

# THE PORTUGUESE JURISDICTION AND THE USE OF ALTERNATIVES TO DETENTION

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## The Portuguese juvenile justice framework

In Portugal, the process of ratifying the Convention on the Rights of the Child (UN, 1989) by the State in 1990 supported the need for its implementation,<sup>1</sup> which has led to a broader evaluation and deep critical reflection on the efficacy and limits of the juvenile justice welfare model, which was in force since 1911. As a result the system has made significant changes, and international standards have been integrated into the legal framework.<sup>2</sup> Current juvenile justice laws integrate the tools and procedures for exercising formal social control, framed by the definition of criteria and socially accepted norms consecrated by law, embodying the guarantee to protect human rights established,<sup>3</sup> and the State can only intervene in indispensable cases (Moura, 2000).<sup>4</sup>

The new laws approved in 1999 – the Promotion and Protection Law for Children and Young in Danger (LPCJP),<sup>5</sup> and the Educational Guardianship Law (LTE),<sup>6</sup> came into force on the 1<sup>st</sup> of January 2001, and both have undergone the changes in 2015. The essential idea was to distinguish the situation of children in danger,<sup>7</sup> that legitimizes a State's intervention of protection (LPCJP), from the needs and situation of the children, between 12 and 16 years old, who commit an offence qualified by the penal law as crime and, as a result, justify another kind of intervention, an educational one (LTE) (Gersão, 2000; Bolieiro & Guerra, 2009). Depending on the nature of the offences committed by a young person who is 12 years of age or older, on his or her social and educational needs, and on other specific criteria, both differentiated interventions could be applied to the same individual since, as in many cases, both needs are often related (Rodrigues & Fonseca, 2000, 2010).

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<sup>1</sup> The Convention on the Rights of the Child was signed by Portugal on the 26<sup>th</sup> of January of 1990, approved for ratification by the Resolution N° 20/90 of the Assembly of the Portuguese Republic and published in the Official Gazette of Portugal (*Diário da República*), Series I, n.° 211, 12<sup>th</sup> of September of 1990.

<sup>2</sup> According to the Constitution of the Portuguese Republic (Article 8) 'the rules and principles of general or customary international law are an integral part of Portuguese law' (§1) and the 'rules provided for in international conventions that have been duly ratified or approved, shall apply in national law, following their official publication' (§2).

<sup>3</sup> The general principles of a comprehensive policy for a juvenile justice provided by the CRC (i) non discrimination (art.° 2); ii) best interests of the child (art.° 3); iii) the right to life, survival and development (art.° 6); iv) the right to be heard (art.°12); v) dignity (art.° 40(1)), and the General Comment n°10, para.5-14, framed the Portuguese law.

<sup>4</sup> Embodied the guidance provided for Article 40 (3) (4) of the CRC, Portugal has a specific youth justice system separated from adults.

<sup>5</sup> Law N.º. 142/2015 of 8<sup>th</sup> of September, which constitutes the second amendment to Law No. 147/99, 1<sup>st</sup> of September.

<sup>6</sup> Law N.º 4/2015 of 15<sup>th</sup> of January, which constitutes the first amendment to Law n.º 166/99 of 14<sup>th</sup> September.

<sup>7</sup> The LPCJP (Article 3) considers that children are in danger when: "a) are abandoned or left to themselves; b) suffers physical or psychological abuse or is a victim of sexual abuse; c) do not receive the care or affection appropriate to their age and personal circumstances; d) is involved in activities excessive or inappropriate to their age, dignity and personal well-being or prejudicial to their fully development; e) is subject or exposed, directly or indirectly, to behavior which seriously affect their safety or emotional balance; f) assume behavior or indulges in activities or consumption that seriously affect their health, safety, training, education or development without the parents, legal representative or who has custody preclude them properly to remove this situation."

The minimum age of criminal responsibility (MACR) is 16 years old,<sup>8</sup> which is also the minimum age for criminal majority; although the age of civil majority is 18 years. Portugal has a strict model, which does not allow for exceptions in the enforcement of criminal laws and does not foresee the prosecution of juveniles for certain offences only. Below the age of 16, it is not possible to sentence children and youth in criminal or penal terms. Status offences are no longer sufficient to initiate a proceeding involving a young person, and only alleged criminal offences are eligible to start a judicial process within the LTE.

Despite following the concept of child defined by the CRC considering the age of 18 years to reach civil majority in Portugal, youth who commit offences at the age of 16 fall under the general penal law and are regarded and judged as adults (Article 19 of the Portuguese Penal Code).<sup>9</sup> As a result of the Penal Code Reform of 1982, a Young Adult's Special Penal Regime is applied to those aged from 16 to 21 years,<sup>10</sup> but in fact, until 18 years, from a civil point of view, they are still considered minors. At the age of 16 and 17 they can be sent to prison and be placed together with adults in the same facilities. In the face of the principles and guidelines of the CRC, mostly in what concerns Article 37<sup>o</sup>, the Portuguese State has been regularly notified by national and international entities about the dangers of accommodating 16- and 17-year-old youth in cells with adults. The international standards regarding this matter have not been fully implemented (Muncie, 2008; Bolieiro & Guerra, 2009; Rodrigues & Fonseca 2010; Kilkelly, 2011; Pruin, 2011; Carvalho, 2014). Therefore, not surprisingly, in its last report (2010), the Permanent Observatory on Portuguese Justice (OPJ),<sup>11</sup> recommended changing the age of the criminal majority from 16 to 18 years, in order to attend to international standards and avoid the existence of youth aged 16 to 17 years old, who are currently 'swallowed' by the prison's system (Santos et al., 2010, p. 333).

## **Guarantees and procedures**

There has never been a juvenile criminal law in the country, and the juvenile justice system does not have a retributive or punitive purpose; it is focused on addressing the offending behaviour in a manner appropriate to the young person's development (Gersão, 2000; Agra & Castro, 2002, 2007). At the core of the LTE is the respect for the young person's personality, ideological, cultural and religious freedom, within all the

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<sup>8</sup> The establishment of MACR in Portugal respect the guidance provided by Article 40(3) of CRC (States parties have the obligation to set a minimum age of criminal responsibility below which children shall be presumed not have the capacity to infringe the penal law), the Rule 4 of the Beijing Rules (the beginning of MACR shall not be fixed at too low an age level, bearing in mind the child biopsychic development and the level of maturity), and General Comment n<sup>o</sup>10, para. 30-35, Committee on the Rights of the Child (the MACR below the age of 12 years is considered by the as not internationally acceptable).

<sup>9</sup> Portugal does not follow the guidance provided by the Committee of the Rights of the Child defending every child under the age of 18 years at the time of the alleged commission of the offence must be treated in accordance with the rules of juvenile. This provision is also defended by Rule 17. of the European Rules for juvenile offenders subject to sanctions or measures (young adult offenders may, where appropriate, be regarded as juveniles and dealt with accordingly. A similar position has been taken by the Committee on the Rights of the Child in para. 86 of General Comment No. 10.

<sup>10</sup> Article 19 of the Portuguese Penal Code. As a result of the Penal Code Reform of 1982, a Young Adult's Special Penal Regime (Decree-Law n.º 401/82, of 23<sup>rd</sup> of September) makes possible some specific mitigating regulations and alternatives to this age group. The application of the so-called corrective measures as alternative to a prison sentence for certain cases is foreseen by the law. These measures are: admonition, imposition of obligations, fine and detention in a detention centre, though these facilities have never been built, which means there has not been the possibility of imposing this last measure. The law promotes reduced sentences and, more recently, in 2007, house arrest (including electronic monitoring) was added as a measure eligible for application to young adult's offenders (Dünkel & Pruin, 2012).

<sup>11</sup> At the Centre for Social Studies, of the University of Coimbra, the Observatory aims at accompanying and analyzing the performance of the Portuguese courts, as well as related institutions such as police forces, prisons, alternative dispute resolution mechanisms, forensic services, and social reintegration services.

rights conferred upon him/her by the Constitution of the Portuguese Republic.<sup>12</sup> Juvenile offenders' rehabilitation is based on their needs to be educated on the fundamental values for living in society aiming they would assume a constructive role in society as foreseen in Article 40(1) CRC (Un, 1989) and in the UN General Comment No. 10 (2007).<sup>13</sup>

The youth court may — after a specific procedure that is different from a penal one but follows some similar rules to a criminal procedure for adults — apply compulsory educational measures. From the least to the most impactful to the young person's life, they are as follows: admonition, restriction of the right to drive or obtain a driver's permit for motorcycles, reparation to the victim, economic compensation or work for the benefit of the community, imposition of rules of conduct, imposition of obligations, attendance of training programs, educational supervision, and placement in custody at educational centres managed by the Ministry of Justice.

Due process guarantees were introduced and the set of educational measures established by the LTE aims at the offender's socialization, based on the core principle of '*education in the law*' (Rodrigues & Fonseca, 2000, 2010). The meaning of socialization is fully explicit in the LTE and being educated in the law "does not represent moral correction, but is rather – in respect for the freedom of conscience that pertains to all citizens – to educate the minor to pursue a social life that complies with essential legal norms" (Rodrigues & Fonseca, 2010, p.1035).

The fundamental principles foreseen by the CRC (Articles 37 and 40) are the basis of the LTE core principles.<sup>14</sup> The 1999 Reform introduced the principle of the juvenile offenders' responsibility, but it has remained focused on the application of educational measures and has not signified a rising punitive trend. The system could be described in what Bailleau and Fraene (2009, p. 6) considered a "tendency towards bifurcation – a soft approach in most cases and tougher actions against a limited number of adolescent undergoing a custodianship order". The proof of the facts of a criminal offence is indispensable to the lawsuit, but merely by itself it is insufficient being also required the evaluation of the young offender's need for '*education in the law*'.<sup>15</sup> Only by the

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<sup>12</sup> In accordance with Article 40 (2) of the CRC are established the following principles: legality; presumption of innocence; prohibition of self-incrimination; procedural safeguards; trial without delay by competent, independent and impartial authority; particular role of parents or legal guardians; right to appeal; free assistance of an interpreter; respect for privacy 'at all stages of the proceedings'; effective participation and proportionality.

<sup>13</sup> Also considering the UN General Assembly Resolution on Human rights in the Administration of Justice (November 2010), the Guidelines of the Committee of the Ministers of the Council of Europe on Child-Friendly Justice (2010), and the Recommendation CM/Rec (2008)11 of the Committee of the Ministers to member states on the European Rules for Juvenile offenders subject to sanctions or measures.

<sup>14</sup> The key juvenile justice system principles established by the LTE are: **preference for non institutional measures over institutional measures**; specific duration of educational measures; proportionality (according to the offence gravity and the identified educational needs); jurisdictional control over the execution of the order; legality (in terms of the 'vagueness doctrine' - the legislator provided a closed catalogue of educational measures and other modalities, types or measures distinct from those stipulated in the law cannot be applied); need; suitability; and subsidiary. The young person has the following rights (Article 45, para. 2, LTE): a) to be heard, informally or by request of the judicial authority; b) do not respond to questions asked by any entity on the facts that are alleged assigned to him/her and on the content of statements about him/her pay; c) do not answer about his/her conduct, his/her character or personality; d) be assisted by a specialist in psychiatry or psychology whenever required, for assessment purposes or need for application of an educational measure; e) be assisted by a defence lawyer on all proceedings in which is participating and, when arrested, can communicate, even in private, with him/her; f) be accompanied by a parent, legal representative or the legal guardian, unless founded on his/her best interests or needs of the case; g) provide evidence and make applications; h) be informed of the rights he/she has; i) to appeal, under the law, to the decisions unfavorable to him/her.

<sup>15</sup> At the core of the LTE is Article 6 of the European Convention on Human Rights, which guarantees the right to a fair trial and guarantees the right of an accused individual, adult or child, to participate effectively in his trial. A major improvement brought up by the Children and Youth Justice Reform (1999) regarding youth offending has been the introduction of the young person defence lawyer, in all the judicial proceedings in which is required his/her participation. The mandatory constitution of assistance by defence lawyer finds its rationale in the need to ensure the effective protection of the child's rights and the enforcement of the international standards. The young person has the right to constitute or to request the nomination of a defence lawyer, and this right could be exercised by him/her or by the parents or legal guardians. If he/she or the parents or legal guardians cannot afford it, the judge decides to appoint one that will exercise free of charge. The right to assistance by a defence lawyer must give legal expression to the

corroboration of the above assumptions could the youth court decide to apply an educational measure (Articles 2 and 3, LTE). The criteria on which an educational measure is determined by the youth court rely not only on young offenders' needs, which are evaluated before the sentence by social and psychological or psychiatric assessments, but also on the seriousness of the committed offences in comparison to what is defined in the penal code.

In accordance to international standards, custody, in any of its modalities,<sup>16</sup> must be only used as last resort and alternatives measures to detention must be given priority.<sup>17</sup> Thus, fulfilling the principles of legality and proportionality, the requirements and assumptions underlying the application of liberty-depriving measure are restricted, and in the case of the closed regime “are extremely restricted, which is perfectly understandable” (Rodrigues & Fonseca, 2010, p. 1060).<sup>18</sup> Depending on the juvenile offenders' progress in detention, a change to a less restrictive regime can be proposed to the court and the detention measure applied can be reviewed accordingly to the law and changed, but never to a more restrictive regime.

## Alternatives to detention

Overall, the available statistics on the sentencing practice in Portuguese juvenile justice since the Children and Youth Justice Reform was instituted show a global trend towards an increase diversification of educational measures as an alternative to liberty-depriving measures (Castro, 2011). Among the set of non-institutional educational measures

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young person's point of view. Since the first contact with the police, the young person must be assisted by a defence lawyer whose action is extended to all the proceedings and stages of the process in which he/she is participating. It is compulsory for a young person to be assisted by a defence lawyer in the first interrogation when detained, and also in any hearing during the investigation stage and on the trial. When arrested, he/she could communicate in private with the defence lawyer. The police can only take the responsibility of identifying the juvenile and presenting him/her for interrogation led by the public prosecutor. A young person alleged suspected of having committed a fact qualified by the penal law as crime, cannot remain more than three hours in a police station for purposes of identification. When present at the young person's first interrogation, the parents, legal representative or legal guardians must refrain from any interference (Art.º 55, LTE). At any time of the proceeding, the young person has the right to contact in private with the judge, with the public prosecutor and his/her defence lawyer. It is also required the assistance of the defence lawyer in the cases of revision of the pre-trial detention measure and in the preliminary hearings.

<sup>16</sup> Liberty-depriving educational measures within the LTE respect the UN Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), the UN Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules, 1990), and could be enforced in five ways: pre-trial detention, custodial measure to perform the young offender's psychological assessment in forensic context, compliance of detention following the young person have been caught in 'flagrant offense', custody/detention.

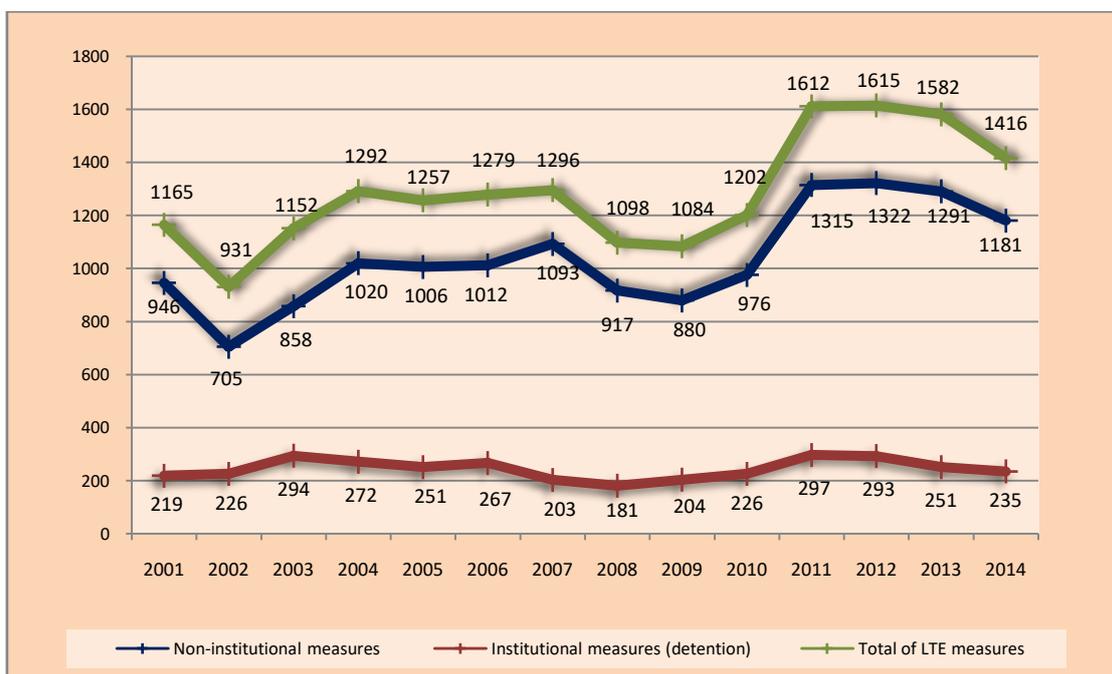
<sup>17</sup> The LTE incorporates the leading principles established by Art. 9 and 10 ICCPR and Rule 13 of the Beijing Rules establishing pre-trial detention as an exception and gives priority to the use of alternative measures. The LTE defines pre-trial detention can only be applied to youth if other precautionary measures provided by the LTE are insufficient or inadequate. This measure is restricted in its enforcement and may only be imposed when there is strong evidence of the offence or offences, when there is the probability of the application of a LTE measure, corresponding to the need of 'education in the law' of the young person and there is the probability that the he/she will abscond or commit further offences. To impose a pre-trial detention measure, these three pre-conditions must be cumulatively fulfilled; if they are no longer applicable the measure has to be terminated. The period of pre-trial detention is limited by the law: it can take up to three months and can be extended for another three months in specially complex cases and where the reasons on which it is based are duly stated (Art. 10 ICCPR; Rule 13 Beijing Rules). Pre-trial detention of juveniles in Portugal can only be applied to juveniles when the offence committed is an offence that carries a maximum prison sentence of more than five years, or when two or more offences have been committed, which are classified as crimes against people that are punishable by a maximum prison sentence in excess of three years. Only if the young person is over 14 years-old can be placed in the closed regime; if is under 14 years-old he/she cannot be placed in the closed regime and the order must be carried out in the semi-open regime. According to Article 5(1)(c) ECHR, the use of pre-trial detention of juveniles must attend the core principle that everyone has the right to liberty and security and no one shall be deprived of his/her liberty save in specific cases and in accordance with a procedure prescriber by law.

<sup>18</sup> Detention in the semiopen regime at educational centres can only be applicable to those who juveniles have committed an offence against people that corresponds to a prison sentence in excess of three years or two or more offences punished by a prison sentence in excess of three years. Detention in closed regime can only be applicable to juveniles at the age of 14 or older, who have committed an offence corresponding to a prison sentence of more than eight years or when the committed offences correspond to crimes against people, punished with prison sentences of more than five years. A psychological assessment in forensic context is required before the judicial decision is taken. The minimum length for a custodial measure is six months; the maximum length is up to two years in all the regimes, exceptionally three years in the closed regime for the most serious cases.

provided by the LTE,<sup>19</sup> the most important feature is the increase, over the years, of the work for the benefit of the community (+16.3% from 2010 to 2014) and of the imposition of obligations (-13.4% from 2010 to 2014).<sup>20</sup> The enforcement of educational supervision has suffered more variations (+56.3% from 2010 to 2014), although having always a strong presence in this population through the years in analysis. These alternatives do detention corresponded to a total of 83,4% of the educational interventions managed by the DGRSP by 31 december 2014. The other non-institutional educational measures have a reduced statistical expression.

Figure 1

Educational Guardianship Law (2001-2014): educational measures carried out by the Directorate-General of Reinsertion and Prison Services from the Ministry of Justice (\*)



(\*) The figures refer to the number of measures being enforced at 31<sup>st</sup> December, each year.

Source: *Statistical Indicators*, Directorate-General of Reinsertion and Prison Services (DGRS), Ministry of Justice (2001-2014).

Currently, educational centres have reach to the lowest number ever (151 youth placed by 31 december 2015), but it is difficult to say there is an strong decrease on the use of custodial measures because there is a lack of information about the sentencing process. It is a fact that statistics do not show an increase in the enforcement of depriving liberty measures since 2001. Political options have also led to the closure of custodial facilities (from 14 in 2000 to 6 in 2014), which could have be related to increase in the enforcement of alternatives.

<sup>19</sup> On average, the 16-17 years has been the age group most represented over the years. By September 2010, the 17 years age-group represented 27.1% of the total, the 16 years age group was 26.0%. Regarding the sex distribution, 85.3% were male and 14.5% female. Around 38.6% committed crimes against property, and 24.1% against people. It is relevant that 8.7% of this population was of foreign nationality (DGRS, 2010).

<sup>20</sup> Admonition represented around 63% of the total of educational measures applied in 2001, 41% of the total of 2002, 30% in 2003, 24% in 2004, and 22% in 2005. The figures related to the 2006-2014 are not available.

The Permanent Observatory on Portuguese Justice defends that it is essential to encourage the resurgence of mediation in the juvenile jurisdiction (Santos et al., 2010). The OPJ considers that, despite the convergence with international principles and recommendations on restorative justice, the LTE included the mediation only as a means to suspend the process or as a legal instrument to reach a consensus regarding the decision of the preliminary audience. There are different opinions about the nature of the restorative justice model to adopt in the country. Some intervenient propose the creation of restorative mechanisms outside the judicial system, but most seem to regard this kind of legal instrument mainly or only through judicial proceedings under the competent judicial authority (Santos et al., 2010; Rodrigues & Santos, 2015; Chapman et al., 2015).

## Conclusion

Alternatives to detention within juvenile justice in Portugal are referred to as a legal instrument that has not been adequately and effectively implemented, and more debate and evaluation about is required (Hazel, 2008; Santos et al., 2010; DGRS, 2010; Dünkel, 2014; Rodrigues, 2015). One of the biggest constraints in this discussion is the lack of data on the sentencing process and other essential matters. Official data on the use of liberty-depriving measures are more accessible than those related to alternatives. Therefore, the portrait presented in these pages is incomplete, and it is not possible to undertake a complete evaluation of their implementation.

Besides the recent effects of the political changes on the Portuguese judicial system as a whole,<sup>21</sup> it is also necessary to consider the consequences of the financial and economic crisis affecting the country in recent years (Moore, 2013). An example is the merge of the former Directorate General of Social Reinsertion (DGRS) and the Prison's Service into the new Directorate General of Reinsertion and Prison's Services (DGRSP), which is currently the auxiliary body of the judiciary administration concerning the enforcement of juvenile justice measures. From 1925 to 2012 there was an independent state juvenile justice service, something that no longer exists. Juvenile justice services are now integrated into a state entity that also is in charge of managing the prisons, which could be regarded as quite contradictory when taking into consideration the non-penal nature of the country's youth justice system.

The combination of political options have led to significant staffing cuts and closure of facilities in the justice local services, which are in charge of the enforcement of the non-institutional measures. All over the country the services have being reduced to a minimum, and many of the previous social, educational, employment, health, economic and judicial responses have simply collapsed (Carvalho, 2014, 2015). This means that essential services provided to respond to the needs of the communities in general and of the youth justice in particular have been seriously affected (Moore, 2013).

The lack of research focused on cost-benefits analysis could be also regarded as a limitation (PRI, 2012), and much more should be done regarding the enforcement of alternatives to detention. Moreover, in contrast to what happens in other EU countries,

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<sup>21</sup> Within a recent judicial reform, a new judicial map came into force in Portugal on the 1<sup>st</sup> of September 2014 (Law N.º 62/2013 of 26<sup>th</sup> of August), which provides predicts the existence of competence of specialized sections of Family and Children and Youth Law in all the Courts (articles 28º to 30º, 33º and 39º, LTE) across the country. One year later, it is important to question if they have adequate material and human resources so that the law is properly applied in the appropriate time. This judicial reorganization has suffered serious constraints for a long time due to limitations in the management of the process in face of technical difficulties in computer platforms and systems, which aggravated the situation of having access to accurate and reliable judicial data.

the victims' availability to participate in the mediation process with juveniles has had a significantly reduced statistical expression in Portuguese society (Castela et al., 2005).

Notwithstanding some local programs that have been producing positive outcomes, the enforcement of alternatives measures still presents a significant number of challenges and basic needs. The involvement of more service and providers in general, including NGOs, and increased proactive cooperation between services and professionals, following a teamwork format, are two of the most important needs. Probably the most important obstacle to having a more effective juvenile jurisdiction, which is not restricted to the juvenile justice system but could be regarded as tendency in many other areas of the Portuguese society, is the lack of a community culture intervention (Bolieiro, 2010; Carvalho, 2014), currently exacerbated by the economic crisis.

Nevertheless, in some counties, there are very positive practices, expressing full coordination among entities, professional and the young ones and their families, which should have more public visibility, in order to promote and encourage a broader implementation of this kind of initiative.

The need to improve juvenile justice practices in Portugal requires a political strategy focused on evidence-based research that, if it exists, tends to not being publically discussed in the country. Juvenile justice issues continue to be regarded by many of the policy makers and groups of the Portuguese population as a 'minor' subject, even more 'minor' in a time of economic crisis and rising social cleavages. Furthermore, individual and collective rights have been politically devaluated and affected in the recent years which has been directly reflected in the implementation of a 'child rights perspective' in all the national policies related to childhood and youth. What is most needed is to determine the conditions required for the full and effective implementation of the law.

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