



Protocol of action

Procedural facilitator

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The work group that developed this document was formed by members of the Plena inclusión Network of Legal Experts from the following organizations of the associative movement (listed in alphabetical order):

- Confederación Plena inclusión España, coordination.
- Asociación AMPROS
- Asociación APADIS
- Fundación A LA PAR
- Fundación APADIS
- Plena inclusión Andalucía
- Plena inclusión Castilla y León
- Federación FEVAS, Plena inclusión Euskadi

PROTOCOL OF ACTION FOR THE PROCEDURAL FACILITATOR

A. Justification

The Plena inclusión associative movement has long been alerting to the severe consequences of persons with intellectual and developmental disabilities going through judicial proceedings without their disability taken into consideration or without its detection concerning the right to a fair trial of any person.

Such awareness, along with one of the other legal operators, resulted in our intense work in the field of procedural adjustments with particular emphasis on the need for the development and legal recognition of the figure of the procedural facilitator. While at the same time, many of our organizations provide genuine support to persons with intellectual and developmental disabilities when faced with judicial proceedings, demonstrating practically the benefits of this line of action.

In 2020, Plena inclusión established an ad hoc working group to reflect on the professional facilitator and specify its definition. This work resulted in the approval by the Board of Directors of Plena inclusión Spain of the document "The facilitator in legal proceedings," published on October 22, 2020.

This document is only the first step toward defining what the Plena inclusión associative movement believes this professional figure should be as an essential instrument for guaranteeing the right to effective judicial protection on equal terms, as proclaimed by our Constitution.

Subsequently, as a result of the legislative impact of Plena inclusión, the "professional who acts as a facilitator" was legally recognized in article 7 bis of the Law on Civil Procedures (and 7 bis of the Law on Voluntary Jurisdiction). However, there is no specific profile and form of action for this new professional figure which makes it urgent to continue this line of work to specify it and determine and consolidate its legal nature and form of action in the proceedings.

This document aims to tackle the latter aspect and proposes a procedure for the intervention of the facilitating professional in the proceedings. In addition, it contains an annex I dedicated to reflecting on the legal nature of the figure.

B. Definitions

Procedural accommodation

According to the "International Principles and Guidelines on Access to Justice for Persons with Disabilities" (UN, 2020, p.9). Procedural accommodations are "all necessary and appropriate modifications and adjustments in the context of access to justice, where needed in a particular case, to ensure the participation of persons with disabilities on an equal basis with others."

Facilitator

The same document (UN, 2020, p. 9) also defines the concept of intermediaries (or facilitators) as "persons who work, as required, with justice system personnel and persons with disabilities to ensure effective communication during legal proceedings. They support persons with disabilities to understand and make informed choices, making sure that things are explained and talked about in ways that they can understand and that appropriate accommodations and support are provided. Intermediaries are neutral and they do not speak for persons with disabilities or for the justice system, nor do they lead or influence decisions or outcomes."

C. Foundation and scope of action of the procedural facilitator

What is the foundation?

Article 13 of the Convention on the Rights of Persons with Disabilities recognizes the obligation of State Parties to make procedural adjustments as an instrument to ensure the effective participation of persons with disabilities in the process.

In application of the commitment subscribed by our country when ratifying the Convention, Article 7 bis of the Law on Civil Procedure recognizes the obligation of the Administration of Justice to make adaptations and adjustments when necessary to ensure the participation of persons with disabilities under conditions of equality.

*Article 7 bis. Adjustments for persons with disabilities. In the proceedings in which persons with disabilities participate, the necessary adaptations and adjustments will be made to guarantee their **participation under conditions of equality**.*

This obligation has as its basis the constitutional right to a fair trial and the right not to be defenseless in any case.

What is the purpose of the intervention?

The activity of the procedural facilitator aims at ensuring the effective participation of the person with disabilities and developmental disabilities in any proceedings, in any jurisdictional area, and at any stage of the proceedings (including the investigation or preliminary stages), independently of their role within the proceedings (plaintiff, defendant, accused, investigated, victim or witness).

The result of the intervention of a procedural facilitator will be the identification and development of the necessary procedural accommodations to guarantee the effective participation of the person, eliminating the barriers that prevent them from exercising their right to access justice with equal opportunities.

Who are the target persons?

Any person with a disability with support needs arising from their participation in a legal proceeding, including the preliminary stages.

The disability may be detected or accredited by any means. A certificate of disability is not a prerequisite. In this sense, Constitutional Court Judgment 161/2021, of October 4 in its Legal Basis 3, "The protection that the Spanish Constitution provides for persons with disabilities - both in terms of the prohibition of discrimination against them (art. 14 SC) and the mandate to the public authorities to implement a policy of integration of these persons that protects them for the enjoyment of the rights that the Constitution grants to all citizens (art.49) and that the recognition, respect, and protection of this mandate should inform the needs of positive legislation and judicial practice (art. 53.3 SC) - **cannot be conditioned by formal requirements such as prior judicial or administrative recognition or declaration of the situation of (sic) disability**, which would conflict, on the one hand, with the constitutional requirement of promoting the equality of the individual and of the groups in which he/she is integrated to be real and effective (art. 9.2 SC), and on the other, with the own legal regulation of development of the rights of persons with disabilities established in art. 4 of the aforementioned Royal Legislative Decree 1/2013, of November 29, which preferentially attends to a material concept of disability."

They must have support needs, particularly related to communication, understanding, and/or interaction with the context of the proceedings.

Who may apply?

Under Article 7 bis of Civil Procedure Law, the procedural facilitator will act at the request of any of the parties or the Public Prosecutor's Office, as well as ex officio by the Court itself.

The request must contain a minimum justification.

Scope of the action:

As established by Article 7 bis of the Law on Civil Procedure (hereinafter referred to as LCP):

"The participation of an expert professional who, as a facilitator, will be allowed to perform adaptation and adjustment tasks necessary for the person with a disability to understand and be understood."

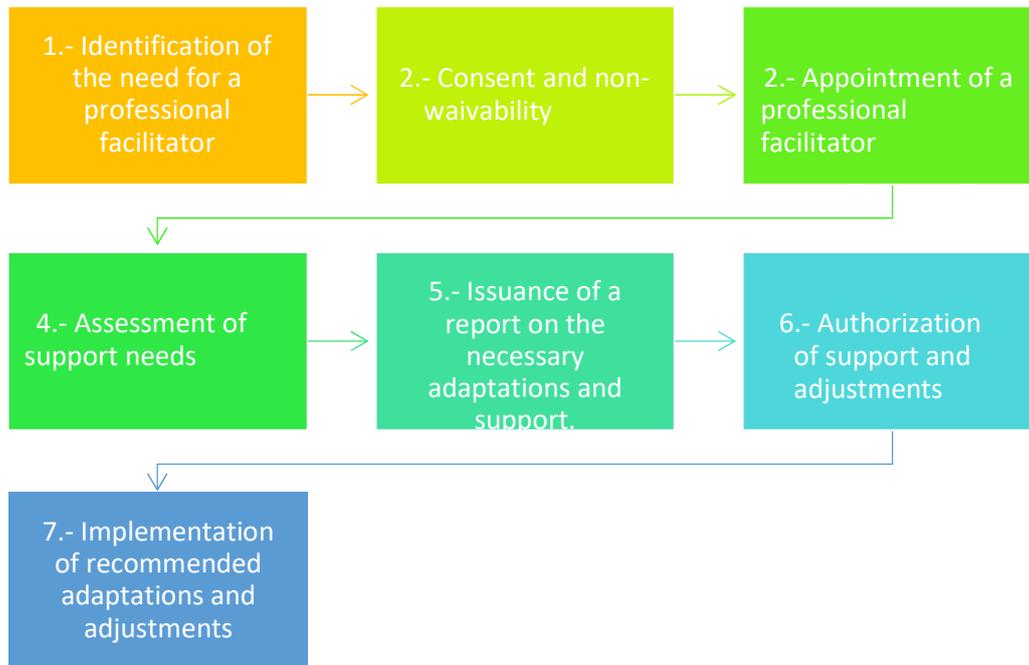
The adaptations and adjustments that the legal precept guarantees may refer to oral and written communication, comprehension, and interaction with the environment.

May act in all procedural stages and proceedings in which it is necessary.

As previously stated, Article 7 bis will be applicable not only in civil proceedings, to which it directly refers, but also in criminal, contentious-administrative, labor, and military proceedings, under Article 4 of the LCP, which establishes that in the absence of similar provisions in other procedural rules, the LCP is suppletory.

The expenses derived from the intervention of the professional facilitator to guarantee the right to a fair trial shall be borne by the Administration, regardless of the outcome of the process (see Annex).

D. Process of action



1. - Identification of the potential need for a procedural facilitator

The need for a procedural facilitator may be identified by the person with a disability themselves, family members, support professionals, police services, lawyers, judges, the Public Prosecutor's Office, legal counseling services, legal medical institutes, psychosocial teams, victim assistance offices, penitentiary institutions.

Under Article 7 bis of the LCP "Adjustments for persons with disabilities. In the proceedings in which persons with disabilities participate, the necessary adaptations and adjustments will be made to guarantee their **participation under conditions of equality.**" The Administration of Justice is justified in this obligation because failure to comply with it violates the right to a fair trial as an embodiment of the right to effective judicial protection contemplated in the Constitution. Therefore, the non-observance of this new procedure in the proceedings, should it be necessary, must generate the consequent nullity of the proceeding.

Despite the fact that there is still no specific jurisprudence concerning the non-observance of the use of the procedure of making adjustments, it is possible to refer to rulings that establish the need to guarantee the right of the person to understand the text of the resolutions, and consequently be able to duly exercise their rights.

Thus, Constitutional Court Judgment 41/2022, of March 21, pronounces on the lack of translation of the ruling issued on appeal, which deprived the convicted person, who did not understand the Spanish language, of the right to know the grounds for the dismissal of the claims and of the possibility of challenging them in cassation, and which in its 2º Legal Basis establishes that:

*"From the perspective of the right to a trial with all guarantees (art. 24. 2 SC), we have repeatedly stated (among many others, the rulings of the Constitutional Court 48/1986, of April 23, Legal Basis 1; 32/1994, of January 31, Legal Basis 3; 41/1998, of February 24, Legal Basis 27; 14/1999, of February 22, LB 6; 97/2000, of April 10, FJ 3; 228/2000, of October 2, LB 1; 87/2001, of April 2, LB 3, and 174/2001, of July 26, LB 4) that **"infractions of procedural norms or rules not only constitute a violation of the right to a trial with all guarantees but also cause a relevant reduction in the possibilities of defense"** (the ruling of the Constitutional Court 229/2003, of December 18, LB 8, concerning a criminal trial. More recently, Constitutional Court Judgment 26/2020, of 24 February, Legal Basis 5, concerning an executive civil proceeding)."*

Or the Supreme Court Judgment 940/2022, of March 14, which pronounces on the failure of the court of appeals to take the evidence required by Article 759 LCP, and which in its Legal Basis 3:

"It is obvious, therefore, that the Provincial Court violated a procedural guarantee of fundamental importance to rule on the judicial fixing of supports, and therefore it is appropriate to declare the nullity of the proceedings, without it being an obstacle for this that the appellant had not challenged the measure of order, which fixed the day and time for deliberation and judgment, given that it is a mandatory rule, alien to the procedural behavior and disposition of the appellant, which is of public order and constitutional relevance, with the only causes of exemption of the current 759. 2 LEC, which do not concur as we have analyzed above."

How to identify the need?

There could be several possible alternatives.

- Direct knowledge of the person's support needs: the person themselves, family members, or professionals in the person's environment inform the judicial authority of the need.
- Knowledge gained through awareness/training of various legal operators gives them the tools to recognize the support needs after contacting a person.
- Standardized tools and/or interviews available to legal operators enable them to obtain information related to the possible existence of support needs on behalf of the person.

Once there is suspicion/certainty that the person has a disability and support needs, the intervention of a professional facilitator will be requested from the judicial authority. If the decision is made ex officio, no further action is required.

If possible, the request should be made before the start of the proceedings, but in any case, at any point in the proceedings when the need is identified. The need must be minimally justified.

2. - Consent and non-waivability

The intervention of the procedural facilitator is based on the right to a fair trial, the right to participation and the right to ensure that a person with a disability is not defenseless in any case when intervening in a legal proceeding. Therefore, the person with a disability may only waive this right if the judicial authority considers that the waiver does not cause the person's defenseless or if the lack of the procedural facilitator will imply the person's non-participation in the judicial process.

This implies that if the person does not wish the figure to intervene, they are free to express it and not to cooperate.

In addition, if the person with a disability considers that the professional facilitator does not respond to their needs, they may request a change of a professional.

However, it should not be ignored that the justice system and, specifically, justice professionals must comply with a series of obligations directly imposed by legislation, such as using clear, simple, and accessible language in all oral and written communications.

It is clear that, in some instances, they will require the assistance of a procedural facilitator to comply with them.

3. - Appointment of the procedural facilitator

Once the request is submitted, several possible events may occur:

- None of the parties object.
- Any of the parties may object. The formulation of this opposition shall not interrupt the proceedings.

The judicial body must resolve positively or negatively on the request. We understand that, given that the resolution of this incident affects a personal right, it should be resolved by means of an order.

- o If it rules negatively, the judicial body must give sufficient reasons and the party that requested it may appeal the decision.

If the final resolution is negative, a procedural facilitator will not intervene.

However, if it is proven in the second instance that such intervention would guarantee effective judicial protection and it was denied, this could lead to the nullity of the process.

- If it rules negatively:
 - The procedural facilitator must be appointed.

The appointment

Currently, facilitation is a service provided by non-profit entities of the Third Sector, and these entities bear the economic cost of the service.

Concerning people with intellectual and developmental disabilities, most of them are entities belonging to the associative movement of Plena inclusión.

Despite the provisions of article 7 bis of the LCP, there is still no specific professional profile associated with the figure, nor a sufficient number of professionals trained in that professional profile; at present, this service is being provided mainly through 2 channels:

- Within the scope of Plena inclusión's support program for prisoners and ex-prisoners who support defendants during the legal proceedings in question.
- Entities that have trained professionals and have traditionally been supporting victims with intellectual and developmental disabilities but, due to the current need, are expanding their scope of action to any person with intellectual and developmental disabilities involved in a legal proceeding, including the preliminary stages.

In the future, the Administration of Justice must provide this service and might use one of the following means for this purpose:

- Regulation of the activities of entities cooperating with the administration of justice included in the first additional provision of Law 8/2021 of June 2, which reforms civil and procedural legislation to support people with disabilities in exercising their legal capacity. Among the functions that collaborating entities could perform are informing, aiding, assisting, providing expert knowledge, and cooperating with the Administration of Justice in matters within their scope under the terms to be determined by regulation. However, it is not enough for them to be Third Sector entities. They must prove that their personnel has the necessary skills and experience to perform the functions of the facilitator.

¹ Pilot experiences linked to some Departments of Justice of the Autonomous Communities are beginning to take place.

- Creation of a professional database with the necessary training and experience to perform this function.
- Duly trained internal personnel of the Administration of Justice.

However, regardless of the chosen formula, it is necessary to insist that the Administration of Justice require duly trained professionals to perform these functions, otherwise, the figure will not prevent the defenselessness of persons with disabilities.

Once appointed the professional facilitator in the manner to be determined, the Court shall communicate the appointment to the facilitator, who may:

- Refuse the appointment based on just cause. If the excuse presented by the professional facilitator is accepted, the Court will proceed to appoint the next on the list.
- Accept the appointment.

The facilitator who accepts the appointment must accompany the person during the entire procedure, unless there is a justified cause, without prejudice to the figure of the accompanying person provided for in both the Law on Civil Procedure and the Law on the standing of victims of crime.

4. - Assessment of support needs

The purpose of the assessment is to identify the needs of the person with a disability in the context of their participation in the judicial proceedings. All aspects of the assessment should comply with and be limited to this purpose.

Therefore, obtained information will be analyzed concerning the impact on the participation of the person with a disability in the judicial process and, if applicable, to ensure that no defenselessness is caused. The assessment may vary depending on the type of proceedings, the role of the person with a disability in the proceedings, or the stage of the legal proceedings.

Upon acceptance of the appointment, the facilitator:

- Will arrange an interview with the person with a disability to inform them of the purpose of their action.
- Request from the Court all the necessary documentation corresponding to the case and may request assistance if information not included in the file needs to be obtained.

- Assess the need to request the intervention of a forensic psychologist with expertise in the field of disability, for example, to issue a report on the person's capacity to testify.
- Will arrange an interview with relevant persons in the environment that is deemed necessary.
- Will arrange an interview with the lawyer.
- Will gather all the information that may be useful for the assessment of needs.

Before starting any interview, the facilitator will explain to the interviewee their role and why they are interested in this information. In addition to clarifying that such information will not be used as evidence in the case but will help to ensure participation, fairness, and equal access to justice. The person with a disability will be free to cooperate or not in the collection of information.

The facilitator is encouraged to **explore support needs and interference during the proceedings in the following areas:**

- Sensory.
- Physical.
- Behavioral.
- Medical.
- Basic cognitive capacities:
 - o Memory.
 - o Perception.
 - o Attention.
- Secondary cognitive capacities:
 - o Cognitive.
 - o Communication.
 - o Social interaction.

The information gathered during the support needs assessment, including the notes taken by the facilitator, will be kept confidential and must be archived in a secure location and in full compliance with specific legislation on personal data protection.

Principles of facilitator performance:

- **Principle of individualization:** Procedural accommodations should include the procedural flexibility necessary to accommodate specific requirements for the participation of each individual.
- **Due information:** the facilitator will explain to the person with a disability their role, what a procedural accommodation is, and what purpose it serves.

- **Impartiality and neutrality:** The facilitator is neutral and impartial, with no other interest in the proceedings than providing the necessary support to enable the person to participate fully in the process.
- **Confidentiality:** the confidentiality of all information concerning the case and the person must be respected.
- **They assist the Administration of Justice** in complying with its obligation to guarantee the right to effective legal protection.
- **A rights-based approach and support design based on the social model of disability** that focuses on individuals' potential and understands their limitations in the context rather than as inherent to the person.
- The designation of the facilitator and the recommended accommodations will respect the principles of the **need for action and proportionality**.

5. - Issuance of a report on adaptations and supports

After gathering the necessary information, the procedural facilitator will issue a report that must:

- Be signed by a duly identified and accredited professional(s).
- Respect and protect confidentiality.
- Be impartial.
- Provide accurate and objective observations, avoiding subjective and personal opinions.
- Not to be based on a diagnosis.
- Not to diagnose or issue recommendations outside the limits of the judicial facilitator's role. The judicial facilitator is not an expert or a lawyer.
- The facilitator will not make any judgments about the specific case that led to the initiation of the proceedings.

Minimum content of the report

There is no specific content template, but we recommend it should include at least the following information:

- Purpose of the report.
- Who requests to perform the report.
- Sources of the obtained information.
- Methodology followed to prepare the report.
- General information obtained from previous rulings and documents.
- Medical history, type of disability, %.
- Chronology and people present in the intervention process.

- Comprehension of the purpose and possible consent to support.
- Specific support needs identified in the areas defined in section 4.
- Recommendations and different options for adjustments. Prioritization according to the impact and the wishes and preferences of the individual.
- Assessment of the need, if applicable, for pre-constituted evidence.
- The role of the facilitator in the implementation of such adjustments or adaptations.
- Signature of the facilitator.

The person with a disability should get a copy of the document and ensure they understand it. The procedural facilitator's task will be to ensure that it is understood.

6. - Authorization of support and adjustments

This report shall be sent to the judicial authority and attached to the proceedings to ensure that the facilitator's adaptation and intervention needs are addressed at all subsequent stages of the process.

The judicial body will bring together the parties and the facilitator to inform them of the contents of the report and establish basic rules of conduct during the judicial proceedings. For example, to state how the questions should be asked so that the person with a disability can understand them or how the facilitator should alert in the event that the person has not understood or needs a rest period.

7. - Implementation of recommended adaptations and adjustments

The judicial body shall proceed with the implementation of the necessary adaptations or adjustments.

Recommended publications

- ***International Principles and Guidelines on Access to Justice for Persons with Disabilities. United Nations (2020).***
 Available on:
https://www.ohchr.org/Documents/Issues/Disability/SR_Disability/GoodPractices/Access-to-Justice-SP.pdf
 Easy Reading Summary:
https://www.plenainclusion.org/sites/default/files/naciones_unidas.10_consejos_para_mejorar_el_acceso_a_la_justicia.pdf
- ***Access to justice: procedural adjustments for persons with intellectual or developmental disabilities. Plena inclusión (2019).***
 Available on:
https://www.plenainclusion.org/wp-content/uploads/2021/03/acceso_a_la_justicia_web.pdf
- ***The facilitator in judicial proceedings. Plena inclusión (2020).***
 Available on:
https://www.plenainclusion.org/sites/default/files/plena_inclusion_la_persona_a_facilitadora_en_procesos_judiciales.pdf
- ***On each side. Report on the situation of incarcerated and ex-inmates with intellectual disabilities in Spain. Plena inclusión (2020).***
 Available on:
https://www.plenainclusion.org/wp-content/uploads/2021/03/plena_inclusion_a_cada_lado.2020.pdf
- ***Facilitation of access to justice. Plena inclusión (2021).***
 Available on:
<https://www.plenainclusion.org/wp-content/uploads/2022/05/Facilitacion-justicia-Atkinson.pdf>

Annex: The legal nature of the intervention of the procedural facilitator

The right to interpretation and translation in access to justice

In the words of Guerrero Palomares², "whoever does not understand idiomatically the facts attributed to him, the procedural stage in which he finds himself, nor the rights that protect him, cannot argue in his defense, nor propose evidence about them, nor contradict what exists against him. There is no room for greater defenselessness".

The right to translation and interpretation is a right held by persons who do not speak or understand the language of the proceedings and is enshrined in Article 6(3)(e) of the ECHR.

Directive 2010/64/EU of the European Parliament (EP) and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings

This obligation has as its basis the right to a fair trial and the right not to be defenseless in any case. Directive 2010/64/EU of the European Parliament (EP) and of the Council on the right to interpretation and translation in criminal proceedings recognizes this in recital 5.

Recital 14 states that the Directive aims to guarantee the right of the suspect or accused person to interpretation and translation in criminal proceedings to ensure their right to a fair trial.

This directive further establishes the obligation to guarantee free and adequate linguistic assistance, allowing suspects or defendants who do not speak or understand the language of the criminal proceedings to fully exercise their right to a defense and ensure the fairness of the proceedings.

Article 2 of the Directive states that "Member States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings."

Article 4 states, "Member States shall bear the costs of translation and interpretation resulting from the application of Articles 2 and 3, regardless of the outcome of the proceedings."

² Guerrero Palomares, S. (2016). *El derecho a la traducción e interpretación en el proceso penal. Análisis de los nuevos artículos 123 a 127 de la LECRIM, tras la reforma operada por la LO 5/2015 de 27 de abril*. Revista Aranzadi de Derecho y Proceso penal, 41, 23-58.

Organic Act 5/2015, of April 27

This Directive was embodied in Organic Law 5/2015, of April 27, which, in coherence with the Directive, recognizes the link between this right and the right to a fair trial and extends its scope of application to deaf sign language users.

The right to information of detained persons and those charged or accused in criminal proceedings is based on the provisions of articles 5 and 6 of the European Convention on Human Rights. As interpreted by the European Court of Human Rights and its explanatory memorandum explicitly states that the Law is a development that directly affects Article 24 of the Constitution [...] by developing fundamental rights and public freedoms contained therein.

The fourth paragraph referring to Article 123 of the Criminal Procedure Act establishes that "the costs of translation and interpretation arising from the exercise of these rights shall be borne by the Administration, regardless of the outcome of the proceedings."

This right is waivable only if the judge considers that the waiver does not result in a lack of defense. According to Supreme Court Judgment 47/2019, of February 7, 2019, in its 2nd Legal Basis:

"We recalled in the recent Supreme Court Judgment 584/2018, reviewing the Constitutional Court Judgments 188/91 of October 3 and 181/94 of October 3, that the requirement of an interpreter in criminal proceedings for all those who do not know the Spanish language derives directly from the Constitution, which recognizes and guarantees the rights to not suffer defenselessness (art. 24.1) and to defense (art. 24.2)".

It should therefore be stated that at the core of this right is the fact that a person who does not understand the "language" of a proceeding, understood in a broad sense, i.e., who is unable to understand the verbal or written elements and communications inherent in the proceeding in which they participate, regardless of the role in which they do so, will see their right to Article 24 of the SC violated.

Lack of understanding of the proceedings due to other reasons

However, it should not be overlooked that the reason for the lack of understanding of the "language" is not only that the person speaks a different language, but also the likelihood exists that despite the use of the same language, the lack of understanding occurs for other reasons. This circumstance is already legislatively recognized, as we have seen. Thus, examples can be found in:

- Article 118 of the Criminal Procedure Act when it establishes that:

"The information referred to in this paragraph will be provided in understandable, simple language. For this purpose the information will be adapted to the age of the recipient, their degree of maturity, disability, and any other personal circumstance which may give rise to a modification to the capacity to understand the scope of the information being provided to them."

- Article 520.1.h of the Criminal Procedure Act when it establishes that:
 - "2. All arrested or imprisoned persons will be informed, in writing, in easily understandable language, in a language which they can understand immediately, of the acts they are accused of and the grounds giving rise to their imprisonment, and also their rights, particularly the following:
[...]*
 - h) The right to be assisted by an interpreter, free of charge, where a foreigner does not understand or speak Spanish or the official language of the proceedings in question, or deaf people, or those with impaired hearing, **or other people with language difficulties are concerned.**"*

- Article 520.2.bis of the Criminal Procedure Act when it establishes that:
 - "The information referred to in the previous paragraph will be provided in a language that can be understood and that is accessible for the recipient. For this purpose the information will be adapted to the age of the recipient, their degree of maturity, disability and any other personal circumstance which may give rise to a limitation on the capacity to understand the scope of the information being provided to them."*

- Law 4/2015, of 27 April, on the standing of victims of crime, *Article 4 the victim's right to understand and be understood:*
 - All victims are entitled to understand and be understood in any act occurring from the time of making the complaint and during criminal proceedings, including any information given prior to the complaint being made."*
 - To that end:*
 - a) All communications with victims, whether oral or in writing, must be effected in clear, simple and accessible language, taking into account the victim's personal characteristics and, in particular, the needs of individuals with sensory, intellectual or mental disabilities or who are not of legal age. Where the victim is a minor or the victim's capacity has been modified by a court, communications must be addressed to the victim's representative or to the person who assists the victim.*

- Law 1/2000, of January 7, on Civil Procedure, supplementary to the rest of the procedural rules, goes further and, according to article 7 bis, establishes measures to avoid discrimination of people with disabilities in the procedural field (adjustments and adaptations to guarantee their participation under conditions of equality) and recognizes the right to understand and be understood of people with disabilities in general and to the realization of adaptations referring to communication, understanding, and interaction with the environment.

Article 7 bis. Adjustments for persons with disabilities.

*1. In the proceedings in which persons with disabilities participate, the necessary adaptations and adjustments will be made to guarantee their **participation under conditions of equality**.*

*The adaptations and adjustments shall be made, either at the request of any of the parties, or the Public Prosecutor's Office, or ex officio by the Court, and in all phases and procedural actions in which it is necessary, including acts of communication. **The adaptations may refer to communication, comprehension, and interaction with the environment.***

2. Persons with disabilities have the right to understand and be understood in any proceedings to be taken. To that end:

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

b) The person with a disability shall be provided with the necessary assistance or support to be understood, including interpretation in legally recognized sign languages and means of oral communication support for persons with hearing impairment, deaf and deaf-blind persons.

c) The participation of an expert professional who, as a facilitator, will be allowed to perform adaptation and adjustment tasks necessary for the person with a disability to understand and be understood.

d) The person may be accompanied by a person of their choice from the first contact with authorities and officials."

This same article is reproduced in Article 7 bis, of Law 15/2015, of July 2, on the Voluntary Jurisdiction.

- Law 15/2015, of July 2, on Voluntary Jurisdiction in its article 18, 1.4^a, establishes that it will be necessary to seek the assistance of specialists when necessary.

*The judicial authority or the Counsel for the Administration of Justice may agree that the hearing of the minor or **person with disabilities** is carried out in a separate act, without interference from other persons, with the assistance of the Public Prosecutor's Office. **In any case, it shall be guaranteed that they can be heard in suitable conditions, in terms that are accessible, understandable, and adapted to their age, maturity, and circumstances, seeking the assistance of specialists when necessary***

Discrimination in different treatment

Article 4 of the Civil Code establishes the analogical application of the rules when they do not contemplate a specific case but regulate another similar case in which there is an identity of reason. And furthermore, it establishes the supplementary application of the Civil Code with respect to other provisions.

We find that there is an "identity of reason" between the two cases since in both cases the person facing the judicial proceeding does not understand the language of the proceeding, regardless of the reason for the lack of understanding.

Legal treatment, however, varies widely, as in the case of a lack of understanding resulting from the use of another language, a person benefits from a number of guarantees that are considered to fall under Article 24 of the SC, particularly the right to a fair trial. Among these guarantees, as far as we are concerned, the possibility of having professional support that can guarantee to understand is recognized, the right to written translation of all essential documents of the process is recognized, and the right to free translation is explicitly acknowledged.

In the case of the lack of understanding of the language, when it is the same language, it is not covered by the same level of protection since, as of today, there is no jurisprudence on this matter.

There are some generic regulatory provisions, but the Administration of Justice has not yet implemented measures to ensure fairness in the trial beyond some good practices, which so far have been financially supported by the Third Sector entities in the vast majority of cases. Unlike what happens with the right to translation and interpretation, persons with disabilities do not have the recognized right to have all the essential written documentation in the proceeding, and in practice, it does not occur beyond some cases of isolated sentences. Neither is the free provision of support recognized, in addition, Law 8/2021 could raise concerns about it since its explanatory statement says that the person with disabilities "*if desired and at their own expense, may use a professional who as a facilitator performs tasks of adaptation and adjustment.*" It is necessary to clarify that explanatory statements do not have normative value, as has been repeatedly established by the Constitutional Court (Constitutional Court Sentences 36/1981, of November 12, F. 7; 150/1990, of October 4, F. 2; 173/1998, of July 23, F. 4; 116/1999, of June 17, F. 2; and 222/2006, of July 6, F. 8).

However, according to the report of the Office of the UN High Commissioner for Human Rights on the right of access to justice under Article 13 of the Convention on the Rights of Persons with Disabilities (2017), procedural accommodations are "a means of effectively asserting the right to a fair trial and the right to participate in the administration of justice, and are an intrinsic element of the right of access to justice":

24. Equality of arms is an **element of the right to a fair trial that ensures that all parties have the same procedural rights in order to ensure access to the same information and the same opportunities to present or rebut evidence** [...] The list of measures that States Parties should take to ensure effective and equal access to justice contained in article 13, paragraph 1, of the Convention is not exhaustive and States Parties have an obligation to provide procedural and age-appropriate accommodations to facilitate the participation of persons with disabilities as direct and indirect participants in all legal proceedings, including at the investigative and other preliminary stages. ***Therefore, procedural adjustments are a means to effectively enforce the right to a fair trial and the right to participate in the administration of justice, and are an intrinsic element of the right of access to justice.***

25. The obligation to provide procedural accommodations follows directly from civil and political rights. It is linked to the principle of non-discrimination and cannot be subject to progressive realization. In the negotiations on Article 13 of the Convention, there was discussion as to whether the terminology to be adopted was "procedural adjustment" or "reasonable accommodation" and it was decided to drop the reference to "reasonable". The decision to voluntarily discard the term "reasonable" highlighted the fact that, unlike reasonable accommodation, procedural accommodation is not subject to the proportionality test. **Consequently, the failure to provide procedural accommodation when a particular person with a disability requires it constitutes a form of discrimination on the basis of disability in relation to the right of access to justice.**

Since there is a similarity in reasoning with the case of the right to translation and interpretation, this right can only be waived if the judge determines that the waiver does not result in a lack of defense.

Conclusions

- It should be understood that Article 24 of SC, while recognizing the right to effective judicial protection without the possibility of defenselessness, includes the right to assistance if someone, for whatever reason, does not know or understand the language of the proceedings.

This constitutional guarantee should not be interpreted with restrictive criteria as it is a fundamental right but should reach all acts of communication of a process.

- This right is waivable only if the judge considers that the waiver does not result in a lack of defense.
- Discrimination currently exists concerning persons with disabilities in recognition of this right.
- Elimination of said discrimination will require, at a minimum, the following:
 - Recognize the right of persons with disabilities to support when they do not understand the process. This recognition cannot be merely formal, but must include and guarantee the provision of personal and material resources to make it possible.
 - Recognize and ensure that this service is free of charge.
 - Ensure that essential process documentation is provided in understandable formats for the individual.

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