close relatives of a person with a mental disability have the right to participate in the proceedings and to exercise a wide range of procedural rights (to contest the act committed by the person, the person's state of health, the medical measures under consideration, to lodge an appeal and cassation appeal, etc.) (Articles 399, 404 and 405 of the CCP of the Republic of Lithuania).

The consistent case law of the ECtHR claims that "the aims pursued by the right of access to a lawyer include the following: prevention of a miscarriage of justice and, above all, the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused; counterweight to the vulnerability of suspects in police custody; fundamental safeguard against coercion and ill-treatment of suspects by the police; ensuring respect for the right of an accused not to incriminate him/herself and to remain silent, which can – just as the right of access to a lawyer as such – be guaranteed only if he or she is properly notified of these rights. In this connection, immediate access to a lawyer able to provide information about procedural rights is likely to prevent unfairness arising from the lack of appropriate information on rights" (*Beuze*

v. Belgium [GC] 2018, §§ 125–130). When examining the proceedings as a whole, the fact that the applicant was particularly vulnerable, by reason of their mental capacity, should be taken into account (*Ibrahim and Others v. the United Kingdom* [GC] 2016, § 274; *Beuze v. Belgium* [GC] 2018, § 150; *Sitnevskiy and Chaykovskiy v. Ukraine* 2016, §§ 78–80). Regarding a person's right to waive the right to remain silent, research papers also maintain that early access to counsel most effectively assures that a mentally disabled person's waiver of constitutional rights is voluntary, knowing and intelligent (Praiss 1989, pp. 431–465).

It is also important to note that only a properly informed accused who has the procedural capacity to act can waive the right to a lawyer. This conclusion is drawn based on a general rule according to which any purported waiver of a right of access to a lawyer must satisfy the "knowing and intelligent waiver" standard in ECtHR case law (*Ibrahim and Others v. the United Kingdom* [GC] 2016, § 272; *Pishchalnikov v. Russia* 2009, § 77). In the EU law context, it is also acknowledged that the person's mental state is the basis for strengthening the right of access to a lawyer in the case of a serious offence because, for example, the suspect or accused person will not be capable of lawfully waiving the right to have a lawyer present (Article 9 of Directive 2013/48) (Opinion of Advocate General Campos Sánchez-Bordona. Case C 467/18, 2019, § 81). Thus, an accused person whose procedural capacity is limited by reason of a mental disability, or who is incapacitated altogether because of the severity of the disability, is presumably not in a position to refuse to be represented by an appointed defence lawyer, nor are they in a position to give their lawyer binding instructions.

In Lithuania, the court is not obliged to accept a waiver of a defence lawyer from an accused person who, due to mental disability, is unable to exercise their right to defence (Article 52(2) of the CCP); the defence lawyer has the right to carry out certain actions (e.g., to lodge an appeal and cassation appeal) in spite of the will of the defendant, subject to compulsory medical measures (Article 312(6) of the CCP; Article 367(2) of the CCP). Such a decision is usually based on a mandatory medical expert's opinion that the accused person does not understand the proceedings and their legal significance, and is unable to participate effectively, as well as on other material in the case.

In the case law of the US, it is emphasized that when a defendant seeks to waive the right to a lawyer, a determination that they are competent to stand trial is not enough. The waiver must be intelligent and voluntary. In addition, a defendant should understand the potential dangers and disadvantages of self-representation (*Indiana v. Edwards* 2008, *Holland v. Florida* 2014). Thus, a judge would determine whether the symptoms of mental disability rose to a level that warranted a finding of incompetence to proceed per se. Furthermore, mental health professionals must be aware of the competencies that are required when conducting various types of forensic evaluations. They must also understand, and effectively convey to the court, how specific symptoms of mental illness might affect each particular type of competency (Rohlehr and Pinals 2015, p. 387).

As stated in the context of sustainability, many countries are shifting strategies toward access to legal services and justice as a continuum of services, including access to understandable legal information and to legal representation (Leveraging the SDGs for Inclusive Growth 2016, p. 15). On the other hand, it is recognized that due to financial, organizational and other reasons, many countries struggle to maintain an affordable and sustainable legal aid system (Barendrecht and Van den Biggelaar 2009). In the analyzed case, despite the objective difficulties it is the State that has to fulfil its positive obligation to provide a timely and effective remedy. Inter alia, the State is under

an obligation to provide legal aid "where the interests of justice so require" (*Quaranta v. Switzerland* 1991, § 27).

The ECtHR's case law also states that the legal representation (legal defence) of a person suffering from a mental illness must not be of doubtful effectiveness, and the legal services must be of high quality. While the effectiveness of the legal assistance does not necessarily call for a proactive approach on behalf of a lawyer and the quality of legal services cannot be measured by the number of applications or objections lodged by counsel with a court, manifestly passive conduct might at least give rise to serious doubts about the efficiency of the defence. This is particularly so if the accused strongly disputes the accusation and challenges evidence or is unable to attend the trial and ensure their defence in-person (*Vasenin v. Russia* 2016, § 142). Passive defence occurs, for instance, when a lawyer and legal guardian: appear to have mirrored the position of the prosecution; do not request the consideration of the essential arguments or requests of the defendant (regarding participation in the process, alibi, etc.); do not challenge the admissibility of evidence; fail to lodge an appeal, etc. When passive defence has sufficient shortcomings, it may be (and often is) recognised as inefficient, i.e., not compliant with the requirements of Article 6 (1) and (3) (c) of the Convention (*Vasenin v. Russia* 2016, §§ 144–145). The ECtHR judgments also emphasize that the appointment of a defence lawyer does not in itself mean that a mentally ill person has been provided with the necessary legal assistance; the effectiveness of the legal representation of such persons requires enhanced scrutiny by the examining court (*Vasenin v. Russia* 2016, §§ 142–147). National courts have similar views on the legal aid provided by defence counsel (Decision of the Supreme Court of Lithuania of 5 June 2014 in Civil Case No. 3K-3-302/2014; Decision of the Supreme Court of Lithuania of 7 January 2020 in Criminal Case No. 2K-55-222/2020).

The right of the alleged incapacitated person to provide explanations and their assessment

Even if the right of an alleged incapacitated person to be present in court is fully exercised, the question arises as to the legal significance of their explanations or statements. When answering this question, it is important to take into account that some individuals with metal disorders are likely to have difficulties in understanding and veraciously responding to questions, since they may have difficulties in recalling and processing information. They are also more likely to make damaging assertions, including false confessions, since they may be acquiescent and suggestible and, under pressure, may try to appease other people or may incriminate themselves (Nemitz and Bean 2001, pp. 595–605 cited Verbeke *et al.* 2015, p. 69). This is particularly important because the right to a fair trial in criminal cases includes the right for anyone charged with a criminal offence to remain silent and not to contribute to incriminating themselves (Verbeke *et al.* 2015, p. 69).

The presence of an accused person with a mental disability in court has certain specificities, which is why their explanations usually have a different legal significance than the accused's testimony given in court. It should be stressed that, in accordance with the principle of non-self-incrimination, no person may be compelled to testify against themselves in criminal proceedings. However, the right to be heard in court is, of course, the right of every person subject to criminal proceedings.

The recommendations of the European Council regarding persons with mental disorders note that the court should take into account the opinion of the person concerned and act in accordance with procedures provided by law based on the principle that the person concerned should be seen and consulted (Recommendation Rec(2004)10, Article 20). As has been mentioned, the ECtHR has noted that the participation of a person of unsound mind is therefore necessary, not only to enable them to present their own case, but also to allow the judge to have at least brief visual contact with them, and preferably question them in order to form a personal opinion about their mental capacity (*Shtukaturov v. Russia* 2008, § 72). In cases where the potential finding of the applicant being of unsound mind is, by its very nature, largely based on their personality, their statements would have been an important part of the presentation of their case (*D.D. v. Lithuania* 2012, § 120; *A.N. v. Lithuania* 2016, § 96; The Recommendation No. R (99) 4 (1999), Principle 13).

In Lithuania, criminal procedure law does not require a person with a mental disorder to be heard (give testimony) in court. It should be noted that the Supreme Court of Lithuania, referring to the jurisprudence of the ECtHR, has formed the practice that such a regulation does not release the court from the obligation to take all measures, including listening to the person themselves, when deciding on their possibility of participating in the court. The Supreme Court of Lithuania has noted that "although Article 400(2) of the Code of Criminal Procedure does not require a person with a mental disorder to be interviewed, and, given his/her perceptual deficiencies, the testimony of such a person is not a source of evidence, but his/her explanations, if possible, may help the court to evaluate the other evidence in the case and to clarify more fully the facts of the case" (Decision of the Supreme Court of Lithuania of 7 January 2020 in Criminal Case No. 2K-55-222/2020). Thus, the requirement to protect the rights of the individual during criminal proceedings (Article 44 of the CCP) implies the necessity of carefully checking whether, at the time of the proceedings in question, the type and degree of a person's mental disorder preclude their participation, access to the case file, the possibility of submitting explanations and other information, as the mere fact that a person suffers from a mental disorder does not, in itself, exclude the possibility of them exercising the rights of procedure, including the right to be heard. Such an examination and decision, which excludes a person from taking part in one or another procedural step, or, more generally, from taking part in the criminal proceedings in-person, must be based on objective and convincing data on the accused person's actual state of mental health, which may change over time, depending, for example, on medical treatment. Thus, an actual mental disorder that allows or prevents an individual from participating in the process at a specific time relevant for the case (e.g., submitting explanations in the court hearing), is one of the circumstances that need to be proved (Article 395(2) and (3) of the CCP). Therefore, this circumstance describing the person must be established by referring to the data of the case, in compliance with the rules on providing evidence set forth by the CCP (Decision of the Supreme Court of Lithuania of 7 January 2020 in Criminal Case No. 2K-55-222/2020; Decision of the Supreme Court of Lithuania of 3 February 2021 in Criminal Case No. 2K-5-976/2021). When ordering a forensic psychiatric examination of a suspect or accused, Lithuanian courts ask the following questions of psychiatric experts: Is the defendant able to stand before the court? Is the accused, due to their mental condition, capable of understanding the circumstances relevant to the proceedings and giving evidence? (Examples of questions to judicial psychiatry expert examination).

The authors of this research conclude that such a defendant's explanations in relation to their criminal offence should be assessed very carefully, considering the vulnerable accused person's capacity to understand and exercise their right not to testify against themselves. Meanwhile, the person's explanations about their state of health, attitude towards the treatment, etc., together with the other evidence in the case, including expert reports, should help the court to decide on the choice of the appropriate medical measure, if any.

Conclusions

International and EU legal standards for persons with disabilities, including defendants with mental disabilities and alleged incapacitated defendants, are based on the principles of equality and non-discrimination. The right of persons with disabilities to access justice and its implementation should be also seen as an important factor in the sustainable development of society. Effective implementation of such standards ensures access to justice, i.e., by enabling accused persons with mental disabilities to participate directly or through representatives in criminal proceedings.

Historically, certain models have been defined in relation to the assessment of a defendant's mental capacity: next to the "functional approach" model that replaced the „status approach," there are some newly emerging models in the "outcomes approach" and "disability-neutral doctrines." The present research assumes that, due to the specificity of criminal proceedings, it is the functional approach model, with appropriate adjustments, that should be applied to the issue of the content of the fitness to stand trial of a defendant with a mental disability and of the fitness to stand trial of a person who has committed a criminal offence in a state of insanity.

The content of fitness to stand trial for both a mentally disabled defendant and a person who may have committed a criminal offence in a state of insanity includes the criteria of intellect and will. The criterion of intellect determines the person's ability to grasp the nature and significance of the offence and of their procedural position; the criterion of will determines the person's ability to independently exercise their procedural rights and obligations. This justification of the content of a person's fitness to stand trial makes it possible to distinguish: 1) limited fitness to stand trial; and 2) unfitness to stand trial.

Although different legal traditions may interpret and assess the content of "fitness to stand trial" differently, it should nevertheless be considered universally accepted. The overall concept is that it is not enough for a person with a mental disability to have the "capacity to understand the process," but the defendant must also be able to participate effectively in the process.

The accused person with a mental disability must be given the opportunity to be heard, either in-person or, where necessary, through some form of representation. This guarantee is not only an important procedural element of an accused person's right to a court, but also makes it possible to ensure that the judgment is substantively fair.

A defendant cannot be deprived of the right to participate in criminal proceedings, to present their own arguments and other procedural rights on the grounds that the defendant has been declared mentally incapacitated or is suffering from a mental illness at the time of trial. These procedural rights can only be limited or deprived where the data of the case establishes that the person's

state of mind prevents them from exercising their rights in-person for a significant period of time, which would make the person's participation meaningless. Courts must give reasons for their decision to restrict an accused person's right to participate in court, and they cannot rely solely on the opinions of medical experts.

When dealing with the issue of compulsory committal to a psychiatric hospital (or other compulsory medical measures) for an accused person with a mental disability in a criminal court, it is essential, first and foremost, to ensure that the individual is provided with timely and adequate legal assistance. All other mechanisms for the participation of any representatives of such persons, including an appropriate adult, should be subsidiary (supplementary). In that case, the state has a positive obligation to ensure effective legal aid and, if necessary, to limit the person's right to refuse legal aid.

Any testimonies and explanations presented by a mentally disabled accused person to the court concerning their offence should be assessed with particular care, taking into account their capacity to understand the legal significance of the explanations and their right not to testify against themselves. Meanwhile, the accused person's explanations about their state of health, attitude towards treatment, etc., together with the other evidence in the case, including expert reports, should help the court to decide on the choice of appropriate medical measure, if any.

References

ARSTEIN-KERSLAKE, A., P. GOODING, L. ANDREWS & B. MCSHERRY, 2017. Human Rights and Unfitness to Plead: The Demands of the Convention on the Rights of Persons with Disabilities. *Human Rights Law Review*, 17(3), 399–420. https://doi.org/10.1093/hrlr/ngx025.

AŽUBALYTĖ, R., 2022. Pandemijos poveikis teisei į teisminę gynybą [The impact of the pandemic on the right to judicial protection]. In: L. Jakulevičienė, R. Valutytė & D. Sagatienė, eds. *Teisė ir Covid 19 pandemija* [*Law and the Covid 19 pandemic*]. Vilnius: Mykolo Romerio universitetas, 371–405.

AŽUBALYTĖ, R. & I. TITKO, 2022. Remote Criminal Trial – Fair Trial? *International Comparative Jurisprudence*, 8 (2), 178–192. https://doi.org/10.13165/j.icj.2022.12.005.

BARENDRECHT, M., & P. VAN DEN BIGGELAAR, 2009. *Sustainable Legal Aid and Access to Justice: A Supply Chain Approach* [online]. Tilburg University Legal Studies Working Paper 005/2009, TISCO Working Paper Series 005/2009, Paper prepared for the International Legal Aid Group, April 2009, Available from: https://ssrn.com/abstract=1387716 [Accessed 6 October 2022]. http://dx.doi.org/10.2139/ssrn.1387716.

BEQIRAJ, J., L. MCNAMARA & V. WICKS, 2017. *Access to Justice for Persons with Disabilities: From International Principles to Practice* [online]. International Bar Association, 1–54. Available from: https://www.biicl.org/documents/1771_access_to_justice_persons_with_disabilities_report_october_2017.pdf [Accessed 2 September 2022].

BOOTH GLEN, K., 2012. Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond. *Columbia Hum. Rights Law Rev*, 44, 93–169.

BYROM, N., 2020. *What We Know about the Impact of Remote Hearings on Access to Justice: A Rapid Evidence Review*. Briefing paper [online]. London: Nuffield Family Justice Observatory. The Legal Education

Foundation. Available from: https://www.nuffieldfjo.org.uk/wp-content/uploads/2021/05/nfjo_remote_hearings_vulnerable-groups_rapid-review_20200506.pdf [Accessed 2 September 2022].

Charter of Fundamental Rights of the European Union [online]. *OL C* 326, 2012 10 26, 391–407. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012P%2FTXT [Accessed 1 September 2022].

Commission Recommendation of 27 November 2013 on Procedural Safeguards for Vulnerable Persons Suspected or Accused in Criminal Proceedings [online]. *OJ C* 378, 24.12.2013, 8–10. Available from: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:378:0008:0010:EN:PDF [Accessed 1 September 2022].

COMMISSIONER FOR HUMAN RIGHTS, 2012. *Who Gets to Decide? Right to Legal Capacity for Persons with Intellectual and Psychosocial Disabilities* [online]. Strasbourg: Council of Europe, Strasbourg, 1–23. Available from: https://rm.coe.int/16806da5c0 [Accessed 1 October 2022].

Committee on the Rights of Persons with Disabilities CRPD/C/18/D/30/2015, 2017 August 18. Views adopted by the Committee under article 2 of the Optional Protocol, concerning communication No. 30/2015 [online]. Available from: http://docstore.ohchr.org/ [Accessed 12 September 2022].

Committee on the Rights of Persons with Disabilities. General Comment No. 1, 2014. Article 12: Equal Recognition before the Law [online]. Eleventh session 31 March–11 April 2014. Available from: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement [Accessed 21 September 2022].

Council Conclusions on the Protection of Vulnerable Adults across the European Union 2021/C 330 I/01 [online]. *OJ C* 330I, 17.8.2021, 1–6. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021XG0817(01) [Accessed 8 September 2022].

DEVI, N., 2013. Supported Decision-making and Personal Autonomy for Persons with Intellectual Disabilities: Article 12 of the UN Convention on the Rights of Persons with Disabilities. *J. Law Med. Ethics*, 41, 792–806. https://doi.org/10.1111/jlme.12090.

Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to be Present at the Trial in Criminal Proceedings [online]. *OJ L* 65, 11.3.2016, 1–11. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L0343 [Accessed 24 September 2022].

Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the Right to Interpretation and Translation in Criminal Proceedings [online]. *OL L* 280, 2010 10 26, 1—7. Available from: https://eurlex.europa.eu/legalcontent/EN/TXT/?uri=CELEX:32010L0064&qid=1658337674998 [Accessed 24 September 2022].

Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the Right to Information in Criminal Proceedings [online]. *OL L* 142, 2012 6 1, 1–10. Available from: https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=CELEX:32012L0013&qid=1658336678147 [Accessed 24 September 2022].

Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings, and on the Right to Have a Third Party Informed upon Deprivation of Liberty and to Communicate with Third Persons and with Consular Authorities while Deprived of Liberty [online]. *OL L* 294,

2013 11 6, 1–12. Available from: https://eurlex.europa.eu/legalcontent/EN/TXT/?uri=CELEX:32013L0048&qid=1658336678147 [Accessed 24 September 2022].

ECtHR, *A.N. v. Lithuania*, application no. 17280/08, 31 May 2016 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-163344 [Accessed 24 July 2022].

ECtHR, *Alajos Kiss v. Hungary*, application no. 38832/06, 20 May 2010 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-98800 [Accessed 15 July 2022].

ECtHR, *Anatoliy Rudenko v. Ukraine*, application no. 50264/08, 17 April 2014 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-142421 [Accessed 2 June 2022].

ECtHR, *Beuze v. Belgium* [GC], application no. 71409/10, 9 November 2018 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-187802 [Accessed 7 September 2022].

ECtHR, *Colozza v. Italy*, application no. 9024/80, 12 February 1985 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-57462 [Accessed 13 July 2022].

ECtHR, *D.D. v. Lithuania*, application no. 13469/06, 14 February 2012 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-109091 [Accessed 6 September 2022].

ECtHR, *D.R. v. Lithuania*, application no. 691/15, 26 June 2018 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-184425 [Accessed 23 July 2022].

ECtHR, *Dallos v. Hungary*, application no. 29082/95, 1 March 2001 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-59264 [Accessed 10 September 2022].

ECtHR, *De Wilde, Ooms and Versyp ("VAGRANCY") v. Belgium*, application no. 2832/66; 2835/66; 2899/66. 18 June 1971 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-57606 [Accessed 1 September 2022].

ECtHR, *Duda v. Poland*, application no. 67016/01, 19 December 2006 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-78573 [Accessed 9 June 2022].

ECtHR, *Golder v. The United Kingdom*, application no. 4451/70, 21 February 1975 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-57496 [Accessed 7 September 2022].

ECtHR, *Gorshkov v. Ukraine*, application no. 67531/01, 8 November 2005 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-70855 [Accessed 1 October 2022].

ECtHR, *Hadi v. Croatia*, application no. 42998/08, 1 July 2010 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-99732 [Accessed 23 September 2022].

ECtHR, *Hasáliková v. Slovakia*, application no. 39654/15, 24 June 2021 [online]. Available from: https://hudoc.echr.coe.int/fre?i=001-210496 [Accessed 23 September 2022].

ECtHR, *Hodžić v. Croatia*, application no. 28932/142016, 4 April 2019 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-192077 [Accessed 23 September 2022].

ECtHR, *I.N. v. Ukraine*, application no. 28472/08, 23 June 2016 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-163914 [Accessed 19 June 2022].

ECtHR, *Ibrahim and Others v. the United Kingdom* [GC], applications nos. 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-166680 [Accessed 18 July 2022].

ECtHR, *Kamasinski v. Austria*, application no. 9783/82, 19 December 1989 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-57614 [Accessed 25 September 2022].

ECtHR, *Kremzow v. Austria*, application no. 12350/86, 21 September 1993 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-57829 [Accessed 25 September 2022].

ECtHR, *L.M. v. Latvia*, application no. 26000/02, 19 July 2011 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-105669 [Accessed 28 August 2022].

ECtHR, *M. v. Ukraine*, application no. 2452/04, 19 April 2012 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-110515 [Accessed 4 August 2022].

ECtHR, *Mamedova v. Russia*, no. 7064/05, 1 June 2006 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-75646 [Accessed 25 September 2022].

ECtHR, *Mifobova v. Russia*, application no. 5525/11 5 February 2015 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-150792 [Accessed 24 September 2022].

ECtHR, *Murtazaliyeva v. Russia* [GC], application no. 36658/05, 18 December 2018 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-187932 [Accessed 6 September 2022].

ECtHR, *O.G. v. Latvia*, application no. 66095/09, 23 September 2014 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-146409 [Accessed 3 September 2022].

ECtHR, *Pélissier and Sassi v. France* [GC], application no. 25444/94, 25 March 1999 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-58226 [Accessed 18 September 2022].

ECtHR, *Pishchalnikov v. Russia*, application no. 7025/04, 24 September 2009 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-94293 [Accessed 24 September 2022].

ECtHR, *Plesó v. Hungary*, application no. 41242/08, 2 October 2012 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-113293 [Accessed 18 September 2022].

ECtHR, *Pobornikoff v. Austria*, application no. 28501/95, 3 October 2000 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-58825 [Accessed 3 September 2022].

ECtHR, *Proshkin v. Russia*, application no. 28869/03, 7 February 2012 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-108961 [Accessed 24 August 2022].

ECtHR, *Quaranta v. Switzerland*, application no. 12744/87, 24 May 1991 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-57677 [Accessed 24 August 2022].

ECtHR, *Rakevich v. Russia*, application no. 58973/00, 28 October 2003 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-61414 [Accessed 2 August 2022].

ECtHR, *Raudevs v. Latvia*, application no. 24086/03, 17 December 2013 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-139268 [Accessed 24 June 2022].

ECtHR, *S.C. v. The United Kingdom*, application no. 60958/00, 15 June 2004 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-61826 [Accessed 14 August 2022].

ECtHR, *Shtukaturov v. Russia*, application no. 44009/05, 27 March 2008 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-85611 [Accessed 14 August 2022].

ECtHR, *Sitnevskiy and Chaykovskiy v. Ukraine*, applications nos. 48016/06 and 7817/07, 10 November 2016 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-168385 [Accessed 26 August 2022].

ECtHR, *Stanford v. the United Kingdom*, application no. 16757/90, 23 February 1994 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-57874 [Accessed 23 September 2022].

ECtHR, *Trutko v. Russia*, application no. 40979/04, 6 December 2016 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-169198 [Accessed 26 September 2022].

ECtHR, *Valeriy Lopata v. Russia*, application no. 19936/04, 30 October 2012 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-114088 [Accessed 26 August 2022].

ECtHR, *Vasenin v. Russia*, application no. 48023/06, 21 June 2016 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-163805 [Accessed 5 August 2022].

ECtHR, *Vaudelle v. France*, application no. 35683/97, 30 January 2001 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-59167 [Accessed 16 August 2022].

ECtHR, *Winterwerp v. the Netherlands*, application no. 6301/73, 24 October 1979 [online]. Available from: http://hudoc.echr.coe.int/eng?i=001-57597 [Accessed 13 September 2022].

ECtHR, *Zana v. Turkey*, 69/1996/688/880, 25 November 1997 [online]. Available from: https://hudoc.echr.coe.int/eng?i=001-58115 [Accessed 1 October 2022].

GOODING, P., & CH. O'MAHON, 2016. Laws on Unfitness to Stand Trial and the UN Convention on the Rights of Persons with Disabilities: Comparing reform in England, Wales, Northern Ireland and Australia [online]. *International Journal of Law, Crime and Justice*, 44, 122–145. https://doi.org/10.1016/j.ijlcj.2015.07.002.

Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Criminal Limb), 2021 August 31 [online]. Available from: https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf [Accessed 1 August 2022].

Handbook on European Law Relating to Access to Justice, 2016 [online]. European Union Agency for Fundamental Rights and Council of Europe. Available from: https://www.echr.coe.int/documents/handbook_access_justice_eng.pdf [Accessed 8 August 2022].

Holland v. Florida, 775 F.3d 1294, 11th Cir. 2014 [online]. Available from: https://casetext.com/case/holland-v-secy-fla-dept-of-corr [Accessed 6 September 2022].

HOUIDI, A., & S. PARUK, 2021. A Narrative Review of International Legislation Regulating Fitness to Stand Trial and Criminal Responsibility: Is There a Perfect System? [online]. *International Journal of Law and Psychiatry*, 74, 101666. Available from: https://doi.org/10.1016/j.ijlp.2020.101666 [Accessed 6 September 2022].

Indiana v. Edwards, 554 U.S. 164, 2008 [online]. Available from: https://supreme.justia.com/cases/federal/us/554/164/ [Accessed 28 August 2022].

International Principles and Guidelines on Access to Justice for Persons with Disabilities, 2020 August [online]. Geneva. Available from: https://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2020/10/Access-to-Justice-EN.pdf [Accessed 1 October 2022].

JESTE, V.D., M.L.G. EGLIT, W.B. PALMER, G.J. MARTINIS, P. BLANCK & R.E. SAKS, 2018. Supported Decision Making in Serious Mental Illness [online]. *Psychiatry*, 81 (1), 28–40. Available from: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6093283/pdf/nihms-1502003.pdf [Accessed 5 October 2022].

Judgment of the Court (Third Chamber) of 19 September 2019, *Criminal proceedings against EP*, C-467/18, ECLI:EU:C:2019:765 [online]. Available from: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62018CJ0467 [Accessed 1 July 2022].

Judgment of the Supreme Court of Lithuania of 19 May 2021 in Criminal Case No. 2K-121-976/2021.

Judgment of the Supreme Court of Lithuania of 3 February 2021 in Criminal Case No. 2K-5-976/2021.

Judgment of the Supreme Court of Lithuania of 6 June 2014 in Criminal Case No. 3K-3-302/2014.

Judgment of the Supreme Court of Lithuania of 7 January 2020 in Criminal Case No. 2K-55-222/2020.

JURKA, R., R. AŽUBALYTĖ, M. GUŠAUSKIENĖ & A. PANOMARIOVAS, 2009. *Baudžiamojo proceso principai* [*Principles of criminal procedure*]. Vilnius: Eugrimas.

Legal Capacity in Europe. A Call to Action to Governments and to the EU, Mental Disability Advocacy Centre. Report, 2013 October [online]. Available from: https://www.mdac.org/sites/mdac.info/files/legal_capacity_in_europe.pdf [Accessed 26 June 2022].

Leveraging the SDGs for Inclusive Growth: Delivering Access to Justice for All, 2016 [online]. OECD&Open Society Foundations. Available from: https://www.oecd.org/gov/delivering-access-to-justice-for-all.pdf [Accessed 26 September 2022].

MCSHERRY, B., 2012. Legal Capacity Under the Convention on the Rights of Persons with Disabilities. *Journal of Law and Medicine*, 20, 22–27.

MOSSMAN, D., S.G. NOFFSINGER, P. ASH, R.L. FRIERSON, J. GERBASI, M. HACKETT, C.F. LEWIS, D.A. PINALS, CH.L. SCOTT, K.G. SIEG, B.W. WALL & H.V. ZONANA, 2007. AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial [online]. *Journal of the American Academy of Psychiatry and the Law*, 35 (4), S3–S72. Available from: http://jaapl.org/content/35/Supplement_4/S3/tab-figures-data [Accessed 21 August 2022].

NEMITZ, T., & P. BEAN, 2001. Protecting the Rights of the Mentally Disordered in Police Stations: The Use of the Appropriate Adult in England and Wales. *International Journal of Law and Psychiatry*, 24 (6), 595–605. https://doi.org/10.1016/S0160-2527(01)00087-5.

Opinion of Advocate General Campos Sánchez-Bordona, delivered on 10 July 2019. Case C 467/18 [online]. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62018CC0467 [Accessed 1 October 2022].

Pagrindinių klausimų teismo psichiatrijos ekspertizei pavyzdžiai. Valstybinė teismo psichiatrijos tarnyba prie Sveikatos apsaugos ministerijos [Examples of key questions for forensic psychiatric examination. State Forensic Psychiatry Service under the Ministry of Health] [online]. Available from: https://www.vtpt.lt/ekspertine-veikla/ [Accessed 2 July 2022].

PRAISS, D.M., 1989. Constitutional Protection of Confessions Made by Mental Retarded Defendants. *American Journal of Law & Medicine*, 14 (4), 431–466. https://doi.org/10.1017/S009885880000767X.

Recommendation No. R (99) 4 by the Council of Europe on Principles Concerning the Legal Protection of Incapable Adults, Adopted by the Committee of Ministers on 23 February 1999 [online]. Available from: https://www.coe.int/t/dg3/healthbioethic/texts_and_documents/Rec(99)4E.pdf [Accessed 14 July 2022].

Recommendation Rec(2004)10 of the Committee of Ministers to Member States Concerning the Protection of the Human Rights and Dignity of Persons with Mental Disorders, Adopted on 22 September 2004 [online]. Available from: https://rm.coe.int/rec-2004-10-em-e/168066c7e1 [Accessed 17 August 2022].

REISNER, R., C. SLOBOGIN & A. RAI, 1999. *Law and the Mental Health System*. Third edition. West Group. St.P. Minn.

Resolution adopted by the General Assembly on 25 September 2015 [without Reference to a Main Committee (A/70/L.1)] 70/1. Transforming Our World: the 2030 Agenda for Sustainable Development

[online]. Available from: https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E [Accessed 27 June 2022].

Resolution of the Council of 30 November 2009 on a Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings (Text with EEA relevance) [online], *OJ C* 295, 4.12.2009, 1–3. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009G1204(01) [Accessed 16 September 2022].

ROGERS, T.P., N.J. BLACKWOOD, F. FARNHAM, G.J. PICKUP & M.J. WATTS, 2008. Fitness to Plead and Competence to Stand Trial: A Systematic Review of the Constructs and Their Application [online]. *The Journal of Forensic Psychiatry & Psychology*, 19 (4), 576–596. https://doi.org/10.1080/14789940801947909.

ROHLEHR, L.N., & D.A. PINALS, 2015. Competency to Waive Right to Counsel [online]. *Journal of the American Academy of Psychiatry and the Law*, 43 (3), 385–387. http://jaapl.org/content/43/3/385.

ŠTARIENĖ, L., 2006. Teisės į teisingą teismą, įtvirtintos Europos žmogaus teisių konvencijos 6 str., pobūdis, vieta ir apsaugos lygis kitų konvencijos teisių požiūriu [The character, place and the level of protection of the right to a fair court established in article 6 of the European convention of Human rights] [online]. *Jurisprudencija*, 10 (88), 40–48. Available from: https://ojs.mruni.eu/ojs/jurisprudence/article/view/2810 [Accessed 15 July 2022].

Unfitness to Plead Summary, 2016 January 13 [online]. Law Commission. Available from: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2016/01/lc364_unfitness_summary_English.pdf [Accessed 14 August 2022].

Unfitness to Plead: A Consultation Paper, 2010 [online]. *Law Com CP* 197, 1–268. Available from: https://www.lawcom.gov.uk/app/uploads/2015/06/cp197_Unfitness_to_Plead_web.pdf [Accessed 26 August 2022].

United Nations Convention on the Rights of Persons with Disabilities, Adopted and Opened for Signature, Ratification and Accession by General Assembly Resolution 61/106 of 13 December 2006, entry into force 3 May 2008 [online]. Available from: https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html#Fulltext [Accessed 7 August 2022].

VERBEKE, P., G. VERMEULEN, M. MEYSMAN & T. VANDER BEKEN, 2015. Protecting the Fair Trial Rights of Mentally Disordered Defendants in Criminal Proceedings: Exploring the Need for Further EU Action [online]. *International Journal of Law and Psychiatry*, 41, 67–75. https://doi.org/10.1016/j.ijlp.2015.03.009.

ZAJANČKAUSKIENĖ, J., & R. JURKA, 2021. Teisė į teisingą bylos nagrinėjimą: nuotoliniai procesai [Right to a fair trial: remote proceedings]. In: *Konstitucija ir teisinė sistema* [*Constitution and legal system*]. *Liber Amicorum Vytautui Sinkevičiui*. Vilnius: Mykolo Romerio universitetas, 571–598.

ZAJANČKAUSKIENĖ, J., 2010. Prozessuale Handlungsfähigkeit eines Verdächtigen (Beschuldigten) [The suspect's (indictee's) criminal procedural capability] [online]. *Jurisprudence*, 4 (122), 245–259. Available from: https://ojs.mruni.eu/ojs/jurisprudence/article/view/1036 [Accessed 27 June 2022].