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Minor rights

Access to justice for children at risk of social exclusion

Save the Children
Italia ONLUS

This report is edited by

Antonella Inverno

Luca Bicocchi

Enrica Rigo

Who supervised the research

The single chapters are written by

Irene Claro

Laura Lavorato

Mariavittoria Catanzariti

Poulou Stamatina

Special thanks to

Linda Caroline Wilkinson, Emerson Xn; Manfredi Marchetti,
José Mirabal Gallego-Díaz, Sofia Konstantellia, Francesca Sangermano,
Francisco Calderon, Silvia Taviani, María Rosa Blanco, Fani Stathoulopoulou.

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Elisa, Anastasia, Eva, Omar, Serhasan, Mousé, Johanna, Aaron, Seheran

Save the Children
Italia ONLUS

Save the Children Italia Onlus
Via Volturno 58-00185 Roma
tel + 39 06 4807001
fax + 39 06 48070039
info@savethechildren.it

www.savethechildren.it

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Introduction

The Project Minor Rights* - Access to justice for children at risk of social exclusion, funded by the European Commission, DG Justice, was conducted by Save the Children Italia (project coordinator) together with the Department of Philosophy and Law at Roma Tre University, l'Associazione Studi Giuridici sull'Immigrazione (ASGI), the European Public Law Organization (EPLO) in Athens and l'Instituto Universitario de Estudios sobre Migraciones (IUEM) of Universidad Pontificia Comillas in Madrid.

The project lasted 18 months and provided the following activities:

- Desk research on national and international legislation covering access to justice for children at risk of social exclusion in Italy, Greece, Spain, Sweden and the United Kingdom, conducted by Roma Tre University.
- Three field researches that, starting from the desk research results, performed an analysis of the real application of the legislation in Italy, Spain and Greece, carried out by ASGI, IUEM and EPLO respectively.
- Three international meetings of national and European experts held in Rome, Madrid and Athens, with the aim to analyse the desk and field researches results and to work out shared recommendations for National and European institutions.
- Three ateliers with children in Rome, Madrid and Athens with the scope to collect their point of view on the issue. They were coordinated by Save the Children Italy and held by IUEN and EPLO respectively.

This publication includes reports for all the above mentioned activities. It also contains a video clip of the rap song "They shut us up and put us down", produced by children as a result of the ateliers and a backstage video.

The issue of children's access to justice and particularly those at risk of social exclusion** is a central theme in the most recent European debate regarding the protection of children's rights. The international community is paying increasing attention to the development of practical principles, standards and strategies addressing children's roles and status within the justice system, both as victims and/or witnesses and as offenders.

* Save the Children encourages the use of the word 'child' to refer to everyone under the age of 18, as established by international legislation and, in particular, by the United Nations Convention on the Rights of the Child (UNCRC). The project title therefore refers to the fact that children's rights risk becoming "minor" rights in the sense of rights that are not fully applied within a justice system in which, only too often, children are seen as objects rather than subjects of rights.

** According to the EU Commission COM(2011) 60, the factors which indicate situations at risk of social exclusion are: poverty, disability, violence, sexual exploitation and trafficking, asylum seeking, no parental custody, cyber-bullying, child labour, involvement in armed conflicts and child sex tourism. See the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 15.2.2011 COM(2011) 60 final, p.8

In practice, there is a discrepancy between the rights secured for children on paper and the real situation. Children still face a serious number of obstacles when encountering the justice system, for economic, social, cultural and legal reasons. This is often due to lack of correct information, to lack of national provisions concretely assuring the full participation of children in judicial and administrative proceedings and to other reasons that will be further explained below.

This comprehensive study shows there is still a long road to travel to obtain the principles of "child-friendly justice"*** are truly implemented. Save the Children and its partners hope to give a useful contribution to that journey, ensuring that the justice system becomes truly child-friendly, thus preventing children who come into contact with justice from feeling that "they shut us up and put us down".

Raffaela Milano
Save the Children Italy-Europe Programmes
Head of Division

*** "Child-friendly justice" refers to justice systems which guarantee respect for and effective implementation of all children's rights at the highest attainable level. See Council of Europe "Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice", November 2010.

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Part One

Desk Review

Introduction

This report deals with access to justice for children at risk of social exclusion. To quote one of the many definitions of social exclusion, it could be said that: "social exclusion aims not so much to be a general descriptor of social life as to offer a social diagnosis"[1]. This broad definition is useful for an analysis of the legislation since it specifically links the problem of social exclusion to social policies and to the remedies offered by legal systems. This desk review starts from the assumption that the remedies offered by legal systems define the extent of social exclusion. However, if it is true that social exclusion stems from the lack of specific measures provided by legal systems, it is also true that a normative definition of social exclusion is only feasible when specific protection measures are in force. Hence, with reference to access to justice, we are accustomed to linking social exclusion with the obstacles encountered in access to justice, in so far as the general principle of fair trial is universally conceded. Conversely, if fundamental rights were not enforced broadly, we would be unable to identify the substantial and evaluative indicators of social exclusion affecting these rights. In short, the point at issue is that social exclusion itself is a politically neutral concept which becomes useful if social systems consider it a common point of reference for defining fundamental rights. At the same time, this is only possible if legal systems provide a normative definition of social exclusion with regard to legal remedies.

The policy of combating social exclusion has recently been improved with legal references since the Treaty on European Union firmly states the goal of 'raising of the standard of living and quality of life'. The Lisbon programme aims to limit the phenomenon of social exclusion by focusing on the following points[2]:

- Improving access and participation
- Preventing the risk of social exclusion
- Helping the most vulnerable
- Integrating different bodies into the programme

Thus, in the post–Lisbon Treaty environment, social exclusion has become a framework for understanding, in which social and economic issues are treated as policy responses[3].

There is a stronger perception of this issue when applied to children's rights. Firstly, this is because the legal assumption that children possess their own rights is relatively recent and secondly, because the problem of the legal incapacity of children and the consequent need for them to be represented for most of the procedures affecting them, is seen as an intrinsic obstacle to their access to justice. Therefore, even at international level, a general clause frequently used to link the protection of children's rights with the clause of non-discrimination is the protection of the **best interests of the child** encompassing the concept of living together in a space that respects diversity and protects **the most vulnerable**[4].

In 2004 the European Commission defined social exclusion as "a process whereby certain individuals are pushed to the edge of society and prevented from participating fully by virtue of their poverty, or lack of basic skills and life long learning opportunities, or as a result of discrimination. This distances them from

[1] Mary Daly, *Social Exclusion as Concept and Policy Template in the European Union, Center for European Studies Working Paper Series #135,* School of Sociology and Social Policy Queen's University, Belfast, p.12, 2006, accessed on http://www.ces.fas.harvard.edu/publications/docs/pdfs/Daly135.pdf

[2] *See* Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, Official Journal of the European Union, 2007/C 306/01, Art. 2

[3] See John Micklewright, *Social Exclusion and Children: A European view for a US Debate,* Centre for Analysis of Social Exclusion, 2002

[4] *See* the cooperation plan between the European Commission and the Council of Europe which led to the setting up in 2009 of the Stockholm Programme.

job, income and education and training opportunities, as well as social and community networks and activities. They have little access to power and decision-making bodies and thus feel powerless and unable to take control over the decisions that affect their day to day lives"[5]. This might be read as an institutional definition linking social needs to the response offered by decision-making systems. Thus, subsequent to the Lisbon Treaty, the idea of mutual dependence between economic and social policy has been promoted in order to grant individuals at risk of social exclusion their fundamental rights.

Even before Lisbon, in November 2008, the Council of Europe adopted the strategy 'Building a Europe for and with Children 2009-2011'. The main goals of this strategy are to promote children's rights and protect children from violence. Resolution no. 2 on child-friendly justice adopted by the European Ministers of Justice preceded this initiative, its aim being to appoint the competent body of the Committee of Ministers (four inter-governmental committees) at the Council of Europe to prepare the guidelines on child-friendly justice. These guidelines were laid down in November 2010 with the intention of assisting member states to ensure that children have ready access to justice, and to enhance the treatment of children whenever and for whatever reason they come into contact with civil, administrative or criminal justice authorities.

This report not only provides an analysis of the problem of access to justice for children at risk of social exclusion, but it also pays particular attention to the implementation of the 1996 European Convention on the Exercise of Children's Rights (Strasbourg Convention) and the child-friendly justice guidelines in Italy, Greece, Spain, Sweden and the United Kingdom. The intention of the 1996 Strasbourg Convention in relation to the problem of social exclusion was to set a broad set of normative parameters with which standards of protection must comply. The Strasbourg Convention contains a core of general clauses, implemented by many countries but also rooted in the cultural patterns of most European states, such as the *rule of law*, the general principle behind the fair trial, the assessment of *best interests,* defining the notion of *sufficient understanding* and the principle of *non-discrimination*. These clauses have been improved on and broadened by the European child-friendly justice guidelines, and now social exclusion might be interpreted as an obstacle to achieving this common framework.

This research will compare the implementation by national governments of the principles relating to children's access to justice as defined by the *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice (*adopted on 17 November 2010) with particular attention paid to the most vulnerable categories of children defined by national legal provisions as at risk of social exclusion. In particular, the research analyses the implementation of the principle of **participation** (including the **right to legal counsel and representation** and **the right to be heard and to express views**), the principle of the **best interests of the child**, the **rule of law** principle and non-judicial protection of rights, summed up as **access to alternative measures** in the five countries being examined. The findings described in this report paint a picture of some categories of children at risk of social exclusion in terms of access to justice, according to the comparative legal data from these countries. They are to be understood as partial rather than definitive since the report does not seek to compare domestic legal institutions, but rather the implementation of the legal principles affecting such domestic institutions.

[5] See The Joint Report on Social Inclusion 2004, accessed on http://ec.europa.eu/employment_social/soc-prot/soc-incl/joint_rep_en.htm

The research consists of three different parts.

- Part 1: desk review of national and international legislation and ECHR case-law, conducted by the University of Roma Tre.
- Part 2: field research based on the findings from interviews with different territorial bodies and professionals involved in the juvenile justice system, conducted by our Italian (ASGI), Greek (EPLO) and Spanish (IEM) partners.
- Part 3: findings from national workshops conducted with children at risk of social exclusion.

The report produced by Roma Tre University is also divided into three chapters.

- Chapter 1 deals with the implementation of international and European principles relating to the issue of children's access to justice, paying particular attention to the United Nations Convention on the Rights of the Child, the 1996 Strasbourg Convention, the principles of child-friendly justice and case-law from the European Convention on Human Rights.
- Chapter 2 consists of a comparative analysis of the implementation of the principles of child-friendly justice in domestic legislation.
- Chapter 3, after covering international definitions of social exclusion, focuses on specific domestic measures designed to address children at risk of social exclusion and the issue of access to justice. The report shows that the legal definition of categories at risk of social exclusion differs in the five countries.

It is worth noting that the desk review was being worked on before the end of the field research and therefore, in its conclusions it anticipates the summary of the overall findings, which will be specifically described in the section covering the field research. The common aim of both the desk review and the field research is to reflect on the following issues.

a) Cultural differences or similarities in the legal approach to the problem of children's access to justice in the five countries
b) Weaknesses in national legislation
c) Gaps between domestic law and practice
d) Specific features of national approaches

International and European Principles

1. The United Nations Convention on the Rights of the Child (UNCRC) and the standards for children's procedural rights

The promotion of the rights of the child is the response to specific international obligations. All EU Member States and every country in the world, except for the USA and Somalia, have ratified the 1989 United Nations Convention on the Rights of the Child (UNCRC)[6]. By signing up to the Convention, national governments have committed themselves to guaranteeing children's rights and they have to answer for this commitment before the international community.

The Convention consists of 54 articles, covering four key principles: non-discrimination, protection of the best interests of the child, the right to life, survival and development and respect for the views of the child. Moreover, since 2006 the UNCRC has been used as the official point of reference for strengthening the measures to protect and promote the human rights of the child in the context of internal and external European policies[7]. Particularly relevant in this regard, is the EU Commission's Communication "Towards an EU Strategy on the Rights of the Child"[8] which gives effect to the request by the Council of Europe for the member states *"to take necessary measures to rapidly and significantly reduce child poverty, giving all children equal opportunities, regardless of their social background*". This reminds member states that children's rights form part of the human rights that the EU is obliged to respect under international and European treaties. Despite the EU having no powers with regard to the UN definition of fundamental rights, the EU must respect these fundamental rights in whatever action it takes in accordance with its own powers. The UN convention's goals have also been transposed into the 2000 EU Charter of Fundamental Rights. In line with this action, the EU Commission adopted, on October 2010, the Strategy[9] for the implementation of the Charter of Fundamental Rights. The strategy "requires the Commission to ensure from an early stage, by means of a "**fundamental rights check**", that its legislative proposals are always in full compliance with the fundamental rights guaranteed by the Charter"[10]. In this sense, protection of children's rights, which is enshrined in Article 24 of the Charter of Fundamental Rights, entails achieving the goals of the UN Commission by monitoring the conformity of the charter with draft legislative action.

Our research will focus on the procedural rights of children in terms of their access to justice. Children may be involved in judicial proceedings in a number of situations, for example, following their parents' divorce or disputes over custody, if they commit offences, when they are witnesses or victims of crimes, or when they seek asylum and in such situations, they often find themselves in a non-child-friendly environment in which they are disadvantaged by restriction of their rights.

Children's procedural rights are protected under the terms of Article 12 of the UNCRC, which will be extensively examined in the second chapter of this report. This article provides for children of **all ages** and **capacities** to be able to express

[6] Available at http://www2.ohchr.org/english/law/crc.htm.

[7] Communication from the Commission: Towards an EU Strategy on the Rights of the Child, COM(2006) 367 final, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0367:FIN:EN:PDF

[8] Communication from the Commission. Towards an EU Strategy on the Rights of the Child, {SEC(2006) 888}, available at http://eur-lex.europa.eu

[9] Strategy for the effective implementation of the Charter of FundamentalRights by the European Union COM(2010) 573 final, 19 October 2010, available at: http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0573:FIN:EN:PDF

[10] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 15.2.2011 COM(2011) 60 final, available at http://eur-lex.europa.eu/

their views, perspectives and experiences, and a crucial point is that this article places the duty of listening to the child firmly on the adults concerned, rather than the child. Moreover, in the context of the UN Convention, the filter of age and maturity applies, in the first instance, only to the weight to be attached to the child's views, and not to the hearing of those views. In other words, children have the right to be taken seriously, regardless of their capacity. Discrimination is frequently justified by factors closely linked to the child's age or capacity, but, despite this common attitude, the UN Convention maintains that children with poor capacity or very young children must still be considered to have full rights. Children's views should be given due account in the course of judicial proceedings, as provided for by Article 12(2) UNCRC which states that "the child shall be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law".

2. The 1996 European Convention on the Exercise of Children's Rights

Some of the legal instruments provided at international level are intended to give due account to children's interests in legal proceedings. One of the most recent measures implementing the UNCRC was the adoption of the 1996 European Convention on the Exercise of Children's Rights. In 1990, the Parliamentary Assembly of the Council of Europe, in its Recommendation 1121 (1990) on the rights of the child, invited the Committee of Ministers to issue a legal instrument to supplement the United Nations Convention on the Rights of the Child in the exercise of procedural rights. The text sets out the parents' duty of special assistance for children[11].

The European Convention on the Exercise of Children's Rights[12] aims to protect the best interests of the child from a triple perspective[13].

- Promoting children's rights;
- Granting procedural rights to children;
- Facilitating the exercise of these rights by ensuring that children are, themselves or through other persons or bodies, informed and allowed to participate in proceedings affecting them before a judicial authority.

As quoted in Article 1 of the 1996 European Convention, children are considered to be those who have not reached the age of 18 years. Examples of cases to which the 1996 Strasbourg Convention applies are: **custody, residence, access, questions of parentage, legitimacy** (declaration, contestation), **adoption, legal guardianship, administration of children's property, care procedures, removal or restriction of parental responsibilities, protection from cruel and degrading treatment, medical treatment**[14]. This list sets out minimum standards which can be broadened by the member states. According to the explanatory report, the Strasbourg Convention applies to family proceedings but member states are free to extend it to other proceedings[15]. Under Article 1, paragraph 4, member states are required to specify at least three categories of family issues to which the convention applies. Moreover, states are free to consider whether it is desirable to grant children additional procedural rights, such as the right to apply for assistance from an appropriate person of their own choice in order to help them express their

[11] *See* the Explanatory Report to the Convention available at http://conventions.coe.int/Treaty/en/Reports/Html/160.htm

[12] Hereinafter 1996 *Strasbourg Convention*

[13] *See* European Convention on the Exercise of Children's Rights, Art. 1

[14] *See Explanatory Report of the European Convention on the Exercise of Children's Rights, ETS. 160,* Art. 1, § 17, accessed at http://conventions.coe.int/treaty/en/Reports/Html/160.htm

[15] *See* European Convention on the Exercise of Children's Rights. Explanatory Report, accessed on http://www.coe.int/

views, the right to apply themselves, or through other persons or bodies, for the appointment of a separate representative, in appropriate cases a lawyer, the right to appoint their own representative, the right to exercise some or all of the rights of parties to such proceedings.

The countries examined in this research are divided into those who have ratified the 1996 Strasbourg Convention (Italy and Greece), those who have signed and not yet ratified (Spain and Sweden), those who have neither signed nor ratified (United Kingdom).

3. The approach of the European Court of Human Rights

Study of the **decision-making process,** to which the 1996 European Convention refers, is an important step towards a better understanding of children's rights. In this context, an analysis of European Court of Human Rights case-law would seem to be extremely useful for selecting a number of principles that could apply both to the 1996 Convention and the 1950 European Convention on Human Rights (ECHR).

Under Article 6 of the 1996 Convention, the judicial authority must consider whether it has sufficient information at its disposal to make a decision in the best interests of the child, it must ensure that the child has received all relevant information, allow the child to express his or her views and give due weight to the views expressed by the child. The European Court of Human Rights ruled on the broader right to a fair trial, covered by Article 6 of the1950 European Convention on Human Rights, in the cases *T. v. United Kingdom* and *V. v. United Kingdom*, with regard to the protection of the decision-making process and, among other issues[16], the right of the child to express his or her views. The Court held that "in respect of a young child charged with a grave offence attracting high levels of media and public interest, it would be necessary to conduct the hearing in such a way as to reduce as far as possible his or her feelings of intimidation and inhibition"[17]. It is worth noting that, even before the adoption of the 1996 Strasbourg Convention, the European Court of Human Rights was judging cases involving children's rights, and applying the general principles set out in the text of the 1996 Convention[18]. The principal general rights granted to children by the Strasbourg Convention (Article 3) are as follows.

- To receive all relevant information
- To be consulted and express his or her views
- To be informed of the possible consequences of compliance with these views and the possible consequences of any decision.

With regard to these procedural children's rights, one of the main principles underlying the 1996 Convention is the principle of **non-discrimination**. This principle can be considered to operate at different levels. On the first level, it refers to the relationship between children's and adults' rights. To this end, Articles 3 and 4 of the 1996 Strasbourg Convention stress the importance of the principle of children's "sufficient understanding", which enables children to exercise their rights directly without the compulsory assistance of representatives. This means that, for the first time, children are considered capable of participating in proceedings affecting them, rather then being merely the subjects of these

[16] See the full text of Article 6 – Decision-making process (1996 Strasbourg Convention).
In proceedings affecting a child, the judicial authority, before taking a decision, shall:
a) Consider whether it has sufficient information at its disposal in order to take a decision in the best interests of the child and, where necessary, it shall obtain further information, in particular from the holders of parental responsibilities;
b) In a case where the child is considered by internal law as having sufficient understanding:
– Ensure that the child has received all relevant information;
– Consult the child in person in appropriate cases, if necessary privately, itself or through other persons or bodies, in a manner appropriate to his or her understanding, unless this would be manifestly contrary to the best interests of the child;
– Allow the child to express his or her views;
c) Give due weight to the views expressed by the child.

[17] See Case of *V.* v. *United Kingdom*, (Application no. 24888/94), JUDGMENT STRASBOURG, 16 December 1999,§87; see also case of *T.* v. *United Kingdom*, (Application no. 24724/94), JUDGMENT STRASBOURG, 16 December 1999, Violation of Art. 6

[18] The first case regarding children decided by the ECHR is *Tyrer v. U.K.,* 25 April 1978

proceedings. If domestic law has not established a specific age at which to consider children capable of sufficient understanding, the judicial or administrative authority will determine the necessary level of understanding for children to be considered capable of forming and expressing their own views, depending the nature of the case[19]. Although the 1996 European Convention includes a set of general principles, such as the avoidance of undue delay (Article 7) and judges' ability to act on their own initiative without having received a formal application when the welfare of a child is in serious danger (Article 8), the assessment of sufficient understanding is the crucial parameter in the application of some measures of protection. This principle has taken firm root in European Court of Human Rights case-law, in so far as some judgements involving the assessment of sufficient understanding may affect the application of other rights.

As regards effective participation, in the case of *S.C. v. United Kingdom*, the Court held that Article 6 § 1 of the European Convention on Human Rights "does not require that a child on trial for a criminal offence should understand or be capable of understanding every point of law or evidential detail"[20] and that this explains the role of legal representation. It also held that "when the decision is taken to deal with a child, such as the applicant, who risks not being able to participate effectively because of his young age and limited intellectual capacity, by way of criminal proceedings rather than some other form of disposal directed primarily at determining the child's best interests and those of the community, it is essential that he be tried in a specialist tribunal which is able to give full consideration to, and make proper allowance for, the handicaps under which he labours, and adapt its procedure accordingly"[21].

In the case of *Güvec v. Turkey*, the Court held that "effective participation" in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed", continuing that "It also requires that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court"[22]. In determining age, in the case *Hokkanen v. Finland*, the Court held that a 12 year-old girl "had become sufficiently mature for her views to be taken into account and that access should therefore not be accorded against her own wishes"[23].

4. The child-friendly justice guidelines

In order to make the Strasbourg Convention more effective, an Action Plan was adopted at the Warsaw Summit of the Council of Europe in 2005. In November 2008, this plan launched the transversal programme **"Building a Europe for and with children"**, which provides regular guidelines on child-friendly justice, indicating how standards for children can be improved. The 28th Conference of European Ministers of Justice, which took place in Lanzarote in October 2007, worked out an action plan with the adoption of Resolution no. 2 on child-friendly justice by the Ministers of Justice. The resolution's main goal was to "examine the access and the place children have prior to, during and after judicial proceedings"[24], thus providing further child-friendly justice guidelines. Further to this resolution, the Committee of Ministers entrusted the three major inter-governmental committees: the **European Committee on Legal Co-operation** (CDCJ), the **European**

[19] See point36 of the explanatory report.
[20] See the Case of *S.C.* v. *United Kingdom*, (Application no. 60958/00) JUDGEMENT STRASBOURG, 15 June 2004,Violation of Art.6, §35
[21] *Ivi*, § 36
[22] See the Case *Güvec*v. *Turkey*, *(Application no. 70337/01)*JUDGEMENT STRASBOURG, 20 January 2009, final 20/04/2009, §124
[23] See the Case *Hokkanen* v. *Finland*, (Application no. 19823/92) JUDGMENT STRASBOURG, 23 September 1984, violation of art. 8, § 61
[24] Resolution No. 2 on child-friendly justice, 28th Conference of European Ministers of Justice (Lanzarote, Spain, 25-26 October 2007), www.coe.org

Committee on Crime Problems (CDPC), the **Steering Committee for Human Rights** (CDDH) and the **European Commission for the Efficiency of Justice** (CEPEJ), working in partnership with the other competent bodies of the Council of Europe, with the task of preparing European guidelines on child-friendly justice in all spheres of justice: civil, administrative, criminal and in human rights. These guidelines are intended to assist member states in ensuring that children have successful access to justice, and to enhance the treatment of children whenever they come into contact with civil, administrative or criminal justice authorities.

The Council of Europe initially launched the plan in 2008, producing four reports assessing the challenges and the obstacles faced by children in accessing justice at national level in all sectors of the judicial system. These reports were presented and used as a basis for discussion at high-level Council of Europe conferences held under the auspices of the **Swedish** ("Building a Europe for and with the Children - Towards a strategy for 2009-2011"; Stockholm, 8-10 September 2008) **and Spanish** ("The protection of children in European justice systems", Toledo, 12-13 March 2009) chairmanships of the Committee of Ministers. The findings of the reports and the conclusions of the conferences paved the way for drafting the guidelines and provided valuable material for the Group of Specialists on child-friendly justice (CJ-S-CH) which was set up to prepare the 2009-2010 guidelines framed by 17 independent experts[25].

Child-friendly justice applies to all proceedings involving children. It guarantees respect for and the effective implementation of all children's rights at the highest attainable level, giving due consideration to the child's level of maturity and understanding and the circumstances of the case, and bearing in mind the fundamental principles of the guidelines on child-friendly justice adopted in Strasbourg by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies. The main principles that have to be taken into account according to the guidelines[26] are as follows

- **Participation**: the right to be given appropriate ways to access justice and to be consulted and heard in proceedings involving or affecting children should be respected, in addition to the right to be considered a full holder of rights. Children should have the right to their own legal counsel and representation, in their own name, in proceedings where there is, or could be, a conflict of interest between the child and the parents or other involved parties[27].

- **Best interests of the child**: due weight given to children's opinions, liberty and equal treatment, the right to dignity and a comprehensive approach should be guaranteed[28].

- **Dignity**: children should be treated with care, sensitivity, fairness and respect throughout any procedure or case. Torture or inhuman or degrading treatment as punishment is prohibited[29].

- **Protection from discrimination**: The rights of children shall be secured without discrimination on such grounds as sex, race, colour, ethnicity, age, language, religion, political or other opinions, national or social origin, socio-economic background, status of their parents, association with a national minority, property, birth, sexual orientation, gender identity or other status. Specific protection and assistance may need to be granted to **more vulnerable**

[25] Accessed at http: //www.coe.int/

[26] See Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly justice and their explanatory memorandum, Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies) Guidelines and Explanatory memorandum - version edited 31 May 2011, Part. III

[27] See the above-mentioned guidelines § A.

[28] See the above-mentioned guidelines § B.

[29] See the above-mentioned guidelines § C.

children, such as **migrant children**, **refugee and asylum seeking children**, **unaccompanied children**, **children with disabilities**, **homeless and street children**, **Roma children**, and **children in residential institutions**[30].

- **Rule of law**: the rule of law principle should guarantee a minimum age of criminal responsibility not too low and to be determined by law. It should guarantee due process of law, legality and proportionality, presumption of innocence, right to a fair trial, right to legal advice, right to access courts, right to appeal, avoiding undue delay, interviews carried out by trained professionals, audio-visual statements, support to be enjoyed by children before, during and after the proceedings, protection of private and family life (no information or personal data may be made available or published, particularly in the media, with could reveal or indirectly enable disclosure of the child's identity), limited deprivation of liberty.

Domestic law should, where appropriate, facilitate access to court for children who have sufficient understanding of their rights, in addition to taking measures to protect these rights, based on adequate legal advice[31].

5. Access to justice prior to, during and after proceedings

These principles have been selected according to the phases of trials affecting children and the effective extent of their access to justice prior to, during and after judicial proceedings.

As regards child-friendly justice **before** judicial proceedings, the main points framed in the guidelines can be summed up as follows[32].

- Member states' ability to provide alternatives to judicial proceedings, such as mediation, diversion (of judicial mechanisms) and alternative dispute resolution procedures.
- The right of children to be informed [33] in a manner and in a language that is appropriate to their age, before the start of proceedings, about opportunities for recourse to judicial proceedings or alternatives[34] to court proceedings that guarantee the same level of safeguards.

As regards child-friendly justice **during** judicial proceedings, the main goals framed in the guidelines are as follows[35].

- Any obstacles to access to justice at national level should be removed.
- Access to justice should be granted for a period of time after the child has reached the age of 18 years, for specific violations against children regarding civil or family law.
- Children have the right to their own legal counsel and representation[36] in their own name where there is a conflict of interest between their parents and themselves and when their parents are legal offenders[37].
- Judges should hear children when they are deemed to have a sufficient understanding of the matters in question, with means adapted to their comprehension capacity[38].
- When necessary, judges can take provisional, immediately enforceable, decisions in order to protect the best interests of the child.
- Proceedings should be conducted avoiding undue delay.
- Children should have the opportunity to give evidence during proceedings without the presence of the alleged perpetrator.

[30] *See* the above-mentioned guidelines § D (1).
[31] *See* the above-mentioned guidelines § E.
[32] *See* Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly justice and their explanatory memorandum, Part. B (§ 24, 25, 26, 28)
[33] *See* also European Convention on the Exercise of Children's Rights, Art. 6
[34] *See* also European Convention on the Exercise of Children's Rights, Art. 13
[35] *See* Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly justice and their explanatory memorandum, Part. D (§ 37, 43, 44, 52, 53, 64, 65, 69)
[36] *See Explanatory Report,* supra note 13, at Art.2, § c) *representatives* 25. Under the Convention, the term "representative" refers not only to an individual person, such as a lawyer, who has been specifically appointed to act before a judicial authority on behalf of a child but also to a body so appointed such as a child welfare authority. 26. The holders of parental responsibilities may also be considered to be the representatives of a child, within the meaning of Article 2, where they have been specifically appointed to act on his or her behalf before the judicial authority. Consequently, in such cases they will be required to comply with the provisions of Article 10 in relation to the duty of representatives to inform the child, to explain certain matters and to determine his or her views. 27. In those cases where the holders of parental responsibilities have not been specifically appointed, they do not fall within the meaning of the term "representative". However, in order to ensure that a child in these cases is also informed and account taken of his or her views, the judicial authority is given the task, under paragraph *b* of Article 6, to ensure that the child has received all relevant information.
[37] *See* also European Convention on the Exercise of Children's Rights, Art. 10
[38] *See* also European Convention on the Exercise of Children's Rights, Art. 7

- Trained professionals should carry out interviews with children[39].
- Audio-visual statements for children who are victims or witnesses should be encouraged.

After proceedings, child-friendly justice measures should be adopted according to the following criteria[40].

- Particular health care, guidance, support and therapeutic intervention should be granted to children who are victims of neglect, violence, abuse and other crimes.
- National authorities should provide appropriate measures for the execution of judicial decisions without delay.
- Sanctions should be constructive and proportionate to the circumstances of the case.
- Records of children should not be disclosed until they reach the age of 18 years, except for serious offences, or when public safety or the employment of children is concerned.

6. Child-friendly justice and case-law of the European Court of Human Rights (ECHR)

As previously stated, this report focuses, among other issues, on the implementation of the 1996 Strasbourg Convention in five countries: Italy, Greece, Spain, Sweden and the United Kingdom. It has been ratified by Italy and Greece, merely signed by Sweden and Spain and neither ratified nor signed by the United Kingdom. However, it should be noted that the principles of child-friendly justice, actually apply to all Member States of the Council of Europe. One useful method for verifying how child-friendly justice has been adopted in the legal systems of the countries examined, is to consult European Court of Human Rights case-law. The following cases are relevant since they draw on principles arising from the concept of sufficient understanding and the procedural rights of children, according to the articles of the European Convention on Human Rights.

In the case of *Bronda v.* **Italy** (no violation of Art. 8) the Court held that special weight has to be attached to the child's views in order to act in her best interest[41] even when the child, considered to have sufficient understanding, does not wish to join her natural family. The case originated from an application addressed to the Court by the child's grandparents who initially sought to set aside the decision of the national court as regards the adoptability of the child. The European Court denied the violation of the right to the private life of the grandparents and the mother against the right of the child to have her own wishes granted.

In the *Case of S.C. v.* **United Kingdom** (violation of Art. 6)[42] the applicant was a child convicted of robbery and sentenced by the Crown Court to two and half years' detention. The Court of Appeal recognised that he had been denied a fair trial. The European Court held that the right of legal representation of children "not able to participate effectively because of his young age and limited intellectual capacity" should be granted not only through the appointment of a legal representative but also through the assistance of other specialist figures such as interpreters and social workers in a specialist tribunal. Moreover, the Court held it sufficient for children to have a global and not a technical understanding of the course of the proceedings.

[39] See Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, Part. D (§ 64)

[40] See Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, Part. E (§ 76, 80, 81, 83)

[41] See *Application* (40/1997/824/1030) JUDGMENT STRASBOURG 9 June 1998, §62: "In conclusion, while a fair balance has to be struck between S.'s interest in remaining with her foster parents and her natural family's interest in having her to live with them, the Court attaches special weight to the overriding interest of the child, who, now aged fourteen, has always firmly indicated that she does not wish to leave her foster home. In the present case, S.'s interest outweighs that of her grandparents".

[42] See (Application no. 60958/00 JUDGMENT STRASBOURG 15 June 2004 Violation of Art. 6: §29: "[…]He or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able 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 his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence"; §35. "The Court considers that, when the decision is taken to deal with a child, such as the applicant, who risks not being able to participate effectively because of his young age and limited intellectual capacity, by way of criminal proceedings rather than some other form of disposal directed primarily at determining the child's best interests and those of the community, it is essential that he be tried in a specialist tribunal which is able to give full consideration to, and make proper allowance for, the handicaps under which he labours, and adapt its procedure accordingly".

In the *Cases of T.&V. v.* **United Kingdom** (violation of art. 6) the applicants were two ten-year- old boys convicted of the abduction and murder of a two-year-boy. They were given an adult trial without any sort of confidentiality and were sentenced to "Detention During Her Majesty Pleasure" with a "Tariff" set. Until the age of eighteen a child or young person detained during Her Majesty's Pleasure is held at a children's home or other institution providing facilities appropriate to her/his age. At the age of eighteen, the detainee becomes liable for transfer to a Young Offenders' Institution and, at the age of twenty-one, to detention in the same institution as an adult sentenced to life imprisonment for murder. As was stated in the judgement in §35: "At the time of the applicant's conviction the effect of the sentence of detention during Her Majesty's Pleasure was that the child or young person was detained for an indeterminate period, the duration of which was wholly within the discretion of the Home Secretary". Moreover, the tariff which is an alternative to life imprisonment, provides an exception for children found guilty and sentenced to "Her Majesty's pleasure" who can make representations to the Secretary of State in order to be given a shorter period of detention. However this not happen because the Home Secretary acted with some delay.

More specifically, in the case of *T.* v. **United Kingdom**, the European Court confirmed the notion of the discretional power of judges in assessing the best interests of the child, holding that "where appropriate in view of the age and other characteristics of the child and the circumstances surrounding the criminal proceedings, this general interest could be satisfied by a modified procedure providing for selected attendance rights and judicious reporting"[43]. In the case of *V. v.* **United Kingdom** (violation of Art. 6) the Court held that "in respect of a young child charged with a grave offence attracting high levels of media and public interest, it would be necessary to conduct the hearing in such a way as to reduce as far as possible his or her feelings of intimidation and inhibition"[44].

The case of *Paulsen-Medalen and Svensson v.* **Sweden** (violation of Art. 6) concerned the length of proceedings relating to restrictions on a mother's access to her two sons who had been taken into public care, and the alleged impossibility for the father of one of them to have his right of access to his son determined by a court. In this case the Court held that the length of proceedings should be assessed according to the complexity of the case: "In cases concerning restrictions on access between a parent and a child taken into public care, the nature of the interests at stake for the applicant and the serious and irreversible consequences which the taking into care may have on his or her enjoyment of the right to respect for family life require the authorities to act with exceptional diligence in ensuring progress of the proceedings"[45]. This principle complies with Article 8 of the 1996 Strasbourg Convention, which provides for the judicial authority to act on its own initiative if necessary.

The right to privacy, and more specifically, to family life, was reasserted in two cases involving **Spain**, the *Case of Tapia Gasca* and *D.V. v.* **Spain**[46] and *Iglesias Gil and A. U. I* **v. Spain**[47]. In these cases the court addressed the problem of child abduction and the positive obligations of the State to protect family life under Article 8. *Tapia Gasca and D.V. v.* **Spain** is a case of abduction in Morocco of a child by her father. The man had been denied parental authority by the Spanish courts because of his ill-treatment of the child. Following the abduction, the mother did not see the child again and, when judgement was pronounced before the European Court, she still did not know if her child was alive. The Court held

[43] See (Application no. 24724/94) JUDGMENT STRASBOURG 16 December 1999 Violation of Art. 6, §85

[44] See JUDGMENT STRASBOURG 16 December 1999, §87

[45] See CASE OF PAULSEN-MEDALEN AND SVENSSON v. SWEDEN (149/1996/770/967) ARRÊT/JUDGMENT STRASBOURG 19 February 1998

[46] Application n. 20272/06, Judgement 28/06/2010

[47] Application n. 56673/00, Judgement 29/04/2003

in § 103 that the Hague Convention contains specific measures in Articles 3, 7, 12 and 13 on the immediate return of children wrongfully abducted in a foreign country. Despite Morocco not having ratified the convention, the Spanish-Moroccan authorities, under Articles 4, 7 and 8, had the duty to cooperate in order to secure the immediate return of children.

Similarly, the case *Iglesias Gil and A.U.I. v.* **Spain** arose from a three-year abduction of a child by his father after he was awarded only the right to access, with custody being given to the mother. In this case the Court held in §56 that "the main issue in the present case is the transfer overseas and illicit non-return of the first applicant's child. The Court must accordingly examine whether, in the light of their international obligations arising in particular under the Hague Convention, the domestic authorities made adequate and effective efforts to secure compliance with the first applicant's right to the return of her child and the child's right to be reunited with its mother […]. In that connection, the Court notes that, under Article 96 § 1 of the Constitution, international treaties that have been validly ratified form part of the domestic legal order. Spain has been a Contracting Party to the Hague Convention since 16 June 1987. The United States, the country to which the child was taken by his father, have also ratified it. Furthermore, by virtue of Institutional Law no. 1/1996 of 15 January 1996 on the legal protection of children, the national authorities are under a duty to guarantee compliance with the rights of children in accordance with international treaties that have been ratified by Spain".

The following cases involving **Greece** are of interest because they address the issue of social exclusion. The case *Bubullima v.* **Greece**[48] concerns the inability of the Greek courts to adjudicate within a short time on the application for release of a child of Albanian nationality who had been detained with a view to deportation and the lack of an effective remedy whereby he could challenge the lawfulness of his detention. The case of *Stefanou v.* **Greece**[49] deals with acts of violence inflicted on the child by the police (Art. 3 ECHR) and the length of the criminal proceedings relating to the alleged acts of violence (Art. 6 § 1 ECHR). In the first case the uncle had parental authority over his nephew since his parents were living in Albania. The child was arrested until the deportation procedure was completed, because he did not have a valid residence permit for Greece and because the person with parental authority was the uncle, not the parents. The Court held that there had been was a violation of Article 5, §4 of the European Convention because the child was denied his right to make a claim before a court for a decision on the legality of the detention. The second case concerns a child considered guilty of theft by seven police officers who ill-treated him in order to make him confess the crime. The Court held that in this case there has been a violation of Article 3, for inhuman and degrading treatment, and a violation of Article 6, for the unreasonable length of the proceeding.

As is clear from these brief outlines, the ECHR was implementing the principles of child- friendly justice even before these came into force. This highlights two different methods adopted to implement children's rights: on the one hand, the legally binding tools provided by the ECHR which obliges Member States to respect such rights, even after violation; on the other hand, the guidelines providing a possible instrument for judicial authorities, capable of anticipating the protection measures introduced at national level.

[48] Application n. 41533/08, Judgement 29 October 2010

[49] Application n. 2954/07, Judgement 22 April 2010

7. A fundamental common principle: the right to non-discrimination

Both the **1996 Strasbourg Convention** and the **child-friendly justice guidelines** require children's opinions to be taken into serious account and be given due respect. In this context, the right to a fair trial has to be granted to children in order for them to avoid discrimination. According to this framework and with more extensive reference to the chapter on social exclusion, section D (1) of the guidelines, we can now consider different categories of **"social vulnerability"** which could fit into the broader picture of protection from discrimination.

The categories of discrimination, based on the summary report for the guidelines are as follows.[50]

- Sex
- Race
- Colour or ethnic background
- Age
- Language
- Religion
- Political and other opinion
- National or social origin
- Socio-economic background
- Status of their parents
- Association with a national minority
- Property
- Birth
- Sexual orientation
- Gender identity or other status

More broadly, the Committee on the Rights of the Child has linked the right to non-discrimination to the problem of social exclusion. While this right refers predominantly to judicial proceedings governing matters of residence and contact following separation or divorce, it may also include such alternative measures as mediation and arbitration. This legal framework therefore clearly states that children, even when they do not belong to the specific categories, are permanently at risk of social exclusion. On this assumption, the child-friendly justice guidelines apply more to cases of potential social exclusion in the context of specific examples of decisions affecting children[51]:

- If a child wants to apply to live or study in a country other than the one in which s/he was born.
- If a child is being forced to leave the country in which s/he was born.
- If a child is being forced to return to the country in which s/he was born.

A specific point which relates to the work of the UN Commission, is the focus on migrant children and their lack of understanding of the process and, secondly, the issue of their protection before the courts. As the EU Report on unaccompanied children[52] shows, in *"Procedures at first encounter and standard of protection"*, "EU legislation does not provide for the appointment of a representative from the moment an unaccompanied child is detected by the authorities, namely before the relevant instruments are triggered. Representation is only explicitly stipulated for asylum applicants. Although different directives – such as the Return Directive, the Temporary Protection Directive, the Directive on Victims of trafficking in human

[50] See Part D (1), Protection from Discrimination, Draft Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly justice and its explanatory memorandum, CDCJ (2010) 35, accessed at www.coe.org

[51] See the report of the Council of Europe consultation with children on child-friendly justice as regards the matter of immigration, Ursula *KILKELLY, LISTENING TO CHILDREN ABOUT JUSTICE: REPORT OF THE COUNCIL OF EUROPE CONSULTATION WITH CHILDREN ON CHILD-FRIENDLY JUSTICE*, 56, October 2010

[52] *Action Plan on Unaccompanied Children 2010-2014*, COM(2010)213 final, accessed at http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0213:FIN:EN:PDF

beings and relevant international instruments - have provided important safeguards for unaccompanied children, a margin for interpretation is left to Member States. Moreover, no common understanding exists on the powers, the qualification and the role of representatives. Unaccompanied children should be informed of their rights and have access to complaint and monitoring mechanisms in place"[53].

These preliminary notes show that the concept of social vulnerability is considered an over-arching issue in international instruments affecting children's rights and therefore, the child-friendly justice guidelines aim to direct the orientation of judicial authorities in applying children's rights, in order to lower this risk. In the next chapter we will analyse the impact of child-friendly justice on specific rights.

[53] *See Action Plan on Unaccompanied Children,* supra note 7 at 9

Comparative Analysis: national implementation of the child-friendly justice principles

1. Introduction

The child-friendly justice guidelines cover the four most significant principles in child protection[54]. These principles, which are intended to be incorporated into national law, are as follows.

- The best interests of the child
- The rule of law
- The right to participation
- Access to alternative measures.

The "best interests of the child" and the "rule of law" are basic principles, which are linked to the protection of other fundamental rights and whose implementation relates to all aspects of children's rights, in that they apply to all proceedings affecting children. Conversely, the "right to participation" and "access to alternative measures" are related to specific aspects of the proceedings.

There follows a brief outline of these principles, as commonly described and interpreted at international level. Before proceeding with this however, there is one caveat. Any comparative analysis, which starts from broad principles and concepts, rather than looking first at the operational rules, risks giving a vague and even confusing picture of the legal phenomena involved. This is because every principle and category is understood and constructed in a different way within the various legal systems. As pointed out by comparative law scholars[55], this approach can lead to descriptions of a legal framework which may never be coherently transposed into the operational rules. This problem is particularly relevant to this research because the principles in question are very broad and general in scope, and they may well be implemented differently in the various legal proceedings. Secondly, they are at times overlapping because some of them necessarily imply the application of the others. Therefore, in conducting this research we have tried to adopt a different method and take a functional approach. We looked first at the social problems and the normative solutions provided within each country, after which we described these solutions in the context of the general principles. While the principles themselves are neither specific nor do they offer a comprehensive solution to the entire problem of children's access to justice, they can be seen as a useful starting point for organising the description of national solutions and for illustrating the legal issues involved in child protection.

[54] *See Child–friendly Justice Guidelines*, adopted on *17 November 2010 at the 1098th meeting of the Ministers' Deputies*, sections A, B and E, accessed on *https://wcd.coe.int*

[55] SeeKonrad Zweigert–HeinKötz, *Introduzione al diritto comparato, I*, Milano, 1998, p.30

2. The best interest of the child

In order to define "best interests" it is necessary to consider different patterns. This research aims to look at the implementation of best interests within domestic jurisdictions. This is why it is necessary to add a definition of best interests in the context of child-friendly justice, which means considering best interests as a general standard which informs all matters involving or affecting children. This broad definition does not help judicial authorities in practice when they are assessing when the best interests are being served. Article 3 of the Convention on the Rights of the Child sets out the best interests of the child as a fundamental interpretative legal principle, developed to limit adults' authority over children[56]. This assumption is based on the recognition that an adult can act on behalf of the child to protect his or her interests.

The "best interest of the child" principle can be considered in two ways: both as a rule of procedure and as a substantive right of the child. This means that best interest need to be assessed by decision-makers on the basis of rules to be applied during the proceedings. Furthermore, it means that the best interests principle is not a substantive right in its strict sense, but rather a double-bind principle of interpretation, being used to control the state's obligations and to assist decision-makers in making the most appropriate decision. On these grounds, the definition which seems more consistent with our goals, is "the deliberation that courts undertake when deciding what type of services, actions and orders will best serve a child and who is best suited to taking care of the child"[57]. In this light, the best interests of the child principle is linked to other rights guaranteed to the child by the UN Convention, such as the right to live with his or her parents (Article 9), the right to be brought up by both parents (Article18) and the right to be given the opportunity for alternative care (Article 20). The very notion of best interests displays a lack of certainty, but this is an inherent characteristic of the case-by-case approach. For example, the child-friendly justice guidelines underline how narrow the assessment of the best interests of the child are in matters of juvenile justice compared to family law.

In conclusion, the best interests principle imposes a three-fold obligation.

a) The obligation for governments and public and private bodies to ascertain the impact on children of their actions, giving proper priority to children and building child-friendly societies.
b) An active obligation for states to ensure the necessary protection and care for the child's well-being in all circumstances, while respecting the rights and duties of parents.
c) The obligation for competent bodies to establish evaluative standards for all institutions, services and facilities for children.
d) The state's obligation to ensure that these standards are applied[58].

3. The principle of participation

The principle of participation stems originally from Article 12 of the United Nations Convention on the Rights of the Child, which is considered the most important article in the Convention[59]. It establishes the right of every child freely to express her or his views.

[56] *See UNHCR Guidelines on Formal Determination of the Best Interests of the Child,* May 2006, p. 37, accessed at http://www.iin.oea.org

[57] *See CRC on best interest of the child* comment on Art. 3, accessed at http://www.kinderrechte.gv.at

[58] See Stockholm Conference, Building a Europe for and with children: towards a strategy for 2009 -2011, Draft European Policy Guidelines to Integrated Strategies against Violence, accessed to www.coe.int

[59] It is useful to reproduce Article 12 in its entirety.
1) States Parties shall assure the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child".
2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law".

The Committee on the Rights of the Child considered Article 12 one of the four general principles of the Convention, together with the right to non-discrimination, the right to life and development and the primary consideration of the child's best interests[60]. Therefore, it should be interpreted and applied according to the interpretation of the other rights. Indeed, the right to be heard is one of the most significant pointers to the way in which procedural rights are adapted to comply with the "best interests of the child" clause. On the basis of this, judges and lawyers are expected to consider when children can effectively be heard, i.e. in any judicial or administrative proceedings affecting them. The innovative feature of this provision is that the filter of age and maturity applies only to the child's views as expressed rather than to hearing those views in the first place, highlighting the fact that age alone cannot determine the relevance of a child's views[61]. In this perspective, according to CRC comment no. 12 "States parties should presume that a child has the capacity to form her or his own views and recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity". It is not necessary for the child to have a complete knowledge of all aspects of the matter affecting her or him, but s/he should have a reasonable understanding that is sufficient to enable her/him to form her or his own views on the matter. Furthermore, it is not up to the child to prove his or her capacity to express those own views, since the state in question has to presume it. Consequently, the right "freely" to express his or her own views means that the child must not be manipulated or subjected to undue influence[62].

The final version of the text of the UN Convention, which was passed, refers to "all matters" affecting the child, and it does not contain a list that limits consideration of a child's views, a choice whose aim is not to deny children their right to be heard. Signatory states are obliged to ensure that this right is protected, despite the possible difficulties involved in understanding and respecting the children's views, particularly in the case of children at risk of social exclusion. The right to participation also includes the child's right to express his or her views[63]. This principle was affirmed by the 1996 European Convention on the Exercise of Children's Rights, which we refer to in Chapter I. However, the child also has the right not to exercise this right, it being a choice, rather than an obligation[64]. It follows therefore, that children have the right to be informed whether or not their views have influenced the outcome of the proceeding.

This right can be exercised either directly or through representatives according to the national procedural systems. Wherever possible, children should be given the right to be heard directly, but in many cases representatives acquainted with the various aspects of the proceedings affecting children should assist them. Thus the child must be informed of the option either to communicate directly or through a representative. These representatives can be parents, lawyers (right to legal counsel, inter alia when a conflict of interests could arise) or social workers. Furthermore, the child-friendly justice guidelines provide for children to have a right to be represented independently from their parents when the latter are the alleged offenders. Article 12 is also linked to all other provisions that cannot be implemented without due representation, such as the right to information and the right to freedom of expression. Furthermore, all proceedings in which children can be heard should be supported by preparation with the aid of a trained adult. They must be transparent and informative, voluntary, respectful of children's views, relevant, inclusive and child-friendly.

[60] *See* CRC, GENERAL COMMENT No. 12 (2009), The right of the child to be heard, 20 July 2009, p. 5, accessed at http://www.unhcr.org/refworld/docid/4ae562c52.html

[61] *Ivi*, § 29

[62] *See* CRC United Nations, *The right of the child to be heard*, general comment n.12 /2009, accessed at http://www.unhcr.org

[63] *See* supra note 1 para. 44-49

[64] *See* CRC, § 16: "The child, however, has the right not to exercise this right. Expressing views is a choice for the child, not an obligation. States parties have to ensure that the child receives all necessary information and advice to make a decision in favour of her or his best interests.

4. The rule of law

The rule of law is a broad principle which includes a number of minimal standards for the protection of rights and its definition is not at all precise, particularly in the field of children's rights. Indeed, the only way of establishing if the rule of law principle is being effectively implemented, is to determine if its implementation can be demonstrated through the implementation of other fundamental rights[65]. Indeed, it is easier to define the notion of "rule of law" in the negative sense, for example, when this is shown to be lacking by weaknesses in the justice system as this affects children. This negative definition can stem from such situations as long delays, lack of available and affordable legal representation, abuse of authority and powers, weak enforcement of laws and implementation of orders and decrees, gender bias and other barriers in the law and in legal systems, lack of information about supposed legal provisions, what prevails in practice, and limited general knowledge about rights, all of which situations more clearly demonstrate shortcomings in the rule of law.

However, the child-friendly justice guidelines succeed in illustrating the rule of law principle by identifying the following factors that should apply to all judicial and non-judicial proceedings[66].

- Right to information
- Avoiding undue delay
- Use of an appropriate language
- Principles of legality and proportionality
- Presumption of innocence
- Right to a fair trial
- Right to legal advice
- Right to access to courts
- Right to appeal
- Protection of private life

On the basis of these factors judicial authorities may, when necessary, make provisional decisions, preliminary judgements or decisions that are immediately enforceable if they are in the best interests of the child.

As regard children's access to justice, the above factors can be extended to apply to the following issues: building a knowledge-base on children in justice systems, raising awareness on the rights of children going through justice systems as victims, witnesses or offenders, promoting restorative justice, diversion and alternatives to deprivation of liberty and improving informal mechanisms for dispute resolution

5. Alternative measures

The child-friendly justice guidelines also aim to facilitate children's access to non-judicial institutions. Their role is both to support effective access to the courts and to promote independent complaints mechanisms. This option forms part of the child-friendly mechanisms before judicial proceedings, as provided for by paragraphs 24, 25 and 26 of the guidelines[67], which aim to make the process less intimidating and more in tune with children's own feelings. Even the earlier 1996 Strasbourg Convention also stated, in Article 13, that "in order to prevent or resolve disputes or to avoid proceedings before a judicial authority affecting children, parties shall

[65] See above note 1, section E

[66] See above note 1 in par. 50 -53

[67] See the following paragraphs: "24. Alternatives to judicial proceedings such as mediation, diversion (of judicial mechanisms) and alternative dispute resolution should be encouraged whenever these may best serve the child's best interests. The preliminary use of such alternatives should not be used as an obstacle to the child's access to justice. 25. Children should be thoroughly informed and consulted on the opportunity to have recourse to either a court proceeding or alternatives outside court settings. This information should also explain the possible consequences of each option. Based on adequate information, both legal and otherwise, a choice should be available to use either court procedures or alternatives for these proceedings whenever they exist. Children should be given the opportunity to obtain legal advice and other assistance in determining the appropriateness and desirability of the proposed alternatives. In making this decision, the views of the child should be taken into account. 26. Alternatives to court proceedings should guarantee an equivalent level of legal safeguards. Respect for children's rights as described in these guidelines and in all relevant legal instruments on the rights of the child should be guaranteed to the same extent in both in-court and out-of-court proceedings".

encourage the provision of mediation or other processes to resolve disputes and the use of such processes to reach agreement in appropriate cases to be determined by parties". This concept is made more explicit in the explanatory report, which states in §65 that "In appropriate cases to be determined by internal law, it may be necessary to promote the friendly settlement of disputes concerning the exercise of children's rights. Mediation should be possible independently of any intervention by a judicial authority, before and during proceedings, or even afterwards if a conflict arises while the decision taken by the judicial authority is being enforced. The other processes referred to in this article are informal processes to resolve disputes which enable the persons concerned to reach an agreement by negotiation".

The aim of alternative measures is to prevent children from being disadvantaged by the length of judicial procedures, a preventative approach that varies within the practice of different national systems, including through the office of children's ombudsmen. In Sweden, for example, the office of Parliamentary Ombudsman dates back to 1809. The principal function of the ombudsman is to influence the decision-making process and public opinion and setting up the office of ombudsman is one of the measures for implementing the Convention on the Rights of the Child. The ombudsman's decisions may or may not be binding, depending on the different national systems.

6. The aim of a comparative analysis

The principles explained above have been implemented in different ways within the five countries being examined. We will now put forward a few examples of the legal instruments used in the five countries that demonstrate the implementation of these principles. Our comparison is based on the implementation of the principles of child-friendly justice at domestic level, rather than on an analysis of the strict implementation of the 1996 Strasbourg Convention, because the Strasbourg Convention has not been ratified by every country analysed. Moreover, this suggests that the level of child protection is not strictly linked to ratification of the 1996 Strasbourg Convention, but more often involves national policy choices. This approach is feasible because the principles expressed in the child-friendly justice guidelines and those stated by the Strasbourg Convention do not differ. The guidelines can be interpreted as the extension the Convention's goals to cover the overall experience involved in proceedings affecting children, before, during and after, as the guidelines state.

More specifically, as regards the implementation of the 1996 European Convention on the Exercise of Children's Rights (hereinafter the 1996 Strasbourg Convention), we should distinguish between those countries that have ratified the convention, Italy and Greece, those countries that have signed but not ratified it, Spain and Sweden, and those countries that have neither signed nor ratified it, the United Kingdom[68]. Furthermore, ratification of the convention required states to indicate at least three areas to which the convention is to apply, implying that the Strasbourg Convention can be implemented in different areas, depending on each country's individual choice. In so far our analysis is concerned, only Greece and Italy have indicated different areas of application in the instrument of ratification. The government of Greece declared that the categories of family cases before a judicial authority to which the convention is to apply are: adoption cases, cases

[68] See the list of signatures and ratifications on http://conventions.coe.int

concerning the custody of children and communication between parents and children. This is, therefore, an open cross-reference. Italy, in contrast, has chosen a specific cross–reference (which we refer to in §2), by indicating in the instrument of ratification the single articles of the Civil Code to which it is to apply, namely those relating to parental authority and the disclaiming of paternity[69]. The national choices made to implement the 1996 Strasbourg Convention suggest that judges can meet the best interests of the child in their decisions relating to children's right to be represented in the courts in an appropriate way.

Our analysis focuses on the implementation of the four main principles, best interests of the child, principle of participation, rule of law, access to alternative measures, in Italy, Greece, Spain, Sweden and the UK, in which we examined the most frequent changes made in national legislation to implement the fundamental child-friendly justice principles. This is why the analysis was conducted according to the specific situation pertaining in each country and, since implementation standards naturally vary in each country, we will only refer to the areas in which there has been a significant degree of implementation of the principles[70].

In providing some examples of protection of the best interests of the child, we can refer to Italy and Greece in terms of their ratification of the Strasbourg Convention, in so far as this convention is considered the European response to the New York Convention on the best interests of the child. Ratification has improved the quality of the proceedings, taking account of the standards of protection granted by the convention for the issues to be examined further on. However, some other countries have still managed to meet the same standards of protection without ratifying the Convention. Spain for example, which has not ratified, has a specific legal framework for shared custody based on assessment of the child's best interests, which is the same as that in Italy and Greece.

As regards the right of representation, we can again refer to Italy and Greece, especially in the field of the right to a legal representative, but the consideration of age, understanding and maturity is also a familiar theme in the legislation of Greece and the UK. As regards implementation of the rule of law, we can refer to the United Kingdom and Spain. Since the Children and Young Persons Act of 1933, a good level of protection has been afforded children under the age of sixteen during any proceedings, with the attendance of the child's guardian during all the proceedings. Spain, on the other hand, has adopted specific measures to favour the "dejudicialization" of children, entailing shifting the burden of responsibility for their protection.

In matters of the best interests of the child, Spain, the UK and Sweden are much concerned with the problems of juvenile justice, as they affect child offenders. Italy and Greece, in contrast, devote more attention to family cases, although Italy has reformed its Penal Code on matters of child offenders.

For alternative measures, all countries have appointed an ombudsman affiliated to the ENOC (European Network of Ombudspeople for Children)[71], except for Italy, which has a National Ombudsman who is not specifically concerned with children. However, Italy has also adopted various legal measures relating to family mediation, and has recently set up an independent authority called the "Authority for Childhood and Adolescence"

[69] See the list of declarations, reservations and other communications on http://conventions.coe.int

[70] We do not refer, for example, to the right of participation in Spain because no significant data appear either in the legislation or in the field research. See for this CRC, Consideration of reports submitted by states parties under article 44 of the convention, SPAIN, §30: "30. The Committee recommends that the state party continue to strengthen efforts to fully implement article 12 of the Convention and promote due respect for the views of the child at any age in administrative and judicial proceedings, including child custody hearings, immigration cases, and in society at large. The Committee also recommends that the state party promote the participation of children, assist them to effectively exercise this right and ensure that due weight is given to their views in all matters that concern them in the family, school, other settings, the community, national policy formulation and in the implementation and evaluation of plans, programmes and policies. The Committee recommends that the State party take into account the Committee's General Comment no. 12 adopted in 2009 on the right of the child to be heard (CRC/C/CG/12)".

[71] http://www.crin.org/enoc/

7. Italy

In Italy, the principles of the **best interests of the child** and the **right of participation** have been implemented using different kinds of legal tools. Italy ratified the Strasbourg Convention on Children's Access to Justice in 2003, passing Law 77/2003. This law made a "*per relationem* cross-reference" to the Convention, reporting the entire translated text of the Strasbourg Convention. Article 9[72] of the Convention (as stated in Law 77/2003) amended the Civil Code by modifying the following articles: Article 145, on parental authority; Article 244, final paragraph, on disclaiming paternity; Article 247, final paragraph, on the same subject; Articles 264, paragraph 2, and 274 of the Civil Code, on the same subject (declared unconstitutional); Articles 322 and 323, on the child's opposition to certain acts of administration of property enacted by his or her parents. Before ratification of the 1996 Strasbourg Convention, the principle of "**best interests**" had already been significantly strengthened by Law 149/01 (modifying Adoption Law 183/84) providing for children and their parents to be assisted by a lawyer in proceedings affecting property rights. Moreover, the Italian Constitutional Court, in judgment no. 1/2002, stated that Article 336 of the Civil Code[73] was to be interpreted according to the provisions of the UN Convention on the Rights of the Child, with regard to children's right to due process of law. Adoption Law 183/84, amended by Law 149/01, specifically establishes that, according to the **best interests of the child**, the adoption proceeding can be reversed if the child neglect ceases (Article 21). The best interests principle is also to be taken into account during such proceedings by the judge, who can order specific provisions (Article 20). The Public Prosecutor can also present a challenge to the declaration of adoption (Article 17). Furthermore, in order to meet the best interests of needy children, Law 285/1997[74], in addition to other legal instruments which will be described in the third chapter on social exclusion, sets out measures for the promotion of rights and opportunities for children and adolescents.

As regards the **right of participation**, Law 149/2001 provides for specific measures for the right to a legal counsel which forms part of the broader principle. This law also unifies the notions of representation and assistance in the role of the Children's Advocate. Before this Law has passed, appointment of the Children's Advocate, acting as an assistant rather than legal counsel, was at judges' discretion.

Article 37 of Law 149/2001, modifying Article 336 of the Civil Code, lays down some new interpretative parameters.

- A Children's Advocate is to be present in any legal proceedings involving either conflict of interests or parental authority (see also Article 9 of Law. 77/2003).
- Legal assistance is mandatory for children and their parents in adoption proceedings (Articles 8 and 10) and in proceedings dealing with the forfeiture of parental authority.
- A Children's Advocate is to be appointed regardless the child's capacity for sufficient understanding,
- There are three possible forms of representation: the "Curatore Speciale" (legal guardian), the child's public defender in criminal proceedings and the child's attorney for legal assistance in civil and criminal proceedings[75].

The Children's Advocate is appointed to defend children *directly,* as the child's attorney in criminal proceedings (*ad litem* representative) and as "Curatore Speciale" in adoption proceedings (who is both assistant and representative), or *indirectly,* as

[72] Art.9, Strasbourg Convention - Appointment of a representative
1) In proceedings affecting a child where, by internal law, the holders of parental responsibilities are precluded from representing the child as a result of a conflict of interest between them and the child, the judicial authority shall have the power to appoint a special representative for the child in those proceedings.
2) Parties shall consider providing that, in proceedings affecting a child, the judicial authority shall have the power to appoint a separate representative, in appropriate cases a lawyer, to represent the child.

[73] This article regards the provisions on the administration of children's assets.

[74] We will refer to this law in the third chapter

[75] See Gianfranco Dosi, *L'avvocato del minore nei procedimenti civili e penali*, Torino, Giappichelli, 2005, p.43

"Curatore Speciale" providing assistance to children or substituting the parents as their representative when there are conflicts of interests (Article 82 of the Procedural Civil Code)[76]. There are a number of ways in which the Children's Advocate can act in proceedings affecting children. Among the most important are the following.

a) As "Curatore Speciale" (legal guardian)[77] of the child, who has specific powers of representation. S/he can be appointed as *Curatore Speciale ad acta* or *Curatore Speciale ad processum* according to the extent of the power of representation, when a conflict of interests arises between parents and children in relation to property rights or during the separation and divorce proceedings. In neither case is the "Curatore Speciale" an autonomous figure because a lawyer still needs to be appointed. Conversely, a Children's Advocate can be appointed as a "Curatore Speciale", in which s/he is able to act both in procedural defence and representation.
b) As a "child's public defender" in criminal proceedings, as stated in Article 97 of the Civil Procedural Code for children and parents without economic means. Other provisions in Italian Law, such as D.P.R. 448/1988 and D.Lgs 272/1989 provide such free assistance.
c) As a "child's attorney" for legal assistance in civil and criminal proceedings, as stated in Article 10 of Law 149/01 and Law 134/01 passed just a few days before Law 149, although these provisions only entered into force after the enactment of D.P.R. 115/02. The requirements for the lawyer in question are knowledge and experience of child-related law, no disciplinary charges and six years of professional experience. The third requirement is particularly important since legal assistance in civil proceedings was introduced for the first time with this provision and prior to 2001 it was only provided for criminal proceedings. Moreover, this also recalls Article 336 of the Civil Code which states that a child's attorney is required during proceedings involving parental authority. Subsequently D.P.R 115/2002 repealed the part of Article 336 containing this provision, referring to article 143 of the same DPR 115, which provides for legal assistance in adoption proceedings only. However, it is common practice to provide legal assistance in all proceedings affecting children with the general requisites indicated in D.P.R. 115/2002 for access to the legal assistance.

As regards children's **right to express their own views**, Law 149/01 also amended Law 184/83 on adoption, above all in relation to the right of children to be heard. Article 7 of Law 149 grants the highest degree of protection in this field because it lowers the relevant age to 12 years. This provision states that children of 12 years old must be heard in person, and if they are below 12 years old, according to their capacity for understanding. Another important provision is D.P.R. 488/1988 on criminal proceedings involving children as offenders. Although this also involves the divergent perspectives of the child as an offender and as a victim, it nevertheless presents relevant features in line with the child-friendly justice principles.

- Hearings should be as inoffensive as possible in terms of the emotional, physical and temporal needs of children.
- Particular ways of conducting hearings, paying attention to appropriate terminology and general behaviour[78];
- The right of the child to be silent, i.e. not to express his or her views;
- A precise explanation of what is happening when children are either victims or offenders (DPR 488/88, art. 1)
- Measures to provide assistance, such as legal assistance (Article 11) and legal counselling as in juvenile administration services (Article 12)

[76] In this case representation *ad litem* replaces legal representation
[77] The English term "*guardian*" does not distinguish between the Italian terms "*tutore*" and "*curatore*".
[78] *See* Corte Costituzionale n.1/2002; Corte di Cassazione, S. U. 22238/2009

As regards **access to alternative measures**, two implementation measures should be cited. Firstly, a major improvement in Italian legislation was introduced with the enactment of Law 112/2011, which formally established the "Authority for Childhood and Adolescence", although this has not yet been given binding powers[79]. Secondly, specific provisions for family mediation, treated as a separate issue in the Strasbourg Convention (Article 12), have been laid down.

The remit of the Authority for Childhood and Adolescence, includes the following duties (Article 3).

- Promotion of child protection at national level.
- Consultation and informed collaboration with international and national institutions.
- Independent administrative and hierarchical organisational powers.
- The dissemination of good practice.
- Implementing the Strasbourg Convention.
- Assessment of the conditions for access to health care.
- Proposing initiatives to national government, regional and local authorities.
- Presenting an annual report to Parliament (by the 30th of April) on its activities.
- It does not have effective powers to impose sanctions.

To date, the agency has not been granted effective legal powers to prevent children from starting proceedings before the courts.

As previously mentioned, an alternative measure to court proceedings is family mediation, introduced into the Italian system with Law 54/2006 on shared custody. This law amended Article 155 and introduced the following articles into the Civil Code:

- Art. 155-*bis* on single and shared custody
- Art. 155-*ter* on reversal of shared custody decisions
- Art. 155-*quater* on family home assignment
- Art.155-*quinquies* on children above 18 years of age
- Art. 155-*sexies* on children's hearings and family mediation.

These measures were adopted on the assumption that the best interests of the child can be served by entrusting both parents with responsibility for a child's upbringing. More specifically, this is not a case of mediation in the usual sense, because the subject assigned to that task is not strictly a mediator, but the judge him or herself acting prior to deliberating on the child's future after the parents' separation. Law 154/2001 against domestic violence also covers certain aspects of family mediation, in that it introduces two further articles into the Civil Code, Articles 342 –*bis* and 342–*ter*, on the duty of care. On the basis of these article, the judge can arrange for the intervention of a family mediation centre in proceedings affecting children who are victims of domestic violence.

8. Spain

As regards the child's best interests clause, it must be stated that Spain does not have a general children's act, but rather a range of provisions contained in the Constitution, in the Civil Code, in the Civil Procedural Code and in other statutes and it is worth noting that interpretations will inevitably depend on the legal

[79] *See* Art.6. The report was been written in 2011, when the executive decrees of Law 112/2011 had not yet been passed.

sources used. Unlike the Italian Constitution in which Article 3 does not mention age as an inequality factor, in Spain children are granted constitutional protection, meaning that their rights have a stronger status as fundamental human rights.

The following Constitutional provisions are particularly relevant, since they are consistent with the UN Convention on the Rights of the Child:

- Article 39(2) provides for the full protection of children and their equality before the law regardless of their parentage and of their parents' marital status.
- Article 39(3) requires that parents, whether the child was born in or out of wedlock, provide every kind of assistance while the child is still under age and in other circumstances established by law.
- Article 27(3) guarantees the right of parents to ensure that their children receive religious and moral instruction in accordance with the parents' convictions.
- Article 20(4) recognizes protection of children as a limit to freedom of expression and its corollary rights within that section.

The UN Convention is given precedence in application of these provisions in order to determine the constitutionality of domestic bylaws. Furthermore the UN Convention can be invoked directly before the Spanish Courts, in contrast to the Italian system in which, in order to invoke the UN Convention before the Corte Costituzionale, it is necessary to refer to an internal provision ("*norma interposta*").

In domestic law, assessment of the **best interests of the child** focuses mainly on matters of shared custody, with two main provisions, Article 90 II of the Civil Code which establishes that a judge can deny shared custody on the assumption that it would violate the best interests of the child or cause prejudicial or serious harm to one of the parents. Art. 92.8 of the Civil Code provides that the judge should order joint custody "only if this adequately protects the best interests of the child". However, the Spanish system does not contain a list of criteria for evaluating the principle of the child's best interests, particularly in cases of conflict between parents.

Both Catalonia and Aragon have specific provisions for shared custody. In Catalonia, Article 233(8) of Act 25/2010 assigns specific responsibilities to both parents after their separation, establishing that the duty of care should be exercised jointly as far as possible. More specifically, Article 233 (10) states the principle that joint custody is the favoured arrangement. It states that if an agreement has not been reached or an agreement is not approved, the judicial authority has to determine the way in which custody is to be arranged according to the joint nature of parental responsibility. However, the judicial authority can assign individual custody if this is in the best interests of the child[80]. In Aragon, Act 2/2010 gives preferential treatment to shared custody in order to grant children the right to maintain a personal relationship with both parents.

The principle of best interests is also implemented in the field of juvenile justice, also addressing the **rule of law** principle. More specifically, Law 4/1992 and Law 5/2000 on the criminal responsibility of juveniles, provide a set of relevant provisions which apply to persons over the age of 14 and under 18. The first and most important of these statutes is Organic Law 4/1992, which gives the prosecutor the following powers of "dejudicialization"[81].

- To dismiss the proceedings and instigate the alternative measure of a victim-

[80] See Handrina Hayden, A Comparative Study of the Position in Spain and England, Revista par elanàlisis del derecho, 1/2011, p.13

[81] The prosecutor can absolve children from criminal responsibility, depending on the circumstances of the case

offender mediation process in which the young person promises to repair the damage or make amends for the injury caused to the victim.
- to dismiss the case when the offence was a default or in response to the circumstances of the young person.

Furthermore, on the basis of this law, the best interests of the child are assessed at the prosecutor's request by an interdisciplinary team. This team has to write a report setting out the action to be taken during the process (Article 27), and the report has to be taken into account by the judge when coming to a decision. The *ratio legis* is that all initiatives have to be conducted on the basis of the principles of rehabilitation and minimal intervention. However, the law sets some limits on assessment of the best interests of the child[82].

- When evaluating the possibility of "dejudicialization", the prosecutor's discretion is constrained by the seriousness of the crime.
- The length of the measure can vary from 2 years for children of 14-15 years of age to 5 years for children of 16-17 years of, according to their age.
  Moreover, Law 7/2000 introduces some provisions for extremely serious crimes such as murder, sexual assault, homicide, and terrorism that do not permit "dejudicialization".
  Specific measures are ordered for these crimes: from age 14 to 15 custody in a closed centre is ordered according to the seriousness of the crimes and to the age: 1-4 years for murder, sexual assault and homicide, 1-5 years for terrorism, and 3 years' probation. From age 16 to 17, 1-8 years for murder, sexual assault, and homicide, 1-10 years for terrorism, and 5 years' probation. The sentence cannot be modified during the first year.

As regards **access to alternative measures**, the Protection of Children Act (Act 1 of 1996) introduced the figure of the Federal Assistant Ombudsman, to whom children may submit complaints about the defence and protection of their rights. According to the International Bar Association Resolution (1974), this is an "office provided for by the constitution or by action of the legislature or parliament and headed by an independent, high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials, and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action, and issue reports"[83].There are various children's ombudsmen within the different autonomous communities[84] in Spain, whose duties can be outlined as follows:

- The Children's Ombudsman in Andalusia and the Catalan Ombudsman provide for the promotion and the protection of children's rights, receive complaints and have the power to investigate, to make recommendations to the authorities and administrative bodies and to monitor all services working with children.
- The Children's Ombudsman in Madrid (set up under Act 5/2006) is responsible for monitoring the activities of all the institutions dealing with children in the province of Madrid. S/he receives complaints from children and adolescents and carries out investigations, supervises the public administration of the Autonomous Community, and any other private entities providing child-care and assistance for adolescents within the Autonomous Community. S/he promotes action aimed at child protection, reporting subsequently to the Assembly, s/he proposes procedural, regulatory and/or legislative reforms, s/he fosters knowledge, dissemination and exercise of the rights of children and adolescents and devises information campaigns on the manner in which

[82] *See*Cristina Rechea Alberola – Ester Fernàndez Molina, Juvenile Justice in Spain. Past and Present, *Journal of Contemporary Criminal Justice*, Vol. 19 No. 4, November 2003, p. 403

[83] Accessed on http://www.crin.org/resources/infodetail.asp?ID=18060

[84] Among them are the following: the Deputy Ombudsman for Children of Andalusia; the Justice Department of Aragon; the Diputado del Común serving as High Commissioner of the Parliament of the Canary Islands for the defence of fundamental rights and public freedoms, who deals with matters pertaining to children; the Children's Ombudsman serving as High Commissioner of the Madrid Assembly; the Adjunto al Sindic de Greuges as regional ombudsman for children in Catalonia; the Valedor do Pobo of Galicia, who delegates her/his powers to one of his/her deputies, or Vicevaledores; the Office for the Protection of the Rights of the Child of the Balearic Islands Government; the Office for Children within the Office of the Ombudsman of Castile-La Mancha; the Ombudsman of Navarra; the Ombudsman of Riojano; the Ombudsman of the Murcia Region; the Public Attorney of Castilla y León; the Attorney General of the Principality of Asturias; the Ombudsman of Valenciana, and a section for children's rights within the Office of the Ombudsman/Ararteko of the Basque Country.

children exercise their rights and adults uphold them, adding to the community's level of knowledge.

- The Valedor do Pobo de Galicia Ombudsman ensures the protection and the promotion of human rights and fundamental freedoms, receives complaints relating to violations caused by the administration, has powers of investigation and recommendation.

9. Greece

Greece, like Italy, has ratified the 1996 Strasbourg Convention, by relating the **best interests of the child** in the instrument of ratification to matters of parental responsibilities and the relationships between children and their parents. In Greek legislation the principle of best interests is focused on notions of parental care and guardianship. Greece ratified the Strasbourg Convention on 11 September 1997 and, as previously stated, the matters indicated in the ratification instrument are cases involving the custody of children, cases concerned with communication between parents and children and adoption cases. Some relevant provisions can be found in the Civil Code. Parental care is the usual situation where parents have parental responsibilities for their child but, in the event of lack of parental care, the court will appoint a special guardian for the child, assigning her/him parental responsibilities. The guardian is assisted and monitored by a supervisory council and the court (Article 1590 of the Greek Civil Code). Both parental care and guardianship have to be exercised in the best interests of the child (Articles 1511 and 1648 of the Greek Civil Code). Both parental care and guardianship affect the issue of the right to participation, in so far as legal representation is granted to the child in any matter, transaction, or litigation involving the child's person or property (Article 1510 para 1 and Article 1603 of the Greek Civil Code). The holders of parental responsibilities represent the child in any matter affecting her/his person or property (Article 1510 para 1 and Article 1603 of the Greek Civil Code). Exceptions to this provision are legal transactions which a child of a certain age is authorised to carry out (Article 135 of the Greek Civil Code), or which are reserved for third parties, for example, the administration of the child's property subject to the condition that a third party will administer them until the age of 18, (Articles 1521 and 1616 para 2 of the Greek Civil Code). Apart from these provisions, Greek family law does not define the best interests of the child, making the concept somewhat vague and flexible, so that it can be adapted to the particular circumstances of each case (*in concreto*). The Civil Code does not provide specific regulations for shared custody. However, it is arguable that the right to joint custody is conceded to both parents, under Article 1512, and parents may only act alone in matters of the child's care or ongoing administration of property, according to Article 1516[85]. In Greece, parental responsibility is exercised by both parents and includes the custody of the child. Before the courts, children's opinions on their relationship with each parent must be given due weight, depending on the child's maturity[86].

As regards the **child's right to express his or her own views,** Greece basically applies Article 3[87] of the Strasbourg Convention to matters involving parental responsibility. The main provisions are Article 1511 of the Greek Civil Code and Article 681c of the Greek Civil Procedural Code. Article 1511 para 3 of the Civil Greek Code states that the child should be heard and his/her opinion should be

[85] Achilles G. Koutsouradis, *Parental Responsibilities, National Report Greece*, accessed on www.ceflonline.net/Reports/pdf2/Greece.pdf

[86] See Vassilios Skouras – Ourania Bournaki, Parental Responsibility, Children's Access in Transitional Cases under Council Regulation 1347/2000, Hellenic Ministry of Justice

[87] See Article 3 – Right to be informed and to express his or her views in proceedings. A child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting him or her, shall be granted, and shall be entitled to request, the following rights:
a) to receive all relevant information;
b) to be consulted and express his or her views;
c) to be informed of the possible consequences of compliance with these views and the possible consequences of any decision.

taken into consideration in every decision regarding parental care and relating to his/her interests, depending on the child's maturity. According to Article 681c para 3 of the Greek Civil Procedural Code, before deciding on issues involving parental responsibilities or contact, the court will consider the opinion of the child, also giving weight to the child's maturity.

As regards **access to alternative measures**, Law 3094/2003 sets up the office of the Greek Ombudsman within the Department of Children's Rights[88]. Complaints received from the Department of Children's Rights relate to:

- family and child welfare;
- conditions of police detention, protection and overall treatment of immigrant and refugee children;
- child abuse and cases of child neglect ;
- family relations, custody and communication issues and the operation of public care institutions and nurseries.

10. The United Kingdom

The United Kingdom has neither ratified nor signed the 1996 Strasbourg Convention. However, it is the only country among those countries analysed in this report to have provided some specific criteria for defining the **best interests of the child**. Section one of 1989 Children Act provides a list of criteria that a judge should take into account in reaching his or her decisions, listed as follows[89].

a) The ascertainable wishes and feelings of the child concerned (considered in the light of her/his age and understanding).
b) His/her physical, emotional and educational needs.
c) The likely effect on her/him of any change in his/her circumstances.
d) His/her age, gender, background and any characteristics which the court considers relevant.
e) Any harm which s/he has suffered or is at risk of suffering.
f) The degree to which each of his or her parents – and any other person in relation to whom the court considers the question to be relevant – is capable of meeting his or her needs.
g) The range of powers available to the court under this Act in the proceedings in question.

In the United Kingdom the age limit is usually taken into account in assessing best interests. Even though England, Wales, Northern Ireland and Scotland each have their own legislation, they agree that a child is a person who has not yet reached the age of 18[90]. The best interests of the child are taken into account whenever any act is considered relevant by a judge for assessment in terms of age. For example, the age of consent, both in England, Wales (Sexual Offences Act 2003) and Scotland (Sexual Offences Order 2008) under the applicable legislation states that the age of consent is 16, but this is not intended to exclude any protection to younger children, since children under 13 can never give their consent and therefore, any sexual intercourse with them will be automatically subject to the maximum penalties. Extra protection is given to children of 16-17 with regard to the distribution or exhibiting of indecent photographs or arrangements for sexual services made by persons who are in a position of trust. In England, Wales[91] and Northern Ireland[92] the age of criminal responsibility is 10, while in Scotland[93] it is 8.

[88] http://www.crin.org/enoc/resources
[89] See Andrina Hayden, supra note…, p.22
[90] See *Legal Definition of a Child,* August 2008, accessed at www.nspcc.org.uk
[91] *Crime and Disorder Act 1998, section 34*
[92] *Criminal Justice Order 1998*
[93] *Criminal Procedure Act 1995, section41*

As regards shared custody, in England judges can only invoke what is known as the *no order principle*[94] when it is in the best interests of the child, on the assumption that parents are considered to be the best judges of their children's best interests. Section 2 of the 1989 Children Act states that if the father and the mother were married at the time of the child's birth, they have joint parental responsibility. Moreover, another relevant provision is section 8(1) of the 1989 Children Act, which introduces the notion of the residence order, defined as "an order to be made as to the person with whom the child is to live". A residence order can also be made in favour of two persons who do not live together, under section 11(4), specifying the periods during which the child is to live with each parent[95].

As regards the **right of participation**, in England and Wales section 53 of the Children Act of 2004 amended sections 17 and 47 of the 1989 Children Act. These provisions concern the right of any child for his or her feelings, wishes and perceptions to be given due weight, "so far as it is reasonably practicable and consistent with the child's welfare and having regard to the child's age and understanding". The same principle is stated in Northern Ireland, by the Children Order of 1995, section 3.

As regards the **rule of law** principle, in England and Wales[96], the law requires that the guardian should be present during any court proceedings concerning children under the age of sixteen[97]. The basic principle of youth criminal justice is to *prevent* offences by children and young people[98]. Moreover, a juvenile court has been operating since 1954 to prevent children from entering into contact with adult offenders[99]. This court is a specialist magistrates' court, which provides a range of different sentences: supervision orders, action plan orders, training orders or detention[100], which apply for a minimum of four months to a maximum of two years. For very serious offences, children are judged in the Crown Court[101].

As for the **access to alternative measures**, in the United Kingdom there are four Ombudspersons. In England and Wales, the Children's Commissioners aim to ensure that children and young people have effective access to justice, giving advice at each level of involvement. The Northern Ireland Commissioner for Children and Young Persons safeguards and promotes the best interests of children up to 21 years of age by listening to them and encouraging such activities in other institutions. The Children's Commissioners for England and Wales promote children's right to be heard, ensuring that adults in charge give due weight to children's views. Finally, Scotland's Commissioner for Children and Young People, promotes awareness and implementation of CRC rights, monitors law, practice and policy, promotes best practice and carries out research programmes on children's rights.

11. Sweden

In Sweden the principle of the **best interests of the child** has particular relevance in relation to the discipline of contact and shared custody[102] which operates through private orders, social services and family courts. Both parents are automatically presumed to have joint custody and legal responsibility for their child if they are married and this remains the case after separation when the child might live with one parent. Child contact is seen primarily as a child welfare issue, and there is no specialist family court within the Swedish legal system. Family law

[94] *Children Act 1989*, section 1(5)
[95] See Andrina Hayden, supra note, p.17
[96] See *United Kingdom: England and Wales. Executive Summary, The Library of Congress, accessed at www.loc.gov*
[97] *Crime and Disorder Act 1998, section 37*
[98] *Idem*
[99] *Youth Court (Constitution) Rules 1954* (S.I. 1954 No. 1711), amended in 2000
[100] *Power and Criminal CourtsAct 2000, sections 64-67*
[101] See Bob Ashford, *Youth Crime Developments in the UK*, accessed at http://www.coe.int/t/dghl/standardsetting/childjustice
[102] See Fran Wasoff, *Dealing with Child Contact Issues: a Literature Review of Mechanisms in Different Jurisdictions*, Edinburgh, 2007, p. 23, accessed at www.scotland.gov.uk

reform in 2006 established a child-centred approach to contact decisions, based on the assumption that a child needs a good close relationship with both parents. The Ministry of Justice promotes many activities to help parents manage conflict and develop more cooperative post-separation arrangements. Firstly, a video is shown dealing with the effects of conflict on children, followed by a discussion. Next, parents are seen separately to focus on conflict management. Finally, both parents meet together with an advisor to plan post-separation parenting. The law reform of 2006, relating to custody and access, has been introduced into the Children and Parents Code. The core principles of this reform are the principle of the best interests of the child and how this is to be determined, and the right of children to be heard. One of the most frequent criteria in determining best interests is the assessment of the risk of any harm coming to a child or another family member[103]. If parents are not married at the time of the child's birth, there is no presumption of shared custody, and the mother automatically has the sole custody of the child. Unmarried parents can obtain joint custody if they marry or if both notify the local social welfare committee in writing, with the legal recognition of the child at the same time. If paternity is acknowledged and both parents are Swedish citizens, they can also obtain joint custody by notifying the tax authority or a social security office. This specific right has been enforced in the light of a child's right to have contact with a non-resident parent. In cases of separation, parents are encouraged to reach an agreement on residence and contact and that agreement then becomes legally binding. Children are expected to have good relationships with both their parents, but it is also acknowledged that living with their parents is not necessarily a better way of protecting best interests in all cases.

As regards the **right of participation**, it is notable that in these proceedings, the child's wishes must be taken into account according to her/his age and maturity. Before any court decision, the local social welfare committee must be given the chance to provide **information** on the case following discussions with the child and its parents. The social welfare committee can give advice and support or appoint someone to assist a family in a contact dispute, with their agreement. The role of municipalities is crucial, since people can apply there for legal aid. Courts cannot order enforcement of contact arrangements if the child involved is 12 years of age or older and has reached a certain degree of maturity, unless the court considers that contact is in the best interests of the child. Courts can refuse to enforce contact arrangements if they considers there to be a risk of physical or psychological harm to the child. Swedish legislation also has relevant provisions for the **social participation** of children. Both the Social Services Act and the Care of Young Persons Act contain provisions on the right of children to participate in matters affecting them, according to their age and maturity. One specific example concerns the Swedish Social Insurance Agency which, in 2004, provided a mechanism for consulting young people on matters of financial family and disability policy as regards children's views on their assistance and care needs[104].

As regards **access to alternative measures**[105], the vast majority of families involved in parental divorce make their own arrangements without recourse to the courts. The most frequent cases affect residence or contact issues. There are no explicit guidelines or norms relating to contact, although parenting plans are thought by practitioners to be a useful framework for working with parents. Some preventative measures are provided for parents who do not live together and who wish to apply to the court for a decision. Before accessing a court, a cooperative discussion (samarbetssamtal) may be held between the parents and an expert in

[103] See Edwuard Kruk, *Custody, Access and Parental Responsability,* December 2008,p. 48, accessed at www.fira.ca

[104] See Sweden's Fourth Periodic Report to the UN Committee on the Rights of the Child 2002–2007, accessed at http://www.regeringen.se/content/1/c6/08/89/86/6bd4cf18.pdf

[105] *Accessed at* www.crin.org

order to facilitate discussion. All municipalities offer cooperative discussions, which are free of charge and are conducted by a mediator, who is usually a social worker, but these are not held in the presence of children. The Office of the Ombudsman (Barnombudmannedìn) was set up in 1993, its main goal being to monitor the implementation of the CRC in Sweden. In 1998 a committee of inquiry was appointed to supervise the activities of the ombudsman who is the only ombudsman in Sweden without legal powers. The office is independent from government, parliament and political parties however, he or she is appointed by the government[106]. The ombudsman promotes CRC rights, by recommending their application in the work of the government agencies, municipalities and country councils. Between 1995 and 1997 the Swedish Children's Ombudsman coordinated a campaign for the prevention of bullying which resulted in the introduction into the Education Act of some provisions relating to the responsibilities of school staff and head teachers, and the allocation of funds to the in-service training of school management.

12. Preliminary findings

We can now summarise some results of the analysis conducted so far. As regards Italy and Greece, we observed that the main principles implemented are the best interests of the child, the right to participation and access to alternative measures. It is not always easy to distinguish between these principles since they are often overlapping, as is the case with Italy, when we did not specifically refer to the rule of law but rather related it to the overall principles of juvenile justice, although this principle is interpreted in Italy as relating to the extent of the right to participation.

Spain is more involved in the implementation of best interests, the rule of law and alternative measures, while there were no relevant provisions dealing with the right to participation. This fact was reported in 2010 by the United Nations Committee which recommended that Spain implement the right to participation.

The United Kingdom has four different legislations: England, Wales, Northern Ireland and Scotland. We observed that all the four principles have been implemented, but the crucial issues are the right of children to express their views in all proceedings and the problem of imputability in criminal proceedings.

Finally, in Sweden the main principles implemented are best interests, the right to participation and alternative measures and the our analysis shows that greater attention is paid to the social educational and training of children. Moreover we observed, as a general comment, the greater propensity for recourse to litigation in Italy, Greece, Spain and the UK compared to Sweden. Even access to alternative measures should be interpreted in this light since in the first four countries, the role of ombudsmen represents a first step before embarking on legal proceedings, while in Sweden, the ombudsman has an autonomous social function without legal powers.

[106] *Accessed at* http://www.barneombudet.no/

Children at risk of social exclusion

1. Social exclusion: international framework

The problem of social exclusion affects the degree of protection afforded vulnerable categories of children. The allegedly greater protection afforded vulnerable children is due to different factors that prevent children from the normal exercise of their rights. Some categories of children are particularly vulnerable and face greater risks to their social, political and economic well-being. According to COM(2011) 60, the factors which indicate situations that put children at risk of social exclusion are poverty[107], disability, violence, sexual exploitation and trafficking, asylum seeking, lack of parental custody, cyber-bullying, child labour, involvement in armed conflicts and child sex tourism[108]. The protection of vulnerable children is a general principle, which is also stated by the UNCRC and the child-friendly justice guidelines[109]. It is not a pre-established principle, because it can vary according to the different material conditions involved. At international level we find various definitions of social vulnerability according to the matters involved. At national level, in contrast, the problem is identifying categories of social exclusion according to the measures of protection implemented and rarely are there abstract definitions equivalent to legal protection. Moreover, there is also a problem with the methodological approach to social exclusion because developing effective and comprehensive strategies depends on member states' ability to establish appropriate targets and indicators for monitoring progress[110].

In 2007, the Commissioner for Human Rights Thomas Hammarberg issued an important statement on vulnerable children: "Migrant children are one of the most vulnerable groups in Europe today. Some of them have fled persecution or war, others have run away from poverty and destitution. There are also those who are victims of trafficking. At particular risk are those who are separated from their families and have no, or only temporary residence permits. Many of these children suffer exploitation and abuse. Their situation is a major challenge to the humanitarian principles we advocate"[111]. Thus, the legal definition will be descriptive, aiming first to identify the categories that the international legal instruments consider at risk of social exclusion. Unfortunately at times, an assessment of the impact of social exclusion on problems associated with access to justice appears vague, but this is further evidence that legal definitions alone rarely cover the practical extent of the legal issues involved and there is frequently a shortfall in the legislative framework when referring to such specific topics as access to justice. When interpreting the legislation, the gap between national and transnational has, wherever possible, to be filled and therefore the aim of this analysis is merely to exemplify the responses provided by the countries in question to the problem of the social exclusion.

Article 4 of the Council of Europe Convention on Action Against Trafficking in Human Beings[112], signed in Warsaw on 16 May 2005, defines the trafficking of human beings as "the recruitment, transportation, transfer, harbouring or receipt

[107] Alberto Minujin, Enrique Delamonica, Edward D. Gonzalez, Alejandra Davidziuk, *Children living in poverty. A review of child poverty definitions, measurements, and policies*, New York, 2005

[108] See the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 15.2.2011 COM(2011) 60 final, p.8

[109] *See* the Draft Guidelines, General Elements of Child –friendly Justice, art. 4, § 15

[110] *See Ending Child Poverty within the EU?*, available at http://www.eurochild.org/fileadmin/user_upload/files/NAP_2008_-_2010/Ending_child_poverty.pdf

[111] Thomas Hammarberg, "Children in migration should get better protection", 6/8/2007, accessed onhttp://www.coe.int/t/commissioner/Viewpoints/070806_en.asp

[112] This is the same definition of trafficking contained in the Palermo Protocol, art. 3, accessed at http://www2.ohchr.org/english/law/protocoltraffic.htm

of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs"[113].

Sexual exploitation has, since 1997, been recognised by all EU Member States as a specific criminal offence, different from exploitation through prostitution, and punished more severely[114]. In 2007, the Council of Europe adopted the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (only ratified by Greece and Spain in 2010, only signed by Italy, Sweden and the UK). This convention provides for a set of general protection measures in terms of procedural rights (Articles 31, 35, 36) and specific sanctions for perpetrators of sexual abuse, child prostitution, child pornography exploitation, participation of a child in a pornographic performance, corruption of children and solicitation of children for sexual purposes (Article 18-23). With specific regard to the right of the child to take part in a proceeding, Article 36 states that: "a) the judge may order the hearing to take place without the presence of the public; b) the victim may be heard in the courtroom without being present, notably through the use of appropriate communication technologies".

The problem of the child labour exploitation has been related by the Council of Europe to specific categories of children: Roma/Gypsy minorities, legal or illegal immigrants and refugees[115]. A more general instrument is the CM/Rec (2009) 2010 on the integrated strategy against violence[116]. This recommendation states that the prohibition of violence covers all forms of sexual violence and abuse, corruption of children and solicitation of children for sexual purposes; all forms of exploitation of children, including child prostitution, child pornography, sexual exploitation in travel and tourism, trafficking, sale of children, illegal adoption, forced labour or services, slavery and practices similar to it, removal of organs, for any purpose or in any form; all forms of exploitation of children through the use of new technologies; all harmful traditional or customary practices, such as early or forced marriage, honour killing and female genital mutilation; exposure of children to violent or harmful content, irrespective of its origin and through any medium; all forms of violence in residential institutions; all forms of violence in school; all corporal punishment and all other cruel, inhuman or degrading treatment or punishment of children, both physical and psychological; exposure of children to violence within the families and home[117].

The Council of Europe has provided specific measures to combat the social exclusion of Roma children[118] with the adoption of Recommendation no. R (2000)4 of the Committee of Ministers to member states on the education of Roma/Gypsy children in Europe. The Council of Europe measures for Roma children aim to achieve three priorities in order to ensure social cohesion in European societies: protection of minorities; the fight against racism and intolerance; the fight against social exclusion[119]. It states more specifically, in Article 5, that "particular attention should also be paid to the need to ensure better communication with parents, where necessary using mediators from the Roma/Gypsy community which could then lead to specific career possibilities. Special information and advice should be given to parents about the necessity of education and about the support mechanisms that municipalities can offer families. There has to be mutual understanding between parents and schools. The parents' exclusion and lack of knowledge and

[113] With particular regard to vulnerable children, art. 10 provides specific measures as for the identification of victims: "As soon as an unaccompanied child is identified as a victim, each Party shall: a) provide for representation of the child by a legal guardian, organisation or authority which shall act in the best interests of that child; b) take the necessary steps to establish his/her identity and nationality; c) make every effort to locate his/her family when this is in the best interests of the child", paying due attention also to the protection of private life and preventing the identification of children from being publicly known (art. 11).

[114] *See* Commission working document - Evaluation and monitoring of the implementation of the EU Plan on best practices, standards and procedures for combating and preventing trafficking in human beings, 2008, art. 1.1, accessed at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008DC0657:EN:NOT

[115] *See* Recommendation 1336 (1997), Council of Europe, available at http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta97/erec1336.htm

[116] It is also worth noting the guidelines on children and armed conflicts adopted by the EU Council in 2003. The international protection of children in armed conflicts is established under Geneva Convention IV and Additional Protocol I. Children are prevented from coercion, corporal punishment, torture, collective punishment and reprisals. During non-international armed conflicts, children's protection is covered by fundamental guarantees for persons not taking direct part in hostilities, and the principle that individual and collective civilians shall not be the object of the attack. The Additional Protocols also requires, in international and non-international armed conflict, that children be the object of special respect, according to the care and aid they require. The UN Convention on the Rights of the Child (UNCRC) also prescribes rights for children that must be respected at all times and cannot be derogated. Under the Convention, states are bound to "take all feasible measures to ensure protection and care of children who are affected by an armed conflict". *See* http://www.consilium.europa.eu/uedocs/cmsUpload/GuidelinesChildren.pdf

[117] *See* The Council of Europe Policy Guidelines on integrated national strategies for the protection of children from violence, p. 18, at http://www.coe.int/t/dg3/children/news/guidelines/Recommendation%20CM%20A4%20protection%20of%20children%20_ENG_BD.pdf

[118] *See* Doc. 9828, The legal situation of Roma in Europe, Parliamentary Assembly, accessed at http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc03/EDOC9828.htm

education (even illiteracy) also prevent children from benefiting from the education system"[120]. Furthermore, in 2009 The Council of Europe increased this interest in Roma children with the new Recommendation CM REC (2009)4[121].

2. National measures addressing children at risk of social exclusion

GREECE

Since 1960, under Law 4051 on "*Supporting Unprotected Children"*, Greece has been offering financial benefits to children who meet certain requisites[122]. Eligible children are children under the age of 14 (and in some instances up to 16), who live with their own families and who are:

- Orphans who have lost both parents.
- Orphans without fathers.
- Children whose fathers cannot support them for reasons of health.
- Children born outside marriage.

This statute also applies to single mothers or guardians[123]. Greece has many active social policies involving direct cash transfer to families[124] with an allowance for the third child, a large family allowance for families at least with 4 children, and an allowance for parents under the age of 23 or single parents[125].

As regards **child labour and exploitation**, Greece has introduced various provisions, including Law 1837/1989 on "Protection of children at work and other provisions", Ministerial Decree 130621/2003 on "Work, projects and activities in which it is prohibited to employ children", Law 3144/2003 on "Social dialogue for the promotion of employment and social protection and other provisions". Since 1989, the minimum age for employment has been set at 15. More specifically, Article 4 of Law 3144/2003 imposes a prison sentence on any employer violating the law or any person who has the custody of the child employed.[126] An earlier Presidential Decree, no. 62/1998, prohibited the employment of children under the minimum age of employment in family businesses and in the agricultural forestry, and livestock sectors. In 2001, Greece adopted further provisions extending the ban on night work to young persons employed in family business in the agricultural, forestry, and livestock sectors and in the maritime and fishing industries[127]. Moreover, specific advantageous measures for people who hire young and low-skilled workers have been provided and, in 2003, the Ministry of Labour and Social Security activated a Social Support Services Network in order to help vulnerable groups of young people approaching the labour market[128].

As regards children who are victims of **sexual abuse**[129], **abduction** and **trafficking**, the Greek Parliament adopted Law 3064/2002 on "Measures to Combat Trafficking in Human Beings, Sexual and Economic Exploitation, and Child Pornography". Articles 323 and 351 of the Penal Code punish with imprisonment the trafficking of human beings for labour purposes and sexual exploitation.[130] New provisions introduced under Laws 3625/07 and 3727/08 established some measures aimed at making investigation and protection easier.
These measures include [131]:

- Cooperation of a child psychiatrist during the investigations.
- Use of recognised diagnostic methods for the mental and emotional maturity and the psychic condition of the child.

[119] See *Education of Roma children: Policy Responses from the Council of Europe*, available athttp://ec.europa.eu/justice/policies/children/forum/doc/presentation_ochoa_llido_en.pdf

[120] Available at http://www.crin.org/Law/instrument.asp?InstID=1371

[121] See Recommendation CM/Rec(2009)4 of the Committee of Ministers to member states on the education of Roma and Travellers in Europe, available at https://wcd.coe.int

[122] See the 21st Greek Report on the implementation of the European Social Charter on the fourth group of provisions on the protection of children, family and migrants (articles 7,8,16,17, 19) - Reference period 1/1/2003-31/12/2009

[123] See European Foundation for the Improvement of Living and Working Conditions. *Greece: Family benefits for employee*. Retrieved on the World Wide Web at http://www.eurofound.ie/emire/GREECE/FAMILYBENEFITSFOREMPLOYEES-GRhtml

[124] See Ministry of Labour and Social Security. General Secretariat of Social Security, *The Greek Social Security System*, Athens 2002, p. 48-49, accessed on www.ggka.gr/english/SSS_en.doc

[125] See European Observatory (2002). *Family benefits and family policies in Europe-Greece*. European Observatory on the Social Situation, Demography, and Family. European Commission, retrieved from the World Wide Web at http://europa.eu.int/comm/employment_social/eoss/index_en.html.

[126] See *European Social Charter*, 21st National Report on the implementation of the European Social Charter submitted by the Government of Greece on 07/02/2011, CYCLE XIX-4 (2011), accessed on www.coe.com

[127] See Law Library of Congress, Greece, The Children's Rights, September 2007-04112, p. 105, accessed on www.loc.gov/law/

[128] See The Clearinghouse on International Developments in Child, Youth and Family Policies at Columbia University, accessed at http://www.childpolicyintl.org/countries/greece.html#regimes

[129] See the *Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, 25 October 2007, CETS N. 201, accessed at www.coe.int

[130] See Law Library of Congress, *Greece*, quoted, p. 105

[131] See Provisions of the Greek legislation and practices that could be incorporated into the European guidelines on child friendly justice, Ministry of Justice, accessed at http://www.coe.int/t/dghl/standardsetting/childjustice/Examples%20of%20good%20practices_en.asp

- Electronic recording of the children's deposition
- Granting of legal aid to children - victims of sexual abuse and the possibility of the judge
- Speedy trial (six months in first degree; four months in second degree)
- Limit of one examination per child
- Presence of the legal representative at the examination

For general prevention of exploitation, in 2004 Greece launched a programme called "Establishing a Social Support Services Network"[132], also promoting the institution of summer camps and a network of free libraries in remote rural areas. In order to prevent the risk of social exclusion during court proceedings, Law 2447/1996 provided for special units of social workers charged with social investigation in proceedings before the courts of first instance, but this provision was never put into practice.

SWEDEN

Sweden has one of the lowest levels of child poverty in Europe. However, this country has promoted several policies affecting children's economic conditions whose principal measures can be summarised as follows.

As regards the Direct Cash Transfer, all children under 16 are eligible for the basic child allowance, families with 3 children or more may access additional child allowances, parents of disabled children can receive allowances for disabled and handicapped children and maintenance support is available for separated parents[133]. Moreover, in the general framework of the child friendly justice programme, in 2008, the Council of Europe organised a conference in Sweden, under the auspices of the Swedish Presidency of the Committee of Ministers of the Council of Europe, entitled "Building a Europe for and with Children: towards a strategy for 2009-2011" placing a special focus on particularly vulnerable children and integrating the gender dimension[134].
These categories are the following:

- Children without parental care[135]
- Children with disabilities
- Children in or at risk of poverty and social exclusion[136].

In the fields of prevention and housing, Sweden has not spared any efforts with a household allowances for families with children and family and youth advice centres instituted[137] in 2003 by the Ministry of Public Health and Social Affairs. Furthermore in July 2011 the New Education Act came into force[138] providing specific instruments to assist children and school pupils achieve the objectives of participation and youth consultation (Chapter 3) and prohibiting degrading treatment (Chapter 6).

THE UNITED KINGDOM

After the Labour Party was elected in 1997, the UK supported many initiatives addressing the problem of child poverty. In 1999 the Government presented a report called "Opportunities for all"[139] which aimed to tackle the problems of social exclusion and poverty. Many policies were enacted to increase families' financial resources and to deal with the problem of unemployment, as in the Employment Zones programme[140]. Specific measures were included in the New Deal for Lone Parents programme [141], involving all lone parents with a youngest child aged 3 or

[132] http://ec.europa.eu/employment_social/esf/docs/el4_en.pdf
[133] Petra Hoelsher, *A thematic study using transnational comparisons to analyse and identify what combination of policy responses are most successful in preventing and reducing high levels of child poverty*, 2004, p. 74-80, accessed at http://ec.europa.eu/employment_social/social_inclusion/docs/child_poverty_study_en.pdf
[134] See *Building a Europe for and with the children: towards a strategy for 2009-2011*, available at http://www.childwatch.uio.no/events/conferences/buildingaeuropeforandwithchildren.html
[135] See the Draft Convention on Contact concerning Children and its draft Explanatory Report - Observations of the Swedish delegation, CDCJ (2001)29, accessed at http://www.coe.int/t/dghl/standardsetting/cdcj/2001/CDCJ(2001)29E.pdf
[136] See *Children rights issued in Sweden*, available at http://www.sweden.gov.se
[137] See supra note 27 at 76
[138] Seehttp://www.sweden.gov.se/sb/d/12996/a/142342
[139] See *Opportunity for all*, Eight Annual Report 2006, accessed at http://www.dwp.gov.uk/docs/strategyandindicators-fullreport.pdf
[140] See DPW (Department for work and pensions), Research and Statistics, *The wider labour market impact of Employment Zones*, p. 59, accessed at http://research.dwp.gov.uk/asd/asd5/working_age/wa2003/175rep.pdf
[141] See DPW (Department for work and pensions), Research and Statistics, *Lone parents and employment: International comparisons of what works*, accessed at http://research.dwp.gov.uk/asd/asd5/working_age/index_2003.asp

those with a new or repeat claim to income support. In 2003 the Working Tax Credit and the Child Tax Credit were introduced[142]. These instruments enabled people with children under 16 and with a low income to receive additional state support and access child benefits. In particular, the Working Tax Credit scheme applies to people who work for at least 30 hours a week or for at least 16 hours a week and people with disabilities or who have responsibility for a child. Other important measures are the Sure Start Maternity Grant for pregnant employees and the Child Trust Fund, which offers a bank account for all children in UK over 18[143].

As regards specific categories, the UK legislation focuses on **child labour and exploitation**.

The Children and Young Persons Act of 1933 states that no child may be employed under the age of 15 years or 14 years for light work and children cannot be required to work during school hours, or between 7 p.m. and 7 a.m.[144] In particular, children under the age of 15 may work up to five hours a day on non-school days, excluding Sundays, up to a maximum of twenty-five hours per week. Those aged fifteen years or older may work up to eight hours per day on any non-school days, up to a maximum of thirty five hours per week, with working limited to a maximum of two hours on Sunday[145]. Moreover, in 2010 a special programme was devised for children in need who are the subject of a child protection plan divided into different steps: referral, an initial assessment, a core assessment, initial child protection conferences and protection plans, child protection plan review[146].

ITALY and SPAIN

Italy and Spain are considered, according to different studies and statistics, the countries in which people suffer the highest degree of monetary social exclusion[147], due, according to the Eurostat 2010 figures, to the low level of state support for families and children in these countries. The categories of children at risk of social exclusion are assessed on the basis of the following criteria: financial difficulties, basic necessities, housing conditions, durables[148]. According to Eurostat 2010, both countries show similarities with the UK as regards the incidence of poverty in the total population[149]. Some studies show, as in the 1990s, that children and young people face a higher risk of poverty than adults[150]. In Spain the most deprived categories of people are single parents, couples with children and older children living at home. Generally, the indicator which shows that the highest level of deprivation in Italy is "basic necessities" while in Spain it is "financial necessities"[151].

In 1997 **Italy** passed Law 285/1997 on "Provisions for the promotion of rights and opportunities for childhood and adolescence". The main goal of this law was to tackle emerging social problems with commitments to local autonomy and to creating a good balance between centralised and decentralised duties[152]. The main rationales for this bill were, on the one hand, the strong relationship between labour market participation and social participation, and, on the other hand, strong subsidiarity. As a next step, Law 328/2000 broadened the main goals of this provision, with similar aims of encouraging integration and participation by assigning to the state responsibility for essential levels of social intervention, even though this is oriented toward all social policies in Italy and not specifically policies for children, through the promotion of horizontal and vertical subsidiarity. Furthermore, Law 285/1997 instituted the National Fund for Childhood and Adolescence, addressing the following areas of intervention.

[142] See supra note 27 at 68
[143] See supra note 9 at 66-73
[144] *Children and Young Persons Act 1933*, ch. 12
[145] See LAW LIBRARY OF CONGRESS UNITED KINGDOM: ENGLAND AND WALES CHILDREN'S RIGHTS *Executive Summary*, August 2007, accessed on http://www.loc.gov/law/help/guide/nations/uk.php
[146] Referrals, assessments and children who were the subject of a child protection plan, available at http://www.education.gov.uk/rsgateway/DB/STR/d000959/index.shtml
[147] See Conchita D'Ambrosio-Carlos Gradìn, *Income Distribution and Social Exclusion for Children. Evidence for Italy and Spain in 1990s*, p. 480, accessed at http://webs.uvigo.es/cgradin/Publicacions/Income%20Distribution%20and%20Social%20Exclusion%20of%20children.pdf
[148] See supra note 41 in 483
[149] See *Europe in figures, in Eurostat Yearbook 2010*, p. 320-323, accessed at http://epp.eurostat.ec.europa.eu/portal/page/portal/publications/eurostat_yearbook_2010
[150] See Atkinson, A. B., *Social Exclusion, Poverty and Unemployment*, in Case Paper, Case 4, Centre for Analysis of Social Exclusion, London School of Economics, 1-20
[151] See supra note 41 in 488
[152] See Youri Kazepov-Eduardo Barberis, *Policies preventing the risks of exclusion of families with difficulties in Italy*, Synthesis Repost, Italy 2004,p. 27, accessed at http://www.euro.centre.org/data/1138965909_28225.pdf

- Counteracting violence, sexual abuse and neglect of children (Article 4, h), prevention of situations involving psychological risk (Article 4, c).
- Giving a minimum amount of money to needy children living with single parents or entrusted to families (Article 4, a).
- Temporary reception of HIV positive and handicapped children (Article 4, e).
- Daily and night-time family foster care (Article 4, d).
- Family mediation or family consulting services (Article 4, i).
- Innovative social and educational services for children (Article 5).
- Leisure-time recreational and educational services (Article 6).
- Promotion of children's and adolescents' rights and well-being (particularly in the urban environment and with attention to cultural, gender and ethnic diversity) (Article 7).

In Spain specific policies for families have been adopted in order to achieve social inclusion goals. In this respect, the Spanish government launched the National Action Plan for Social Inclusion 2001-2003[153], coordinated by the Ministry of Labour and Social Affairs. However, at national level the most important intervention was represented by reform of the Social Security System, with the enactment of Law 40/2007, one of whose most relevant provisions concerns payment of the widow/widower's pension to common-law couples with children or economic dependents of the deceased[154]. In 2006 and 2007 the Ministry of Labour and Social Affairs promoted various initiatives aimed at providing integration assistance at specific centres for children below the age of 18 under a protection measure and children serving a measure adopted by a juvenile court[155].

As regards specific categories of children at risk of social exclusion, the Spanish Penal Code attaches particular importance to **sexual exploitation**. Article 183(1) of the Penal Code[156] specifically sanctions, with two to six years imprisonment, persons who, by the use of deceit, commit sexual abuse against a child aged 13. Article 181(2)[157] and Article 182[158] provide a definition of non-consensual sexual abuse, which is considered a sexual act committed against persons under 13, unconscious persons, or mentally ill persons. Particular attention is paid to the recruitment of children or persons with disabilities for prostitution[159]. Article 187 of Spanish Penal Code[160]punishes this crime with imprisonment.

3. Foreign children in the international context

On the basis of the normative data collected, foreign children are shown be a category at high risk of social exclusion. In this section we will deal with this category more extensively, because all the five countries examined provide a specific legal framework to address this problem, highlighting the fact that the problems facing foreign children are addressed more sensitively than under national child protection rules. Recommendation CM/RC (2007) 9 from the Committee of Ministers to member states on life projects for unaccompanied migrant children gives a definition of **migrant children** "regardless of their status, irrespective of the reasons for their migration and whether or not they are asylum seekers".

The text of the recommendation continues as follows.

"The expression **'unaccompanied migrant children'** includes separated children and children who have been left to their own devices after entering the territory of the member state".

[153] Ana Arriba-Luis Moreno,*Spain: Poverty, Social Exclusion and 'Safety Nets'*, in *Welfare State Reform in Southern Europe. Fighting poverty and social exclusion in Italy, Spain, Portugal and Greece*, Routledge, 2005, p.110

[154] See Law 40/2007, articles 174 - 174-bid

[155] See *National Action Plan on Social Inclusion of the Kingdom of Spain* 2008-2010, p.98, accessed at http://www.msps.es/politicaSocial/inclusionSocial/docs/2009_2_nap_inclusion_2008_2010_annex_ii_report_execution.pdf

[156] See the text of Ley Orgánica 10/1995, 23rd November, Código Penal , artículo 183(1): "1. El que realizare actos que atenten contra la indemnidad sexual de un menor de trece años será castigado como responsable de abuso".

[157] Artículo 181 (2):"2. A los efectos del apartado anterior, se consideran abusos sexuales no consentidos los que se ejecuten sobre personas que se hallen privadas de sentido o de cuyo trastorno mental se abusare, así como los que se cometan anulando la voluntad de la víctima mediante el uso de fármacos, drogas o cualquier otra sustancia natural o química idónea a tal efecto".

[158] Artículo 182:" 1) El que, interviniendo engaño, realice actos de carácter sexual con persona mayor de trece años y menor de dieciséis, será castigado con la pena de prisión de uno a dos años, o multa de doce a veinticuatro meses. 2) Cuando los actos consistan en acceso carnal por vía vaginal, anal o bucal, o introducción de miembros corporales u objetos por alguna de las dos primeras vías, la pena será de prisión de dos a seis años. La pena se impondrá en su mitad superior si concurriera la circunstancia 3ª, o la 4ª, de las previstas en el artículo 180.1 de este Código".

[159] See theSpain National Report, accessed at http://www.ipg.uni-bremen.de/yuseder/National_Report_Spain.pdf

[160] Artículo 187:"1) El que induzca, promueva, favorezca o facilite la prostitución de una persona menor de edad o incapaz será castigado con las penas de uno a cinco años y multa de doce a veinticuatro meses. La misma pena se impondrá al que solicite, acepte u obtenga a cambio de una remuneración o promesa, una relación sexual con persona menor de edad o incapaz. 2) El que realice las conductas descritas en el apartado 1 de este artículo siendo la víctima menor de trece años será castigado con la pena de prisión de cuatro a seis años. 3)Incurrirán en la pena de prisión indicada, en su mitad superior, y además en la de inhabilitación absoluta de seis a doce años, los que realicen los hechos prevaliéndose de su condición de autoridad, agente de ésta o funcionario público. 4) Se impondrán las penas superiores en grado a las previstas en los apartados anteriores, en sus respectivos casos, cuando el culpable

The definition "unaccompanied migrant children" distinguishes between unaccompanied children and separated children:

"**Unaccompanied children** are children under the age of 18 who have been separated from both parents and other relatives and are not in the care of an adult who, by law or custom, is responsible for doing so"[161].

"**Separated children** are children under the age of 18 who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. They may, therefore, be children accompanied by other adult family members".

All separated and unaccompanied children have the same rights as national children. Some children, due to their vulnerability, may need additional support in accessing their rights, for example, children with intellectual disabilities.

Unaccompanied migrant children should be able to enjoy all the rights recognised by the relevant international and European standards and in particular by the United Nations Convention on the Rights of the Child, which are preconditions for the realisation of their life projects. In order to ensure effective access to these rights member states should take action, in particular, in the political, legal, social, health, educational, economic and cultural areas[162].

The alternative measures that unaccompanied children can choose to exercise their procedural rights were framed in 2006 in an important statement from the European Network for Ombudsmen for Children (ENOC) laying down the state obligations for the treatment of unaccompanied children. This statement also gives the following definition of unaccompanied children.[163]

"By the term "unaccompanied children" (also called "unaccompanied children"), ENOC refers to all persons under 18 years of age who are outside their country of origin unaccompanied by an adult responsible for them (whether by law or custom), and for as long as they are not effectively taken into the care of such a person."

From the full text of the ENOC statement it is clear that the principles applied in general to children are the same as for unaccompanied children, but they enjoy a stronger safeguard, or at least, they should, under the international principles inspired by the UN Convention on the Rights of the Child and the 1996 Strasbourg Convention. For example, the ENOC statement sets out some rules that should be applied to the legal treatment of unaccompanied children. Firstly, this statement deals with the possibility of unaccompanied children being prosecuted for illegal entry to the country, stating that unaccompanied children, should **not be prosecuted for illegal entry to the country or detained** solely because of their immigration status. Moreover, the care arranged for them should be appropriate to their needs, bearing in mind the following criteria.

- Placement in reception centres separately from adults and for the minimum possible period of time.
- Appropriate conditions concerning nutrition, mental and physical health, hygiene, education.
- Play and leisure.
- Nurture and faith/religious needs;
- Encouragement of foster care or appropriate residential care.

Secondly, the statement outlines the necessity for clear rules for identification. The administrative measures must be conducted in a child-friendly manner by competent authorities well trained in international child protection and in techniques for interviewing children and young people[164].

perteneciere a una organización o asociación, incluso de carácter transitorio, que se dedicare a la realización de tales actividades. 5) Las penas señaladas se impondrán en sus respectivos casos sin perjuicio de las que correspondan por las infracciones contra la libertad o indemnidad sexual cometidas sobre los menores e incapaces".

[161] See the definition provided by Dublin II Regulation, art. 2 lett. h) "unaccompanied child" means unmarried persons below the age of eighteen who arrive in the territory of the Member States unaccompanied by an adult responsible for them whether by law or by custom, and for as long as they are not effectively taken into the care of such a person; it includes children who are left unaccompanied after they have entered the territory of the Member States.

[162] See European Commission, Action Plan for unaccompanied children (2010-2014), SEC (2010) 534, section 5.2. International protection status, other legal status and integration of unaccompanied children: Unaccompanied children can be granted refugee or subsidiary protection status under the conditions set out in EU legislation. Given their particularly vulnerable situation, measures to support their integration into the host society are essential. The European Refugee Fund (ERF) could finance relevant activities.

[163] See www.ombudsnet.org, ENOC Statement on State Obligations for the Treatment of Unaccompanied Children, approved in the Annual Meeting in Athens on 26-28 September 2006

[164] We report hereinafter the statement of the Deputy Ombudsman for Children in Catalonia: I. a. Complaints and ex-officio actions: Individual complaints have been increasing in number this year addressed to the Ombudsman of Catalonia, and they have incorporated the voice and worries of the children through the Children's Web. They are related mainly to school problems, unfair family treatment, problems deriving from divorce cases, lack of leisure facilities, not enough inclusive education, architectonical barriers, and others; old issues have kept coming back to the Ombudsman in relation to school access, delays and conflicts in the adoption process, bullying, family relationship in contentious divorce cases, care and protection facilities, unaccompanied children mostly referred to deportation procedures, among others. An effort is made by the team not to be engulfed by individual casework, in order to make possible the follow-up of several ex-officio actions undertaken this term or even the previous year. Some of them have resulted in quite a number of recommendations and proposals made to the administration, and the rest are in the process of field study or data analysis. These include child evaluation task teams, juvenile justice education and detention

As regards the specific rights granted to unaccompanied children, **age assessment** is the most important because it affords more protection on the basis of the child's age. It should only be conducted in cases of serious doubt and should be scientific and systematic, using independent experts and modern technological tools and it includes a combination of physical, social and psychological maturity assessments. According to the **right to information,** unaccompanied children should be informed, in their own mother tongue or in a comprehensible language, about their opportunities for applying for asylum. The **right to representation** should be ensured through interpreters and specialised legal advisors[165]. In this respect a broad right to defence has to be granted through the possibility of launching an **appeal procedure** against administrative and judicial decisions. Moreover, immediately after their arrival, unaccompanied child should be entrusted to a skilled guardian who should be appointed without delay and continue in that role until the child is reunified with his/her family or receives an appropriate care placement that identifies the carer as guardian. The guardian, who is appointed to serve the child's best interests, should ensure that the rights relating to the welfare and care needs of the child are properly granted. The legal core of the safeguards for unaccompanied children is that they should **never be deported/expelled**. Re-integration into their social country of origin should only be possible through assisted voluntary repatriation, and only if this meets the best interests of the child.

The problem of safeguarding children at risk of social exclusion now presents a challenging standard to be achieved. As the European Commission Action Plan posted on 5 May 2010[166] shows, there are many still gaps at the level of European legislation, particularly as regards children at risk of social exclusion, who do not fit into a definite category. As the report explains: "In particular, EU legislation does not provide for the appointment of a representative from the moment an unaccompanied child is detected by the authorities, namely before the relevant instruments are triggered. Representation is only explicitly stipulated for asylum applicants. Although important safeguards for unaccompanied children are provided by the Return Directive, the Temporary Protection Directive, the Directive on Victims of trafficking in human beings and other relevant international instruments, a margin for interpretation is left to member states. Moreover, no common understanding exists on the powers, the qualification and the role of representatives. Unaccompanied children should be informed of their rights and have access to the complaint and monitoring mechanisms in place".

4. Protection of migrant children at national level

Our research focuses on five different countries that are member states of the Council of Europe. They are Italy, Spain, Greece, Sweden and the United Kingdom. The only country whose definition of an unaccompanied child is totally compatible with the European standards is **Greece**[167]. According to Law 3386/05 "Unaccompanied child means any third country national or stateless person who has not attained the 18th year of his/her age and enters Hellenic Territory without being accompanied by a person responsible for him/her, according to law or custom, throughout the above mentioned status, or was found unaccompanied after his/her entry in the Country". In **Italy**, the definition of unaccompanied children[168] does not include children who have requested

centres, re-organisation of the child protection system, the situation of temporary foster care, and which the professionals working both in the area of education and in the area of child care and protection have asked for the intervention of the Deputy Ombudsman for Children's Rights, this being a growing group of citizens urging our institution for advocacy and mediation with the administration (Barcelona 2007, Sindic, El defensor de les persones).

[165] See Marvin Ventrell, Legal Representation of Children in Dependency Court: Toward a Better Model. The ABA (NACC revised) Standards of Practice, NACC Children's Manual Series, 10,167, (1999)

[166] See the COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL, Action Plan on Unaccompanied Children (2010 – 2014), Brussels, 6.5.2010 COM(2010)213 final, SEC(2010)534

[167] Law 3386/2005, art. 1, translation service, Ministry of Foreign Affairs, accessed at http://old.certh.gr/libfiles/PDF/MOBIL-65-Nomos3386_en.pdf

[168] See *Regulation concerning the missions of the Committee for foreign children*, D.P.C.M. 9-12-1999, n.535. The definition includes every child who does not posses Italian citizenship or the nationality of other states of the European Union, who has not presented an application for asylum, and who finds her/himself, for whatever reasons, on national territory without assistance or a legal representative or without other adults legally responsible for him/her according to the law in force.

asylum and are in national territory without any adult responsible for them. **Spain** did not have a statutory definition of **unaccompanied children**, but only one for foreign children[169], until Royal Decree no. 557 was passed in June 2011, in which Article 189 defines unaccompanied children as foreigners under eighteen years of age who reached Spanish territory without being accompanied by an adult responsible for them or any foreign children who are in Spain in the same situation. Since 1987, the Spanish government has been developing a new system for the legal protection of children's rights and interests. Specifically, Law 21/1987 extended welfare intervention and administrative guardianship. The Spanish protection system has been improved by Spanish Organic Law 1/1996, which recognizes children as holders of a series of rights. On the basis of these two state laws (Law 21/1987 and Organic Law 1/1996), the Autonomous Communities have improved social and legal protection of children in terms of administrative custody and guardianship with biological, foster and adoptive families[170]. The **United Kingdom** definition of unaccompanied children includes those who apply for asylum, recognising "unaccompanied children seeking asylum"[171]. In **Sweden**, an unaccompanied child is a child with no custodial parent in the country[172].

As regards the procedural rights granted to these children, Directive 2005/85/EC of 1 December 2005 on minimum standards for the procedure for granting and withdrawing refugee status within the Member States, Article 14 provides that "specific procedural guarantees for unaccompanied children should be laid down on account of their vulnerability"[173]. In **Italy** the procedure for entering the country has become more complex following a Directive from the Ministry of the Interior and the Ministry of Justice in 2006 and the Circular from the Department of Civil Liberties and Immigration in 2007. The application for asylum must be transmitted immediately to the central police station, which informs the juvenile court and the guardianship judge. In **Spain** the procedure takes three months rather that six months[174]. In **Greece** the summary preliminary interview of the child is conducted through general questions whose goal is to make the child say that he migrated for economic reasons. In the **UK,** the asylum procedure is conducted by the UK Border Agency, and the rules state that "account should be taken of the applicant's maturity and, in assessing the application of a child, more weight should be given to the objective indications of risk than to the child's state of mind and understanding of their situation"[175]. After a first brief interview, the applicant is provided with an asylum seeker's certificate and, if s/he is a child, with an application for asylum that has to be filled out within 20 days. If the child is over 12, the immigration officer in charge of the case must screen him/her. In **Sweden** the Aliens Act amended in 2005 states that the asylum procedure should last for three months at maximum. It begins with the appointment of the legal representative, and only if the application is processed, is it necessary to appoint a lawyer. Then the Migration Board in the presence of the child's lawyer screens the child, and the interview should be conducted in order to establish his/her identity and obtain information about her/his family[176].

At the end of the investigation, the decisions of the Migration Board can make one of the following decisions.

- refugee status
- subsidiary protection
- humanitarian protection

[169] See Immigration Act 2009, Art. 9 and Art. 17

[170] See the concluding observations of Spain at the Fifty-fifth session of the Committee on the Right of the Child, 13 September - 1 October 2010: "§60. The Committee recommends that the State party:
a) Take all necessary measures to prevent irregular procedures in the expulsion of unaccompanied children;
b) Establish child-friendly reception centres for children, with effective mechanisms to receive and address complaints from children in custody, and effectively investigate reported cases of ill-treatment of children;
c) Coordinate with Governments of countries of origin, especially Morocco, to ensure that repatriated children are returned to family members willing to care for them or to an appropriate social service agency;
d) Develop a uniformed protocol on age-determination methods and ensure that age-determination procedures are conducted in a safe, scientific, child- and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child;
e) Guarantee, following identification, an analysis of the unaccompanied child's individual circumstances, bearing in mind the best interests of the child, and the child's right to be heard;
f) Provide unaccompanied children with information about their rights under Spanish and international law, including the right to apply for asylum;
g) Ensure adequate territorial coordination between central, regional and local administrations, as well as with security forces;
h) Address the quality of conditions in emergency centres in the Canary Islands and Spanish enclaves;
i) Provide training on asylum matters and the specific needs of children, including the situation of unaccompanied and separated children, issues concerning human trafficking, and treatment of traumatised children to personnel dealing with unaccompanied children, including asylum officials, border police and civil servants, who might be the first persons in contact with children in need of protection; and
j) Take into account the Committee's general comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin.

[171] See UKBA, Asylum Process guidance for special cases, processing application from a child, §4-2

[172] See Aliens Act 2005-716, chapter 10 §3, chapter 18 §3; Law 2005/429

As regards the **age assessment** in **Italy** and **Spain,** the method used is bone examination based on the Greulich and Pyle method, taking X-rays of the left hand and wrist of boys and girls in various age brackets. The people carrying out the tests are not told of the consequences of their examination, the margin of error in Italy is never indicated and the medical personnel are not always specifically skilled in that area[177]. In **Greece** there is generally no medical examination, and the decision is based on the appearance of the children. If they appear to be under 16 years of age, they are considered children, otherwise they are considered adults and can be deported[178]. In **Sweden** age assessment is based on an interview, which can be combined with a medical examination. Although the way the assessment is carried out can be challenged in the courts, the assessment of the Migration Board cannot not be appealed. In the **UK** the assessment is provided by the social worker and is based on the history of the child, a medical examination is not mandatory and the use of the social worker could provoke conflicts of interest[179].

The age assessment is particularly relevant for the application of the Dublin II regulation[180], adopted in 2003, which establishes which European country is responsible for processing the asylum application. Generally, the first state entered by the applicant is the country responsible for handling the request for asylum. Even though Dublin II contains a general clause which identifies the competent state for unaccompanied children seeking asylum as the state in which one member of their family lives or, secondarily, the state in which the child is seeking asylum (Article 6), other criteria are currently used to transfer these children. The age assessment is crucial for application of Dublin II, because children may be considered adults in some countries. In **Italy** a child is always examined on the basis of her/his statements in addition to in the application for return to her/his family. **Greece** is a highly risk-prone country because it often incorrectly identifies children as adults on the basis of faulty age assessment[181]. Furthermore, children are not given access to the complete asylum process. In the **UK** the transfer of unaccompanied children increased considerably between 2004 and 2009 and transfers to Greece are considered in order by the British authorities which holds that asylum seekers returned to Greece can be assessed in that country. In **Sweden** in 2008 the Migration Board stopped transfers to Greece.

4.1 The right of residence and removal

Some of these countries recognise a right of residence until children reach the age of 18 years. In **Italy** every unaccompanied child found by the authorities is granted a residence permit as a child for the necessary time to research his or her family ties. When the Committee for Foreign Children does not decide to proceed with repatriation, the child is granted a residence permit for placement on the basis of the procedure set down in Law 184/83. There is no possibility of staying in Italy illegally [182] since children enjoy the right of residence on Italian territory. If the child is under the age of 14, s/he is entrusted to a foreign person who is a legal resident and with whom s/he lives and on whose personal residence permit s/he will be listed. Children over the age of 14 years living with their own parents are granted the same protection. In **Spain** children can request a residence permit by applying for guardianship, nine months after being taken into care by the protection services and if repatriation is considered impossible. Being under the care of the protection services allows children to be considered legally resident in the country[183]. The residence permit is valid for one year from when the protection service takes the child[184] into care.

[173] See Children's Ombudsman, Comments concerning the Swedish government's fourth periodic report to the UN Committee on the Rights of the Child, January 2009
[174] See Law 12/2009
[175] See UKBA, Guidance for Special Cases, supra note 37
[176] See Aliens Act, Chapter 1, sections 10 and 11
[177] See The reception and care for unaccompanied children, cit., 88-90
[178] See Presidential Decree 90/08
[179] See UKBA, Asylum Process Guidance, cit.
[180] See *The reception and care for unaccompanied children*, cit., 76
[181] According to Article 12.4 of Presidential Decree 114/2010 the competent authorities may use medical examinations in examining applications for asylum but until now the authorities have not circulated any official procedure for age assessment.
[182] See Circular from the Ministry for the Interior, 13-11-2000
[183] See Royal Decree 2393/04 (no longer in force), art. 92.5
[184] See also RoyalDecree 557/11, art. 196. 2&4

In other countries illegal residence while underage is possible[185]. In **Greece** only children who have applied for asylum or who have been taken into care by the protection services can enjoy the right of residence. Since the vast majority of unaccompanied children are not able to apply for asylum or be taken into care, they technically find themselves in an illegal position on the territory of the state[186]. In the **UK** children can be granted different kinds of permits: refugee status (residence permit for 5 years), subsidiary protection (residence permit for 5 years), temporary residence authorisation (discretionary leave) and if return is not possible (residence permit for 3 years or until 17 and a half years). Children whose application is unsuccessful are considered illegal migrants[187]. In **Sweden** children can also be granted different permits depending their status: refugee status (residence card for 5 years), permanent residence permit based on the need for protection, permanent or temporary permits based on humanitarian reasons or family ties. Children whose application is unsuccessful on the above grounds are considered illegal migrants and in Sweden the fact of being a child does not dispense with the need for a residence card[188].

As regards the possibility of removal, in **Italy** children who enter Italian territory cannot be deported without a public order or national security order following a decision of the juvenile court[189]. In Italy, as in **Sweden**, the country of return establishes the conditions of return[190]. Although it is not possible to deport children, it is possible to engage in a procedure of assisted repatriation when the child so wishes[191]. In **Spain** removal is based on the child's wishes[192]. In 2008 the Constitutional Court recognised the right of the child to oppose his/her repatriation[193] and according to Article 35.5 of the 2009 Immigration Act "repatriation to the country of origin shall be made either through family reunification, or by the provision of the child protection services if conditions are suitable for protection". Moreover, children cannot be deported but can be subject to a repatriation procedure after the child has been heard before the courts. This safeguard granted to children led the Constitutional Court, on 22 December 2008, to call a halt to the return of children. In **Greece,** removal is subject to the same rules as those for adults[194]. It is the only country form which children can be deported under the same conditions as the adults and in which there is no procedure for voluntary return[195].

As regards the **United Kingdom**, the 1971 Immigration Law permits authorities to remove illegal migrants, including unaccompanied children. Children can be deported with adequate guarantees and voluntary return is possible within the International Organization for Migration (IOM) programmes. These programmes are based on an assessment of the best interests of the child, the assignation of the child to a social worker, an inquiry undertaken by the IOM on the country of origin's conditions of return[196]. Finally, in **Sweden** children can be subject to a removal decision undertaken by the Immigration Board that is a voluntary or a forced return. The decision is made on the basis of return conditions (identification of the family), but not on the basis of the child's wishes[197].

4.2. The problem of legal representation for unaccompanied children

Unaccompanied children are not considered to have legal capacity and therefore they need to be granted legal representation on the basis of Article 12 of the UN Convention and Article 4 of the Strasbourg Convention. In **Italy** the Committee for Foreign Children or the child's reception centre, within 30 days from arrival, may request the guardianship judge to appoint a legal representative as quickly as possible. The legal representative is subject to the rules of the Civil Code and, in the event of

[185] Supra note 34 at 30
[186] See Law 3386/05
[187] See UKBA, Asylum process guidance for special cases, accessed on www.ukba.homeoffice.gov.uk
[188] See Aliens Act, chapter 4, section 1
[189] See Immigration Act, Art. 19
[190] See *The reception and care of unaccompanied children in eight countries of the European Union*, supra note 37, at 35
[191] See Immigration Act, Art. 33, § 2-bis
[192] See Immigration Act, Art. 33, § 2-bis
[193] See Spanish Constitutional Court, Decision 183/2008
[194] See Law 3386/05, art.76, §3
[195] Report by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, February 2009, Comm DH (2009) 6
[196] International Organization for Migration, Voluntary Assisted Return and Reintegration Programme, Guidelines for Unaccompanied Children, accessed at www.iomlondon.org
[197] See European Migration Network, May 2010, at 35

conflict of interest, s/he can be replaced by a supervisor known as a "protutore". If asylum is being sought, the procedure can be suspended until the guardian is appointed[198]. In **Spain** the manager of the reception centre assumes the role of legal representative[199]. In **Sweden** a first representative who assists the child during the asylum application can be appointed, but if the residence has been granted, a second representative will be appointed, referred to as the guardian[200]. In the **UK** and in **Greece** no legal representation for unaccompanied children is granted.

In the **UK** reception centres assume responsibility for child protection but they do not have parental authority, and in practice, children do not have legal representation until the age of 18 years [201]. However, an extension of protection over the age of 18 years is provided, although this is not be a requisite for extending the right of residence. It is called leaving care service and depends on different factors, such as the type and duration of the care, and therefore a child who has been denied asylum protection, can continue enjoying this social protection, but a child who is considered illegally resident does not have further access to social protection[202].

In 2007 **Greece** passed a law which made provisions for extending the guarantees of asylum seekers to the period before they make their request and prosecutors usually apply these provisions very strictly. In practice, children who have been placed with protection services can be granted an informal representative, who is not a legal representative[203]. More recently, in 2010, Article 12 of Presidential Decree 114 introduced specific measures to make the competent authorities appoint a guardian for the child (according to paragraph 1 of article 19 of Presidential Decree 220/2007 if an application is lodged by an unaccompanied child). Hence the authorities must immediately inform the public prosecutor who acts as temporary guardian according to Presidential Decree 220/2007 article 19/1 (which relates to article 1592 and 1601 of the Greek Civil Code) and s/he may propose that a permanent guardian be appointed by the court.

4.3 The problem of legal representation for children seeking asylum

The term "legal representative" has a general definition which includes any person who is a custodian, representative, administrator, guardian and who assists children in legal procedures[204]. In **Italy** a child needs a representative in order to apply for asylum. The guardian is appointed by the juvenile court and her/his role is to assist the child during every step of the procedure, including submitting an appeal[205]. In **Spain** the guardian is appointed by the regional protection services[206]. In **Greece** children over the age of 14 can apply for asylum without a representative if the police officer considers them sufficiently mature. Under the age of 14, the prosecutor usually provides temporary legal representation and appoints the legal representative[207]. According to Presidential Decree 90/2008, Article 4.3, the prosecutor can also act as a representative of children under 14 years old in order to submit the application for asylum. Furthermore, according to Article 11 of Presidential Decree 114/2010, all applicants for asylum have the right to free legal aid (Law 3226/2004) but only during, and not before, judicial proceedings. According to the same article, there is no provision for legal aid for unaccompanied children except for those who submit a claim for asylum. In the **UK** children can be granted a lawyer free of charge and they can be heard before the judicial authorities in the presence of a responsible adult who can be "the legal representative, lawyer, social worker, guardian, relative or a member of the host family of the unaccompanied child"[208]. In **Sweden** the legal representative of the child should be appointed on the initiative of the Immigration Board or the Social Affairs

[198] See Articles 346 and 348 Civil Code
[199] See Royal Decree 557/11, art. 196
[200] See supra note 43
[201] See Children Act 1989, § 31
[202] See Nationality, Immigration and Asylum Act, 2002, Appendix 3, Chapters 6 and 7
[203] See Unaccompanied Children Seeking Asylum in Greece, April 2008
[204] See the Statement of Good Practices, 4th Revised Edition. Separated Children in Europe Programme, Save the Children, edited by Terry Smith, 2009
[205] Art. 374 Italian Civil Code
[206] See Royal Decree 557/11, art. 196.2
[207] Presidential Decree 220/07, O.G. 251 (A)
[208] UK Boarder Agency, Guidance for special cases, www.ukba.homeoffice.gov.uk

Committee as quickly as possible, as Swedish Law on legal representation indicates. The UN Committee on the Rights of the Child has indicated the reasonable time as 24 hours[209].

4.4 Unaccompanied children who are victims of trafficking

As regards child victims of trafficking, almost all the surveyed countries treat them as unaccompanied children and sometimes those most vulnerable to trafficking are indeed unaccompanied children. All EU countries have ratified the Council of Europe Convention on Action against Trafficking in Human Beings, except Greece[210]. In **Italy** a high standard of protection is provided in this respect by Legislative Decree 268/98 and Law 228/03. Under the first provision, child victims of exploitation or violence, including trafficking under Article 600 of the Penal Code, can be granted a six-month permit, regardless of their cooperation with the police services, which is valid for one year (Article 18). The second provision modifies Articles 416, 600, 601 and 602 of the Penal Code on the trafficking of human beings, providing for a penalty increase of one third to half whenever the victims are children. This law also provides a special programme of social assistance for victims under Article 13.

In 2007 **Spain** passed Organic Law 13/2007 (19.11.2007)[211], amending Organic Law 6/1985, allowing Spanish courts to prosecute cases of trafficking even when these occurred outside Spain's borders[212]. Spain also adopted Action Plan II against the Sexual Exploitation of Children and Adolescents for the period 2006-2009. As regards criminal law, the Penal Code punishes with imprisonment not only persons responsible for trafficking (Article 318-bis) but also those responsible for trafficking for labour (Article 312.1)[213]. The Spanish Civil Code contains a general provision, allowing vulnerable children to apply for a guardian[214]. No specific measures are provided for granting **asylum** to trafficked children and Law 5/1984 on Asylum and Refugees refers to the requirements established by the Geneva Convention and the additional New York Protocol. The only provision is Article 15 of the Asylum Ordinance Law adopted by Royal Decree 203/1995 which states that vulnerable child asylum seekers are placed under the responsibility of the competent youth welfare service[215].

In 2002 **Greece** adopted the first Anti-trafficking Law (No. 3064/2002), which amended the Penal Code and provided for punishment for criminal acts of trafficking, as defined *inter alia* in international legal instruments. In December 2007 it ratified the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography with Law 3625/2007[216]. Greek law does not specifically provide for the appointment of legal guardians in cases of unaccompanied child trafficking victims. Due to the lack of legal provisions, Article 4 of the Civil Code states that unaccompanied children are to enjoy the same civil rights as Greek citizens, thus they may invoke the provisions on legal guardianship of the Civil Code and, in all cases, they are allowed a one-month extension[217]. According to Article 47 of Anti-trafficking Law 3386/2005, only prosecutors and police authorities are responsible for contacting the child's family and for the appointment of a legal guardian[218]. In **Greece** the first National Plan of Action against Trafficking in Human Beings was adopted in 2004 and revised in 2006, even though has not been passed as a law. Moreover, unaccompanied child trafficking victims are granted a humanitarian residence card if they cooperate with the police services. In the **UK** and **Sweden** no extra protection is afforded these categories[219], and the legal framework relating to unaccompanied children is applied.

[209] See Peter L. Martens, *Immigrants, Crime, and Criminal Justice in Sweden*, Crime and Justice, Vol. 21, Ethnicity, Crime and Immigration: Comparative and Cross-National Perspectives (1997), p. 192

[210] Italy ratified the Council of Europe Convention on Action against Trafficking in Human Beings on 29 November 2010; Spain on 2 April 2009; Sweden on 31 May 2010; the United Kingdom on 17 December 2008.

[211] The first provision was Organic Law 10/1995 (23.11.1995)

[212] Yolanda Gómez Sánchez, FRA Thematic Study on Child Trafficking SPAIN, Barcelona, Spain July 2008, accessed at http://fra.europa.eu/fraWebsite/attachments/Child-trafficking-09-country-es.pdf

[213] *Ivi*, § 32

[214] *Ivi*, § 5

[215] *Ivi*, § 11

[216] See Erika Kalantzi, Thematic Study on Child Trafficking Greece, August 2008, §4 & 14, accessed at http://fra.europa.eu/fraWebsite/attachments/Child-trafficking-09-country-gr.pdf

[217] *Ivi*, § 22

[218] *Ivi*, § 27

[219] The only provision is the Asylum and Immigration Act 2004, chapter 19

Conclusions

The full final report, as previously stated, will contain the results of the findings of both the desk review and the field research. Naturally these consider the issues from different perspectives in that the former presents an analysis of the legislation and the legal instruments *in the books*, while the latter examines the issues of access to justice *in action*. We will refer here to some of the findings of the field research in order to make an initial comparison with the results of the desk review. It should be noted that the definition of social exclusion used follows the principles framed in the child friendly justice guidelines.

Similarities and differences arise from the survey of national experiences. The global analysis, by and large, brings out the fact that even if the categories of social exclusion are not the same in Italy, Greece and Spain, the problems relating to access to justice are similar. The results of the field research are sometimes consistent with the results of the desk review, including as regards single aspects of the survey, for example, in Spain best interests are frequently assessed in practice according to a "negative definition" which determines what is against the child's best interests rather than assessing with certainty what is. The findings list the specific features of the categories of social exclusion for each country, and they also confirm the existence of some gaps in the legislation and, more frequently, in the implementation of the principles. The main reasons for this, according to the desk review results, derive from the lack of training of the professionals who deal with children and who are often unpaid voluntarily workers. In particular, a common trend in Italy, Greece and Spain is that children's rights to information and participation are not treated as fundamental rights. Sometimes these rights are considered an obstacle to the reasonable length of proceedings since they lead to an excess of time spent on the formalities, as is the case in Spain, where the right to be heard is sometimes not exercised in order to avoid such delays. More specifically, Spain has a judge-friendly approach, since the right to participation often depends on the discretion of the judges who can also deny children considered too young the right to be heard. However, in the analysing these rights, the emphasis is put on different aspects in the various countries. For example, in Italy, as regards the right of representation, there is a general consensus about the role of children's representatives, while in Greece and Spain the right to information is generally not exercised at all by children at risk of social exclusion, even if they have representatives. Moreover, in Spain the right to be heard and the right to express one's own views are deemed overlapping and confusing.

As for some general conclusions on the specific categories identified in order to address the problem of social exclusion, Spain and Greece present a marginalisation factor linked to ethnicity, while in Italy ethnicity does not appear as a marginalisation factor. This is also due to the fact that the Italian field research seems to take a broad sociological approach which identifies a few parameters: gender and age, marginalisation factors, children's participation, best interests, representatives, training and non jurisdictional protection of rights. Spain and Greece, on the other

hand, starting from the legislative data, identify the category of unaccompanied children as the most vulnerable. The approach also differs if we look at another category deemed at risk of social exclusion, for example the category of disabled children, for which, in Greece, there is a distinct lack of legislation covering such people. This aspect highlights the decidedly haphazard character of the definition of social exclusion, which is sometimes much closer to actual practice than to the normative definition. This is consistent with a general argument in the desk review about the strict divide between the law and social needs, which will not necessarily lead to the adoption of specific legal provisions. It is therefore clear that we can deal with specific legal issues and solutions on a national level, but the problem of access to justice is commonly perceived across national boundaries through a similar awareness of the problem.

Divergences sometimes depend on cultural patterns. Particularly relevant in this respect, is the example of access to alternative measures, a right generally included in domestic legislation, but in its implementation we can record three different outcomes. In Italy the problem, due predominantly to lack of financial resources, is perceived to be linked to the efficiency and the enforceability of these measures, whereas in Spain the problem is the general reluctance of judges to order alternative measures. In Greece the only alternative measure is recourse to the Greek Ombudsman, probably because this figure is deeply rooted in Greek cultural civic needs. This generally accounts for the higher level of court proceedings in Italy, Greece, Spain and the United Kingdom where alternative measures are considered merely as a first step before entering judicial proceedings, whereas, in Sweden, alternative measures seem to have an autonomous social function regardless of any subsequent judicial proceedings.

These examples further demonstrate the usefulness of the double-bind approach of using both the desk review and field research. The findings of this research are obviously only partial, given the time constraints and the particular scope of the analysis. They could be deepened and broadened in the future by taking into account other national experiences and different substantive child protection issues.

At this stage, the overall result of the desk review is that children's rights might be summarised as follows. Three different aspects of children's rights must be considered: procedural rights required in order for these rights to be exercised; depending on how they are assigned, rights as tools of protection according to their attribution and, depending on how they are perceived, whether or not these rights are qualified as fundamental. It is known that the principles of the child-friendly justice guidelines are not legally binding, whereas the Strasbourg Convention is, meaning that protection is not strictly linked to the convention and to the legislation in general. We might better express this point by saying that the legislation is not enough, as is confirmed at the level of practice since, for example, the ECHR case-law referred to put in place some child-friendly principles even before the adoption of the Strasbourg Convention and the guidelines.
Finally, these principles are sometimes overlapping and reciprocal, and distinguishing between them is merely conventional, although this is a useful exercise in order to depict cultural trends. In conclusion, the findings of the desk review and the field research appear to be consistent overall.

Part Two

Access to justice for children at risk of social exclusion in Greece, Italy and Spain

Greece

1. General Introduction

According to some of the interviewees, the entire country is suffering from social exclusion due to the current economic crisis. By the end of 2009, as a result of a combination of international and local factors, the Greek economy was facing its most severe crisis since the restoration of democracy in 1974 as the Greek government revised its deficit from an estimated 6% to 12.7% of gross domestic product (GDP). This situation exacerbated the problems of those groups already suffering social exclusion such as unaccompanied children and disabled children. The interviews conducted for this research study revealed that unaccompanied children and disabled children are the largest categories faced with social exclusion due to poverty for the former category and the lack of institutions and services for the latter category.

Over the last 15 years in particular, Greece has become a reception point for migrants and a permanent destination for many immigrants, most of whom hail from Central and Eastern Europe, and despite two legalisation programmes, a good number of them still reside in Greece without authorisation. Recently, there has been an increase in the percentage of illegal migrants arriving from Asia, particularly Afghanistan, Iraq, Pakistan, and India. As in the past, a complex set of forces is both attracting migration to Greece and pushing it away again. According to the latest census, the population of Greece increased from 1991 to 2001 an increase that can be almost exclusively attributed to immigration in the past decade.[220] The census showed that the "foreign population" living in Greece in 2001 numbered 762,191 (47,000 of them EU citizens), making up approximately seven percent of the total population. In 2010, 10273 claims for asylum in first degree were submitted[221], but it is estimated that the real number of immigrants is higher, not least because many immigrants were not included in the census and many analysts believe that migrants make up as much as 10 percent of the population. The Greek Cabinet has approved Law 3838/2010 allowing children born in Greece to parents who are immigrants, one of whom must have been living in the country legally for at least five consecutive years, to apply for Greek citizenship[222].

No quantitative or other statistical data exist for public spending on children with disabilities[223]. According to the Ministry of Health, the intention to record people with disabilities as such in the 2001 national census in Greece were abandoned *"as a result of reactions bases on worries about safeguarding personal data"*. No quantitative data is provided on the rate of cases of abuse–neglect of children with ID (intellectual disabilities) because there is no national reference system for Greece. Data is provided on public expenditure on education in general, yet not on children with special educational needs (SEN). According the Greek National Report of 2009 which was submitted to the United Nations Committee on the Rights of the Child, there is no specification of the benefits for children with SEN resulting from the implementation of the relevant EU programmes. This report quotes **15,850** rather than the **23,470** students with SEN (2007-2008) recorded in recent official data[224]. No separate data is provided on the number of students per type of SEN, on students with ID, nor on children who are not in education and live in an institution or at home. There is no data on the ages and the number

[220] Hellenic Statistical Authority (EL.STAT.) www. Statistics.gr

[221] www. unhcr.gr/statistical information

[222] An appeal against this law has been lodged at the Hellenic Council of State (Symvoulio tis Epikrateias) the Supreme Administrative Court of Greece and two political parties, New Democracy and Popular Orthodox Rally (LAOS), have said they would repeal the law if they come to power.

[223] See I. Kouvaritaki National Narrative report for "Children's Rights for All - Monitoring the implementation of the UN Convention on the Rights of the Child for Children with Intellectual Disabilities' (Author, Title, Date)

[224] See Kouvaritakiibid www.eurydice.org, http://eacea.ec.europa.eu/education/eurydice/documents/eurybase/eurybase_full_reports/EL_EN.pdf Ch.10.8, statistical data, tables 1,2,3.

of children with ID living in a family or in alternative care, nor on children registered with the welfare services, on annual public spending on families, institutions or health, child mortality and the number of abortions due to the possible disability of the infant.[225]. In the opinion of those interviewed, although there is no reliable data collection system, it is estimated that 10% of the population has some form of disability and the largest number of disabled children, probably 80-90%, live with their families.

Last but not least the interviewees mention juvenile offenders as a category that, in their opinion, face social exclusion. In Greece three special institutions for young offenders are now operating and, according to the official records of the Ministry of Justice, 555 young offenders are currently detained in these, one third of whom are Greek, the majority being of Roma origin. The most common offence commented by Greek offenders is traffic code violation (car-related offences), 95-98% of them are males and most of the juvenile offenders are 15 years-old or older. The social background of the offenders depends on the type of crime, but family conditions and poverty are key factors in all of the crimes. According those interviewed, there is no identifiable common factor for drug-related offences.

2. Marginalisation Factors

Marginalisation is defined as a process by which a person becomes distanced from the conventional institutions within society. Although there are no quantitative differences in marginalisation between the various socially excluded children, school failure, drop-out and delinquency are considered to be markers of marginalisation. In general, for socioeconomic reasons and predominantly poverty, most unaccompanied children prefer to work, even without insurance, than to go to school and those that do go to school begin their school careers with a low proficiency in Greek and have other problems that frequently increase rather than decrease during primary school. Consequently, most of them leave school without a diploma, the school system having failed to offer them equality of opportunity, and are therefore excluded form the labour market, all of which may lead to social exclusion or even to crime. While children with disabilities benefit from care placements providing social, educational and health support, these still do not meet all their needs and therefore many of them are unable to integrate fully into society.

3. Methodology and Objectives

Throughout the months of October, November and December, almost 20 interviews were conducted with public authority personnel and experts on issues related to social exclusion. Four areas in Greece were selected: Athens and Thessaloniki because they are the biggest cities in Greece and therefore have the largest portion of excluded children, Avlona a small village in Attica the location of the Special Detention Centre for Juvenile Offenders and Evros, a remote area in Northern Greece on the Turkish border where a large number of unaccompanied children without legal documents cross into Greece. The Athens interviews were conducted with the representatives of The Centre for the Education and Rehabilitation of the Blind (C.E.R.B.) a public-sector legal entity, supervised by the Ministry of Public Health and Social Solidarity (Welfare). C.E.R.B supports visually impaired individuals from all over Greece, with the aim of creating equal opportunities for

[225] See Kouvaritaki ibid

them by providing education, thus enabling them to integrate into society. Interviews were also conducted with personnel from the Rehabilitation and Recovery Centre for Handicapped Children (KAAPV), a public-sector body specialising in infant therapy, physical, speech/language and occupational therapies, assistive technology services, in addition to child and family counselling; the National Confederation of Disabled People (N.C.D.P) a member of the European Disability Forum that represents organisations of people with disabilities; the Pan-Hellenic Federation POSGAMEA, a federation of associations of parents and guardians of children with severe disabilities (mainly mental retardation, autism, psychoses, orthopaedic impairment, multiple disabilities), whose members number 184, distributed throughout the country; the Centre for the Protection of Children with Special Needs; The Greek office of the United Nations High Commissioner for Refugees (UNHCR), a United Nations agency mandated to protect and support refugees at the request of a government or the UN itself, assisting with their voluntary repatriation, local integration or resettlement to a third country; EPANODOS the Reintegration Centre for Ex-offenders, founded to facilitate ex-offenders' reintegration into society by providing them with every possible assistance with their social and professional resettlement; the Greek Council for Refugees and the Ministry of Justice. In Avlona, Attica, interviews were conducted at the Special Juvenile Detention Establishment (Ekkn), a detention centre for juvenile offenders and at the Central Scientific Council for Prevention of and Fight against Child Victimisation and Juvenile Delinquency" (www.kesathea.org).

4. Findings

4.1. General Findings

- It is worth repeating that most of the legal provisions relating to socially excluded children in Greece have been drawn up along the right lines and seem to be consistent with the European requirements. However, there are significant failures in the implementation of these provisions, since the services lack both trained personnel and the necessary technical infrastructure, for example, to date there are not enough institutions to deal with all the unaccompanied children and therefore the majority of them are living in very poor conditions on the street.
- According to the research findings, different Greek social services use different approaches and different systems and there is no common code of practice, sometimes even within the same service, for combating social exclusion. Furthermore, the links with the other partners in the same chain will have to be strengthened.
- Specialisation and good training of social service personnel is also crucial. The interviewees told us that social workers, psychologists, and teachers dealing with social exclusion issues are unfortunately under-represented and many more need to be recruited.
- The efficiency of the implementation of laws relating to the protection of socially excluded children can also be measured by the extent of cooperation between the different services and experts. Some interviewees stressed the lack of communication and cooperation between the different experts involved. The interviewees told us that the experts and social service professionals need to work on the basis of clear assignments from their partners in the justice field, cooperation with the prosecution service, the judiciary and juvenile offenders' prison service is of prime importance.

- The lack of a reliable data collection system is another problem, with, crucially, no nationwide database for unaccompanied children.
- A new factor, the result of the economic crisis, is the retirement of trained personnel and an enormous effort is needed to replace those who have left and train new personnel.

4.2. Specific comments

4.2.1. Best interests of the child

Although there is no standard definition of "best interests of the child," in Greek legislation, the term generally refers to the deliberation made by courts and decision-makers when deciding what type of services, actions, and orders will best serve a child, in addition to who is best suited to taking care of a child. "Best interests" decisions are generally made by considering a number of factors relating to the circumstances of the child and the circumstances and capacity of the child's potential caregiver(s), with the child's ultimate safety and well-being as the paramount concern. These factors vary from child to child and from one category of socially excluded children to another. The basic factors are family circumstances, psychological problems and economic conditions but, for juvenile delinquents, the aim of preventing re-offending is also a major consideration. For juvenile delinquents in particular, some of these factors may mean that the child needs more probation supervision and counselling by the authorities.

It was not clear from the interviews if the opinion of the child is always taken into consideration when the decision makers assess the child's best interests. In some cases the judges ask the child's opinion whenever the procedure affects him/her but that opinion may not be the first consideration if an objective issue needs to be examined. However, apparently children are not always given the opportunity to be heard in many procedures conducted according to Greek law. In family courts children are able to be heard in parental care cases, but this is at the discretion of the judge (Article 1511 of the Greek Civil Code). In cases of deportation of unaccompanied children, the child's safety and well-being and the re-unification of the family are considered the main factors and therefore children are not given the opportunity to be heard in this procedure. In cases involving disabled children, the first consideration is to find a suitable hospital/ institution for the child, regardless of his/her opinion and there is no procedure for him to be heard.

4.2.1.1 Assessment

In most cases, there is an assessment of how the needs of the child are to be met in practice, upon arrival at an institution. Provided that a place can be found, there is usually an assessment of the child's needs covering education (including learning the language), clothing, nutrition and health. However, securing a place in an institution or a hospitality centre does not automatically mean that the needs of the child will be met because there are currently serious funding problems and a large number of staff members have resigned after having been unpaid for some time. The initial assessment of the young person's situation and needs is subsequently matched with the most appropriate institution, from those that are available, that corresponds to the child's profile, taking into account the availability of the institution in question and the number of children that can be accommodated there. The probation service co-ordinates this assessment and the appropriate referrals for juvenile offenders. When children are to be detained in young

offenders' institutions, there is also an initial assessment of their condition done by the institution's social service and repeated periodically, but the thoroughness of this assessment is debatable, due to the heavy workload and the shortage of staff. According to the interviewees, nutrition, education and day care, guidance for future and personal development are the main considerations, but not all these needs are assessed or adequately evaluated by the authorities, partly because of the problems facing the available institutions.

4.2.2. Rule of Law

4.2.2.1. Delays.

It should be noted that there are delays in most of the procedures involving protection of socially exclude children. For example, in cases of abuse, the court hearing is delayed up to 2-3 years. Due to the delays that exist in the administration of justice, even the main trial stage is losing its importance. Young offenders have usually already served the sentence that the court subsequently pronounces and, because of the delay in the trial hearing, in some cases young offenders have been detained for longer than the court subsequently orders. Although there is a periodic review of detention cases every six months, there are relatively few people qualified to conduct such reviews, compared with the number of people detained, and, as a result, not all young offenders receive the same attention and treatment during the review process. Language problems make this review even more difficult.

4.2.2.2. The lack of legislation and social (educational- therapeutic) services for socially excluded children

According the interviewees the lack of *social (educational- therapeutic) services for socially excluded children* constitutes an obstacle to their access to justice, because the lack of such services means that children either receive no support for access to the justice system or, when they are involved in the procedures, they are not given the opportunity to fully explain the factors that have influenced them. The lack of specific legislation for promoting children's right to participate in judicial procedures is yet another obstacle to their access to justice. For example, although vocational centres for disabled children exist, their programmes are very limited and therefore they do not have the opportunity to gain awareness of their rights. It is well known the Greek Penal Code stipulates a special diagnostic procedure for children with intellectual disabilities who violate the criminal laws, enabling special care measures to be taken if they require specific treatment, but to date, there has been no evident implementation of this provisions. There are some vocational training programmes for juvenile delinquents but, while a juvenile offender can work and be paid for his/her work, this work, in most cases, does not train the person for any trade. There is no state-funded or state-initiated vocational programme, but only private initiates by a very few enterprises offering such training programmes which, if they are approved by the prison authority, are subsequently incorporated into their weekly activities. Currently, only two such programmes are running, one of which involves design and printing layouts. After young offenders are released, there is some guidance provided by a central system called EPANODOS[226] that co-ordinates the action of various NGOs, offering advice and some training to those released from prisons, including juvenile offenders. The available programmes are however, very limited. Juveniles communicate with people outside the penal institution through 3 visits per week and regular periods of leave are also available. The post-institutional service is very limited and is mainly organised by a publicly funded NGO on a voluntary basis. Various NGOs specialise in helping offenders

[226] Epanodos claims to have a general system for managing and coordinating the various activities and programmes. Although it is not a public-sector institution, it is subject to the supervision of the Ministry of Justice. Epanodos is therefore, a first point of reference for advising ex-offenders on the programmes available to assist their social integration.

according to their needs and, in some cases, this kind of advice and help is communicated during the detention period. There is also some limited assistance with temporary accommodation and co-ordination with other institutions and philanthropic organisations including the Church. For drug-related offenders, the Manpower Agency of Greece (OAED) runs programmes and occasional workshops are organised by NGOs (e.g. Arsis). OAED vocational programmes start in September and are not available to those who have been released at a later stage, for example in November, so these individuals remain out of training for many months and without such help they are likely to re-offend.

4.2.2.3. Awareness

In many cases children are not made aware of the procedure they are involved in or of their rights in language that they understand and, children are rarely familiar with the language used in judicial procedures. Often, juvenile delinquents do not fully understand all aspects of the procedure before the court and, apart from the probation officer, there is no one to explain these to her/him. Many children are without any legal representation at all or this is insufficient for the particular circumstances.

4.2.2.4. Absence of research

Finally, some interviewees indicated that, among the causes of the problems, is the absence of a systematic and thorough research study on the various needs of socially excluded children. These problems are exacerbated by the lack of effective coordination between the different authorities involved.

4.2.2.5. The legal representative

If the child is given a place in a hospitality centre or orphanage (for those having a residence status), guardianship is arranged by social workers, although there is no system to monitor this. Conflict arises when one of the parents abandons the family environment because s/he cannot cope with the pressure of bringing up a disabled child. The legal representative of a child without parental care or whose parents are in conflict is usually a relative or a third party appointed by the court. In most such cases, the Attorney General acts on behalf of the child in the procedure. For example, when an asylum application has been made, the Attorney General is appointed as legal guardian, but in practice s/he is not well-equipped to supervise the essential day-to-day needs of the child. According to the Greek Law (Presidential Decree 90/2008 Art. 4.3) children up to 14 years old may file an asylum application and represent themselves in proceedings that affect them, as when asylum applications are being examined. The interviewees stressed that, in most cases, unaccompanied children do not have legal representation and, when the prosecutor is involved, this mandate is limited to submission of the application for asylum. Finally, it should be noted that, due to the delay waiting for a court hearing, those awaiting trial in prison also need legal representation and counselling during their detention.

4.2.2.6. Free legal Aid

Unfortunately Law 3226/2004 that provides free legal aid does not make special provisions for children. Although for serious criminal offences only, there is a statutory obligation for legal representation, it should be noted that if legal representation only becomes available at the trial stage, this may well have come too late, because the court is likely to pronounce a shorter sentence than has already

been served in pre-trial detention, rendering the legal representation, at that stage, of limited use. If the offence in question is not classed as a serious crime, the penalty imposed takes the form of guidance and counselling provided by the probation service, which is not really seen as a penalty. There is also a pro bono programme provided by the Athens Bar Association, and other external volunteer lawyers and in-house counselling is provided by various NGOs including *EPANODOS*. This form of assistance is limited and does not meet the needs of all juvenile offenders since it is only provided for asylum applications and through the contributions made by volunteer lawyers whose number is diminishing during these times of economic crisis. In drug-related offences, the trial may be suspended if the child is enrolled in a rehabilitation program, and the trial may never occur.

4.2.2.7. The right of appeal

In general, Greek legislation provides for the right of appeal in some procedures, such as parental care cases, but in most cases children do not receive support with the process. There has always been the right of appeal for serious criminal offences and, for child offences incurring reformatory measures, a right of appeal has recently been introduced[227].

4.2.2.8. Use of appropriate language

Difficulties arise when the socially excluded child is an immigrant and does not speak the language. This problem is rare because, if the young person in question has stayed in the country for more than one year, s/he can usually manage basic communication. Although an interpreter is always available in the court, the problem arises in the period before the juvenile appears in the court, leading, in many cases, to the child losing the special protection that the legislation provides. For example, an immigrant juvenile offender may not reappear for probation supervision because s/he cannot communicate effectively with the probation officers and is therefore afraid of being caught and deported.

4.2.3. Right to participation

When decisions are made on behalf of socially excluded children, there are some provisions that allow, some, but not all categories of children to participate in the procedure. Children in asylum applications are always involved, although not in a sufficient way, but for disabled children it is the expert's view that is considered important and it is her/his experience and expertise that is the basis for the imposition of an educational or therapeutic programme. In deportation cases, the child takes a minimal part in the proceedings, since most of the work is done by the authorities seeking to establish the appropriate safeguards for the child's return to his/her country of origin.

In many cases these decisions are made in a way that children do not understand. Although children involved in criminal proceedings are informed of the outcome, the main problem lies in the critical information that the child needs to know and understand before the final decision is made. It must be stated that, in order to be 'heard', the child needs to know and understand the various stages in the process and therefore expert legal advice and representation should be available at the various critical stages. The pre-decision stage is critical and children are often not well informed about their options, since the administrative system has too many applicants for the existing structures and capabilities to deal with. In most cases, the various procedures affecting children involve so many intermediate stages that,

[227] Law 3904/2010 art. 26.

realistically speaking under the existing capabilities, the information communicated is very limited. Although the Attorney General's office undertakes the task of informing juvenile offenders, the probation service also provides information during the pre-trial period.

According to the interviewees, the final decision is communicated efficiently. However, the main problem lies in the critical information that the child needs to know and understand before the final decision is made. The pre-decision stage is critical and children are often not informed about their options, since the administrative system has too many applicants for the existing structures and capabilities to deal with. Juvenile delinquents are always informed of the final decision and, in principle, a record of this decision should be included in his/her file.

4.2.4. Alternative procedures

In 2003 the Department of Children's Rights, within the framework of the independent authority, the Greek Ombudsman, undertook the mission of the Children's Ombudsman. Its assignment is to protect and promote the rights of children and its competence covers the whole field of children's rights in both the public and private sector.

In the context of coordinating state institutions dealing with the protection of socially excluded children, non-governmental and other organisations engaged in assisting (potential) victims, the "Central Scientific Council for the Prevention of and Fight against Child Victimisation and Juvenile Delinquency" (www.kesathea.org) has recently been set up by Law 3860/2010 (Government Gazette A 111/12.7.2010) and is responsible for monitoring and coordinating the activities of every local "Child Protection Institution". Kesathea has being building the *Orestis Network* that links all the relevant services within its centralised system, including the services of 250 local authorities. University professors and legal practitioners are monitoring and studying the work of the various agencies in order to co-ordinate their action and improve current practice. Part of the main brief of Kesathea is to compile reports, studies and proposals, but despite very good intentions, in practice, this system is mainly sustained by volunteers and funding is currently either extremely limited or non-existent, and a quick glance at their website (designed by a volunteer) can easily confirm this. On the positive side, a telephone helpline has been set up to protect children in danger and to help juvenile offenders.

5. Unaccompanied Children

Although in the temporary detention centres at first-entry points, a file is put together for every immigrant, but there is no adequate screening for reliable statistics on unaccompanied children, although FRONTEX representatives may also be present there and information may be shared through EURODATA.

In principle, there are special procedures for these children to be placed in the custody of the state and found appropriate accommodation and, in that sense, they are treated differently from the other immigrant children. Additional procedures exist if the child has submitted an application for asylum, but if this has not been made or has been rejected, the child is placed in the custody of the state, but is also subject to deportation, provided the relevant safeguards for the child's safety have

been established. Asylum seekers are treated different from other unaccompanied children in that they have a legal right to remain in the country while their application is considered and thus, the procedure involving their accommodation and state custody is more closely monitored and observed[228]. The local Attorney General is appointed guardian of the child and acts as his/her legal representative through whom state custody is administered. However, an attorney general is not always available in some parts of the country and, in most cases, the Attorney General's office has such a heavy workload, due to the high number of immigrants entering the country, that his/her guardianship becomes formal rather than real.

The decision-makers for unaccompanied children, particularly police officers and judges, do not receive any special training to develop their skills for working directly with children. Training is usually provided in the form of seminars. While reliable and independent sources, such as respected and experienced NGOs, confirm that these seminars are well attended by attorney generals, they and other forms of training are rather isolated events. There is a serious lack of resources to sustain a training programme for a system capable of coping with very high number of immigrants and immigrant children entering the country at countless entry-points. Moreover, the above-mentioned decision-makers have no knowledge of child-specific persecution and the situation of children in the country of return, if a decision to deport the child is made. In principle, a child is not deported if a prior assessment has been unable to established that the child can return safely to his/her country of origin and this applies not only to the threat of persecution but, more generally, to his/her well-being. Despite the difficulties inherent in obtaining reliable information from the various parties involved, including the child in question, and the very large number of immigrants, it is the state's obligation to protect unaccompanied children properly and give them their rights. In the interviewees' opinion, the large number of unaccompanied children in Greece has led to not all children being treated with the same care, since the relevant processes are often rushed or applied inconsistently, but this does not excuse the state from meeting its obligation to treat all children equally.

Those unaccompanied children who are placed in institutions receive temporary legal residence status. It is a priority to accommodate families and unaccompanied children, something that is reflected in the activities of volunteers and NGOs. In Greece there are various hospitsality centres that accommodate the children but due to the high number of children involved, the existing structures, both public-sector and independent, are unable to offer protection to many children, with the result that many unaccompanied children do not have legal residence status. Only the children in such hospitality reception centres are able to obtain a residence permit.

When decisions are made on behalf of unaccompanied children there are some personal factors to be taken into account, such as the age of the child and her/his psychological condition and economic status. These factors are relevant when hospitality centres are being sought but are less relevant to other procedures, such as asylum applications. It must be emphasised that, while the essential needs of unaccompanied children are taken into consideration, the system cannot accommodate all such children. The decision-makers usually have little knowledge of child-specific needs, and while their essential needs are known: accommodation, food, clothing and education, the system cannot accommodate all children, resulting in a lack of consistency in the assistance offered. Finally, guardianship is largely a

[228] See also:*Proedriko diatagma* (Presidential degree) 114 of 2010
PD 220 of 2007, P D 96 of 2008, Law 3907 of 2011-12-11
EU Directive 2008/115

formality and, in practice, this is exercised in the hospitality centres, and is dependent upon availability and resources.

5.1. Detention of unaccompanied children

In Greece today there are reception centres for immigrants and special accommodation facilities for families, women and children. In principle, detention in such centres, in the form of forced accommodation, should last between 2 and 3 months, but problems arise over dealing with so many people, because the number of hospitality centres is limited, and additional difficulties arise from such costs as transportation. According to the interviewees, there are some, admittedly very limited cases in which children aged 15 and over are detained in young offenders' prisons, while awaiting a decision from the authorities on their deportation or asylum. This small number of cases involves individuals who have not committed an unlawful act other than being found in the country without a residence permit. At the first entry-point there are detention centres at which children can stay for up to 3 months. Thereafter, they may be given accommodation in hospitality centres. The interviewees did not justify the number of cases in which people are detained while awaiting a decision on their deportation or asylum, but they did state that there are periodic reviews every six months. The interviewees also mentioned language problems and staff shortages.

Deportation is possible where the appropriate safeguards are met. There are some problems, including reliability, with communications between the Greek authorities and their foreign counterparts. If deportation is not possible, the child is transferred to a hospitality centre, although, once again, serious shortages exist, faced with the ever-growing demand. In the interviewees opinion, this results in a relaxation of the various safeguards caused by the state system's inability to the huge number of immigrants and unaccompanied children that enter the country on a daily basis, but they emphasised that this does not minimise the state's obligation to respect unaccompanied children' rights. The Attorney General is actively involved in this process and it should be noted that, according to the interviewees, the procedures (detention, asylum claims, deportation) for unaccompanied children are not child-friendly nor sensitive to children's needs. For example, there is a special procedure for asylum application appeals, but the picture is less clear for deportation. At times the process is rushed due to the pressure from the heavy workload. In addition, the review process requires, in most cases, specialist knowledge which is rarely available, given the shortages that exist, even for the main application. For children in detention the principal consideration is to reunite the child with his/her family. If this is not possible and deportation is being considered, there is a process of communication between the Greek state authorities and those of the country of origin to establish whether the safeguards for the child's safety and well-being can be met.

According to the legislation, children should be detained in separate facilities from those used for adults and there are special facilities in (forced) accommodation centres. There is also a limited number of children aged 15 and above who are detained in young offenders' prisons and there are also cases in which some children have been detained in the same places as adults, although the state makes an effort to ensure that most of the children are not in detention but accommodated in hospitality centres. There are also some children who stay with relatives or other groups from their country of origin. But these 'others' or alleged 'relatives'

may not be who they say they are and children in these circumstances often fall victim to exploitation. Unaccompanied children are detained as part of the removal process. For example if the child is aged 15 or above, he/she can be detained while the case for deportation is being considered. This does not happen in all cases since there is no coherent supervision and control system due to the very high number of immigrant people. In practice, much depends on the option that the public officer on the case chooses and the greater his/her workload the less attention s/he is able to pay to the various options available and to best practice. Unfortunately there are no official data about the number of detained or deported unaccompanied children.

The decision to detain is communicated to children in a way that they cannot understand well. Although final decisions are duly communicated, communications in the various intermediate stages and the child's appeal options are problematic for those who do not understand the language. With regard to the best interests of the child, the interviewees said that decisions to detain children are essentially based on whether it is better for them to remain with their family in detention or to be placed in alternative care. The latter option, in which the child is taken from his/her family, is not chosen unless there are serious questions about the child's safety and well-being, to which the standard procedures and safeguards for all children, irrespective of their nationality, apply. Children and families also have priority in every available accommodation scheme.

5.2. Unaccompanied children seeking asylum

According to the UNHCR office in Greece, only a small percentage of unaccompanied children apply or manage to apply for asylum and it is true that asylum-seekers, by law, are treated different from other unaccompanied children because they enjoy the parallel protection that is offered to those applying for asylum. Officially, the legal guardian is the Attorney General under whose guardianship the child is placed. Legal representation on an institutional basis is either very limited or non-existent. There are various voluntary schemes run by NGOs and regional law societies, but these clearly cannot meet the demand. In the current time of economic crisis, these voluntary activities are much reduced, as those involved themselves face economic difficulties.

There is a well-defined legal framework for asylum applications. For the rest, deportation is possible although it is not always pursued. However, things are different in practice since the existing legal framework can only be implemented when sufficient facilities are available, involving considerable financial cost due to the large numbers of immigrants and unaccompanied children. Even for an asylum application, which entails an entrenched and specific procedure, access is often very difficult, since the demand for asylum applications far exceeds the capacity of the existing system that processes them.

Decision-makers dealing directly with unaccompanied children do not receive any training to develop their skills. While there is some training, it is not delivered on a regular basis, and it is inadequate, lacking thorough, coherent coverage of what exactly needs to be done and what must be provided for the individuals concerned. Even training for attorneys general, considered the most highly trained people and who act as guardians, is very often a mere formality, since the state mechanism in overcrowded urban environments is paralysed by the high number of immigrants and unaccompanied children seeking protection.

The interviewees stated that that some authorities engage in practices that could dissuade or prevent children from applying for asylum. For example, unaccompanied children are among the approximately 1000 persons who queue on Sunday mornings to submit their asylum applications to the special department of the Athens police station and there is no separate queue, meaning that majority of them are unable to submit their claims at all. According the interviewees the Attorney General could arrange this but, until now, this office has been unable to manage the heavy workload. There are delays in investigating asylum applications, which usually take 1-2 years meaning that, by the time the decision is made, the applicant may have reached the age of 18 and is therefore, no longer classified as a child. Because of these delays, some children do not have sufficient means to survive and, as a result, they may engage in illegal activities. Depending on the nature of the offence, involvement in an illegal activity can weigh against their application for asylum.

5.3. Assistance for unaccompanied children

According the legislation, the state is obliged to provide assistance to unaccompanied children. Hospitality accommodation facilities that also provide food, clothing and education usually arrange supervision and guardianship and which usually offer assistance and legal representation may also be provided for asylum applications. This system however, cannot accommodate all unaccompanied children and, as a result, the majority of them live on the street, while others are detained in youth offenders' institutions when faced with deportation. Because most of the immigration authorities, the courts and the main police force are based in large urban centres, such as Athens, there is a tendency to transport these people there, causing serious problems in the administration of justice and the system of welfare assistance.

Although it is not clear from the interviews who is obliged or mandated to provide such legal assistance, the Attorney General is theoretically involved in all stages of the process, but, in practice, the protection of children is arranged by the social workers that are employed in the hospitality centres with the co-ordination and assistance of NGOs and volunteers. This independent network however, is clearly unable to cover the large number of immigrants and unaccompanied children and while the small number of NGOs and individual volunteers (e.g. lawyers, social workers, etc.) may offer some assistance they cannot possibly accommodate all the children in need of it. Moreover, many children are unaware that such institutions exist or of the options, such as asylum, available to them. There is no legal framework for appointing those who provide assistance nor for establishing to whom they are accountable, for example the courts, an NGO or a governmental body. The Attorney General is initially the guardian when an application for asylum has been made, after which, if a hospitality centre is found, 'real' guardianship is exercised on an informal basis by the social workers based there, often working in partnership with NGOs or volunteer lawyers, if available. Much depends on the humanity and goodwill of the social worker, lawyer or NGO expert in question and, in overcrowded urban centres, the reality is that many children cannot be protected by the existing structures due to the high numbers, and the scarcity of available resources.

There are often serious language problems and, even if the Attorney General's office or the police inform children about the available options, it is not clear that this information is understood. Contact with the authorities, including the Attorney

General, is viewed with suspicion by many immigrants for fear of being detained, and therefore, legal assistance is not readily taken or trusted.

Children and other immigrant people often stay with relatives or other third parties known to them, However, there is no system for checking the credibility of these people who are often involved in various illegal activities, such as drug dealing, prostitution and trafficking, and who take in children and other immigrants in order to exploit them. Finally, Greece has no monitoring system for unaccompanied children seeking asylum. In theory, the Attorney General's office monitors the implementation of the various protection measures, but if the number of children cannot realistically be handled and hospitality facilities can accommodate only a limited number of them, adequate monitoring is hardly feasible. Furthermore, the relevant legal framework does not seem to have been put in place or defined by a clear and coherent breakdown of best practice and the steps that need to be followed at the various critical stages, resulting in monitoring being limited to such basic information as number of immigrants.

5.4. The return process

While the views of children are always taken into account, if the appropriate safeguards have been met, they may still be deported. Child deportation is permitted, but this is not always done because the whole system is attempting to respond to the high number of children passing through the hands of any given department. In this respect, much depends on the workload and the personal conscience of the public official dealing with the case.

The factors that inform the decision not to seek to return a child to her/his family but to return him/her to the care of an appointed guardian are principally the child's safety and well-being and it often difficult to guarantee the reliability of the evidence. If a child cannot be returned to his/her family a hospitality centre is sought to provide accommodation, food, clothing and education. Real as opposed to merely formal guardianship, is arranged by the social workers employed in these institutions, often working in partnership with an external expert on a voluntary basis. The principal considerations are: the re-unification of the family, if it exists, the safety of the child and his/her well-being. Much depends on communication with the authorities in the child's country of origin, but there are problems with the reliability of the information that is communicated, if it is indeed communicated at all.

5.5. Age assessment

According to Greek legislation there is no age assessment procedure for unaccompanied children, the age claimed by the child being generally accepted. Although there are some medical methods, including examining the teeth and wrist bones, for assessing the child's age, these are not often used since doctors are not always available or trained in these methods. It is also difficult to determine the country of origin, as the situation in that country is the main consideration in asylum applications. In most cases, there is no such assessment and, apart from checking the initial statement at the point-of-entry reception centre, the child's statement is often taken at face value, unless it is blatantly obvious that the statement is untrue. In the interviewees' opinion, the younger the child the more sympathetically the system deals with his/her accommodation, food, clothing and education needs.

5.6. Child Trafficking

When an unaccompanied child is identified as a victim of trafficking, a special process is initiated by the Attorney General. This process involves individual referrals from third parties, social workers or public officials who suspect signs of abuse or who have received relevant information.

According to the legislation, there are facilities able to provide assistance to child victims of trafficking and these hospitality facilities are mainly for unaccompanied children. If a child has suffered harm, the institutions for abused children are also available to them. Although there is additional protection for children considered victims of trafficking and special residence permits are granted to such victims, the practice is not clear since no comprehensive record system exists to monitor the situation adequately.

6. Conclusions/ Proposals

It is worth repeating that Greek legislation on socially excluded children deals efficiently with some, but not other issues. For this reason, the provisions for socially excluded children in the relevant European conventions such as the Strasbourg Convention, the Convention for Children's Rights and the International Convention on the Rights of Persons with Disabilities, should be adapted in such a way as to promote their correct implementation. A number of relevant regulations should be issued in order for the Strasbourg Convention to be consistently and widely implemented. However, the main problem remains the failures in its implementation due to the lack of the afore- mentioned services, trained personnel and the necessary technical infrastructure.

6.1. Achievements and challenges:

- According to our findings, the social services in Greece use different approaches and different systems with no common code of practice for the whole country. A number of different interviewees expressed the need to establish a more unified code of practice for the individual issues.
- The lack of specialisation and training of the decision-makers for socially excluded children.
- A nationwide database for socially excluded children such as disabled children and unaccompanied children is needed.
- The level of efficiency in providing social services for socially excluded children can also be measured by the extent of cooperation between the different services. Some interviewees mentioned a high level of cooperation between the social services and the penitentiary institutions while others stated that there is almost no communication and cooperation.

6.2. Proposals

6.2.1. For the best interests of the child

The decision-makers must respect the child as a person and acknowledge that s/he is the most vulnerable party in the proceeding. Thus, regardless of the circumstances that have led to the child's custody being at issue, his/her best interests must be the central concern of the state.

The placement decision and visitation plans for children whose parents are in conflict must centre on the child's important relationships of emotional attachment.

The decision-makers must balance the due process rights of parents and other

actors in the case with the child's right to a dependable, secure placement that safeguards her/his developmental progress to date and facilitates its continuation

Whoever is caring for the child in the role of a parent must be fit for that parenting role.

6.2.2. For Rule of law

6.2.2.1. For care arrangements

- Increase the number of institutions providing protection and support to the level required to ensure placement for all socially excluded children in the country
- Ensure that care placements provide social, educational and economic integration and access to legal aid free of charge.
- Protect children from ill treatment from authorities
- The exchange of experience between different services and institutions should also be promoted through local, national or international workshops.

6.2.2.2. For guardianship

Ensure that sufficient numbers of trained guardians are available to carry out their duties for socially excluded children in a responsible manner and that more emphasis is placed on the appointment of permanent rather than temporary guardians

6.2.3. For unaccompanied children

- Ensure that all unaccompanied children are given the opportunity to seek asylum and are provided with representation by a guardian
- Ensure that qualified interpreters assist communication with unaccompanied children
- Provide specialised care for unaccompanied children and trafficking victims
- Adopt formal age determination procedures which should take a holistic approach and not rely exclusively on medical examinations which are inexact.

6.2.4. For participation

Participation is one of the guiding principles of the Convention, and also one of its basic challenges. Article 12 of the Convention on the Rights of the Child states that children have the right to participate in decision-making processes that may be relevant to their lives and to influence decisions taken in their regard within the family, the school or the community

- The practical meaning of children's right to participation must be considered in each and every matter concerning children.
- A process of dialogue and exchange needs to be encouraged in which children assume increasing responsibilities and take an active part. This process will enable the child to gain an understanding of why particular options are selected, or why decisions are taken that might differ from the one s/he favoured.
- Children should not be pressured, constrained or influenced in ways that might prevent them from expressing their opinions freely or that might leave them feeling manipulated.
- Fulfilling the right of children to participate entails training and mobilising the adults who live and work with children, in order to prepare them to give children the chance to increase their participation in society freely, thus acquiring democratic skills.

- Children's right to participation as outlined in article 12 of the Convention on Children's Rights is closely linked to fulfilling the right to information, a key prerequisite for children's participation to be relevant and meaningful. It is essential that children be provided with the necessary information about the options that exist and the consequences of such options, in order to able to make informed and free decisions.

6.2.5. For Alternative procedures

The interviewees stressed the need to avoid children' involvement with the justice system either because, for young offenders, it is too lenient a response to the perceived increase in serious juvenile crime, or because it treats poor and minority children unfairly. For that reason, the state must increase the number of alternative institutions to the justice system..

Italy

Toward Child-Friendly Justice

Justice is by definition linked to the concept of fair trial and rule of law and therefore, when approaching field research on justice and access to judicial procedures and their related tools, we refer to the legal instruments individuals are entitled to use in order to claim their rights. At the same time, we refer to a wide range of institutions and people who work together to make this possible. However, when relating this to children, we are not merely addressing a legal dispute and the sole purpose of justice in relation to children is not merely to guarantee the indefeasible rights of the child but rather to protect a vulnerable person and hence, rather than simply mediating between two claimants, it seeks to restore the balance, ensuring the best interests of the child. Access to justice and a supposedly fair legal procedure involving children also implies the need for a trauma-free experience when they are exercising these rights.

The challenges faced by children when accessing the judicial system are dramatically increased by their vulnerability in an unfamiliar adult world and by the technicalities that risk jeopardising the effectiveness of the very protection the legislation is designed to grant them. This is even more relevant for marginalised children, that is to say those who come from deprived backgrounds, have suffered abuse, have been neglected or are at risk of social exclusion by being immigrants or part of a minority. What theoretically seems to be a linear process leads, in practical terms, to an extremely complex scenario since, if it is difficult to define fairness and equality in general terms, in the context of children's rights, this presents much greater challenges. What is deemed to be fair for an adult does not always serve the best interests of the child. What we believe to be a fair solution for parents and/or adults involved in the proceedings is not always the best possible outcome for the child.

This poses a number of questions. How to define fair? How to guarantee that children's rights are safeguarded through a fair process of law? How to deal with the existing legislation in order to render it effective in practice and as trauma-free as possible for children? Providing definitive answers to these questions is undoubtedly beyond the reach of a single piece of field research, but the goal of this study is to assess existing problems in order to overcome obstacles in the near future.

This study aims to highlight the ongoing problems in the Italian system relating to the implementation of child-friendly justice principles. It will take into account the historical and social context of children's rights law in Italy and focus on social changes, new demands and what it is feasible to achieve. It is therefore, my intention to provide the reader with the necessary tools for a comprehensive understanding of children's rights law in Italy, starting with a brief description of the scope and functions of the juvenile court. Following this, it will be necessary to introduce all the actors who take part in the judicial system, who they are, what they do and how they communicate and interact with each other. Last but not least, I will try to place the different point of views in the right perspective, addressing future aims and taking into account the non-judicial protection of rights, describing the experience of the Veneto regional ombudsman.

1.Research: Objectives and Methodology

In addition to a structural overview of the theoretical issues, this field research aims to identify critical areas, interpretational problems and, more generally, to assess the effective implementation of child-friendly justice principles in Italy.
This research focuses on assessing the implementation of the following principles.

a) Child Participation
b) Best Interests of the Child
c) Rule of Law: representation and funding
c) Non-judicial protection of rights

Despite the difficulties inherent in gathering data and the current lack of a coherent European framework, interviews with professionals in the field have made it possible to collect relevant information for a reconstruction of the current scenario for children's rights law in Italy.

In addition to the direct outcomes of research into children's access to justice, this study aims to investigate further consequences for children which are not strictly bound to the technical aspects of the law, but that are due to the vulnerability of children. These consequences are the product of certain deeply-rooted attitudes and social and cultural behaviour that may minimise children's participation in judicial proceedings.

The immediate result of this monitoring activity is that it provides the opportunity to describe the current scenario, drawing on the direct experience of professionals involved in this field, so as to identify crucial issues and consequently propose feasible solutions, in order to avoid the risk of a system jeopardised by fragmentation, discretionary powers and lack of homogeneity.

Through the active involvement of local professionals working with and for children, the aim of this project is to improve information sharing and to optimise resources. This however, has to happen in the context of a broader change of attitudes toward children, a cultural change that must lead to the child being considered an active player in legal proceedings rather than merely the victim or a hidden participant. Only by improving this mindset will children's access to justice be truly fair, avoiding marginalisation and empowering them to have their rights fully recognised.

This research will identify and compare recent trends in children's rights law in different contexts within the Italian system in order to generate a constructive dialogue capable of raising awareness of subject-related issues. This will in turn enable general and mutual critical areas to be identified more coherently and, whenever possible, lead to the adoption and sharing of effective implementation practice.

1.1. Applied Research on Children's Rights Law: Qualitative Analysis and Comparative Studies

The methodology adopted for this research produces qualitative results. The design of the field research faced two main challenges:

- the heterogeneous nature of the professionals interviewed and
- the equally diverse legislative and social scenarios in each of the partner countries.

The opportunity to gather together a wide range of information and the need to interpret this within a comprehensive study is a key element in a full understanding of social phenomena. However, within the framework of a comparative study, the difficulties relating to the gathering of qualitative data

from a wide range of actors, the diverse legislative frameworks and implementation measures at national level, not to mention the fragmented nature of the practice, make comparing the information collected an extremely complex task. A crucial issue therefore, was the need to be able to address these heterogeneous actors in each of the field research partner countries without jeopardising the coherence of the final research paper.

Firstly, a number of observation units (individuals) and territorial units (cities/urban areas) were defined in each partner country. Secondly, a questionnaire was drafted taking account of the specific nature of the legal and social scenario in each country, in addition to the specific role of the subjects interviewed. Using a joint approach, it was decided to make the questionnaire the foundation on which to build the subsequent comparative study.

In Italy the following observation units were selected.

- Law professionals
- Psychologists, social workers
- Children's rights law experts/academics

Observation units were further selected on a territorial basis. The territorial observation units in Italy were chosen on the basis of the role played by such urban areas in typifying the current Italian scenario which is so heavily polarised between the North and the South.

In Italy the following territorial observation units were selected.

- Rome
- Florence
- Cosenza
- Venice[229]

Following the joint drafting of the questionnaire (September to October 2011) the field research consisted of two main phases: administering questionnaires and carrying out interviews (October 2011 to January 2012).

Semi-structured interviews made it possible to define the relevant qualitative aspects and to identify the active involvement of the actors, thus adding a multidimensional perspective to the social analysis.

The questionnaires and interviews were divided into six sections:

- Definition of the analysis unit
- General Profiles:
  - Gender and age of the children seeking judicial assistance
  - Relevance of marginalisation factors (i.e. abused children, street children, immigrant children or children belonging to minorities, etc.)
- Child Participation
  - Right to be informed
  - Sources of information
  - Environmental concerns
  - Balance between child participation and child protection[230]
- Best interests of the child
  - How information is provided to children and how their participation is managed in order to act in their best interests
  - Psychological concerns
  - The role of representatives
- Training and funding issues
  - Specific training of the personnel involved in the field
  - Relevance of training to ensuring that the best interests of the child are pursued

[229] Please note that Venice is to be considered a representative sample for "non-judicial protection of rights" drawing on the experience of the "Pubblico Tutore della Regione Veneto", whose role is to enhance good practice and promote the exercise of children's rights as set out in Article 12 of the Strasbourg Convention.

[230] This principle has to consider the need to protect children because of their vulnerability, trying to enhance their participation without exposing them excessively to unfriendly procedural environments.

- Rule of Law
  - Effectiveness, financial provisions and free legal aid.
  - Legislation and 'codification' of parental conflict of interest[231]
- Non-judicial protection of rights
  - Mediation and other processes to resolve disputes[232]
  - Bodies promoting the exercise of children's rights[233]

The following chapters will assess the current state of child-friendly justice in Italy, reflecting the structure and the content of the questionnaires submitted and the answers collected without any individual reference to the respondents interviewed.

2. Children's rights law in italy legislation and social changes.

Long before the NY and the Strasbourg Conventions were ratified, child protection was perceived as a sensitive issue.

The criminal procedures applied to adults seemed unsuitable for children, leading to the evolution of early Italian children's rights law following on from an initial reflection in the criminal law field that prompted the first comprehensive debate on the seeming unavoidability of children's vulnerability. This implied that children's rights law requires a different sort of administration, a concern still reflected in the complex composition of the juvenile court. When juvenile courts where instituted in 1934 by RD/20/7/1934 the system, in addition to the two professional judges, provided for an honorary judge with non-legal but medical or psycho-social expertise to be part of the team. At that time, the specific nature of juvenile courts in Italy was not the result of a specialist legal framework, since they dealt with criminal, civil and also administrative law, but rather the distinctive composition of their team of judicial professionals. This was due to their aim being not merely to settle the dispute or convict the child but also to provide a form of social care for neglected children and eventually to encourage the rehabilitation of young offenders. At this early stage, the role of the juvenile court was more administrative than judicial, this role not merely defined by the legal proceeding but by its nature as the key mediator with social services in cases involving children. The 1942 civil code but most of all the 1948 constitution added important features to the system[234]. In 1956[235] new legislation clearly established the need for the authorities to assume an educational function with regard to children at risk of social exclusion, providing foster care measures to be monitored and supervised by the Ministry of Justice[236]. Many critical issues emerged in the 1960s when it became clear that the rehabilitation of young offenders could not be the only concern for effective social policy, it being equally if not more important to prevent marginalisation.

It is particularly important to note how those changes in Italian legislation mirrored a crucial social transition. The legalisation of divorce, massive improvements in the education and healthcare systems had dramatic effects on Italian society over the course of the 1970s which also impacted on children's rights law. Family law reform was introduced in 1975 by Law 151 whose provisions were designed to safeguard children in any legal matters involving parental conflict of interest and updating the obsolete notion of child neglect as a weak link requiring merely social care[237]. In the meantime, the shift of administrative and civil duties and responsibilities from the Ministry of Justice to local authorities led to inequalities

[231] Please note that codification is to be understood as legal recognition of the existence of an effective conflict of interest between the child and her/his parents or those entitled to exercise parental authority.
[232] See Article 13 of the Strasbourg Convention and Article 16 of the NY Convention.
[233] See Article 12 of the Strasbourg Convention.
[234] See Articles: 2, 10, 30, 32, 34, 38, 117 of the Italian Constitution.
[235] Law 25/71956 n. 888.
[236] Law 1085 1962.
[237] Law n.35 of 1971 also established the organisational autonomy of the juvenile courts. This was due to the huge workload the courts had to deal with after the new legislation on adoption was enforced.

and fragmentation within the Italian system. Local authorities were incapable of dealing extensively with educational issues and lacked the resources to meet the demand for consistent social services. It can be noted that criminal law has always moved at a swift pace compared to civil and administrative law since the structural policies intended to re-shape the way the various entities are organised fails to produce the expected results.

New ways of thinking in the 1980s embraced the concept that children's rights law should not function solely as an instrument for social control but that it must focus on child protection, particularly in cases of marginalised children. Physical, psychological and sexual abuse and parental neglect were targeted in 1983 by Law no. 184[238] which set up a framework for foster care within families as an intermediate solution between adoption and institutionalisation for children. The legislation however, has always sought to reaffirm the right of children to live with their own family as in their best interests. By the late 1980s Italy had to face up to a new social change: the shift from being a country of emigration to one of immigration. For some decades a coherent regulatory framework for immigrant and separated children has been needed, although following the 1989 UN Convention, new international perspectives paved the way for new attitudes to children's rights law. Ratification of the New York Convention by Law 27/5/91 no. 165 was followed by the enactment of new legislation on the prevention of criminal misconduct by children (Law 19/7/91 no. 216), on support strategies for young people (Law 28/8/97 no. 285) and the implementation of the Hague Conventions of 5/10/62, 25/10/80 and 28/5/70 and of the Luxembourg Convention of 20/5/80. International family law was also entirely reformed in 1995 by law 218 and the 1993 Hague Convention on adoption was implemented by Law 476/98. This new wave of regulations based on international standards opened the way for new reflections on the need to update children's rights law to take into account the cultural and social changes taking place in the country. The driving force behind the political, legislative and juridical process that eventually led to ratification of the Strasbourg Convention (by Law 77/03) and of the relevant child protection regulations was the unavoidable conclusion that children's rights law should no longer be a matter of state control and social care but must be enforced in order to restore or balance children rights, while minimising the psychological impact of legal proceedings on children.

3. Juvenile courts: actors and interactions.

Societal change defines changes in legislation and policies and children's rights law is no exception. When considering children's rights it is ever more necessary to picture the judicial system as a cyclical one in which criminal and civil law are enmeshed. In most cases, criminal law only recognises social distress when it has reached its apex. Crime and anti-social behaviour might be seen as the expression of some latent problem that the system has failed to acknowledge and solve. This is why it seems important to take a comprehensive view of children's access to justice, a scenario in which the child is the prime and principal actor in a heterogeneous yet circular process designed to protect children's rights and correctly identify the child's best interests.

In this regard it is important to highlight some general but fundamental principles of the Italian judicial system. The functions of the juvenile courts in

[238] Law 4/5/83 n. 184

Italy developed around the public system for social protection, particularly designed to care for children at risk of social exclusion. It is therefore, not surprising that these functions were meant to serve broader educational and welfare purposes, reaching beyond the mere judicial function. Aid and support to children at risk of social exclusion is guaranteed by the Italian Constitution in Articles 31 and 30. The structural welfare deficit has lead juvenile courts through the years to step beyond their judicial function and, since they lacked a comprehensive legislative framework for this, practical measures were based on individual court rulings. The subsidiary role of providing social assistance assumed by the Italian judicial system is now in urgent need of review.

International Conventions and DPR 616/1977 have introduced a set of support measures for children. Today's essential legal references for judicial proceedings involving children are Article 111 of the Italian Constitution, which governs the concept of fair trial (to be interpreted as any judicial proceeding concerning both adults and children) and Article 24 of the Lisbon Treaty setting out children's fundamental rights' and their prominent role in such proceedings. Civil law proceedings are equally to be seen as a broad framework whose gaps have been filled by both international law and a few national laws, although the latter have not been implemented in an organic fashion over the years. Judicial decisions in both civil and criminal law must be made according to the child's best interests, hence the need for adequately prepared specialist juvenile courts. Highly specialised skills are recognized as necessary to ensure children's best interests are served and the Italian judicial system seeks to ensure this in two principal ways, with judges appointed exclusively to the juvenile courts and the appointment of honorary judges, predominantly psychologists and education experts. The child's best interests in legal cases are often perceived as in conflict with the interests of her/his own family and therefore access to justice for children inevitably involves recognising and resolving a conflict of interest between the child and the adults in the case. Children's rights may be in conflict when there is public administration intervention in his/her family, or they may be in conflict with an adult entitled to exercise paternal authority and in such diverse conflict situations it is up to the judge to define the child's best interests. In this regard, parental authority is only to be disciplined through judicial intervention, given the need to ensure the child's best interests. Children's rights must be protected as autonomous and under no circumstances as accessories to those of the adults, hence the utmost importance of implementing such principles as child-friendly justice. To achieve these goals it is necessary for everyone involved in a particular case to work together efficiently, guaranteeing not only respect for the various legal provisions and procedures but to enhance the child's participation through all the different steps in the proceeding. This is why interaction between the diverse actors involved in the judicial system is particularly important.

When accessing justice, lawyers are most frequently the first professionals encountered by children. Since child-friendly justice principles apply to both criminal and civil law, it is important that access to justice encompasses both systems. In criminal law proceedings once the child is arrested s/he is taken to the "*centro di prima accoglienza*"[239] at which it is particularly important for the child to be introduced to such professionals as youth workers and judges who will be interacting with her/him. Youth workers also look into the child's personal history in order to ascertain the facts, after which extensive information on the

[239] A reception facility, not a youth detention centre.

way in which the legal proceeding will progress should be provided. If the child, as advised by his/her lawyer, will not answer questions, it must be explained that exercising the right to remain silent is not considered the most effective approach to ensuring her/his best interests are served in the judicial proceeding. The preliminary phase of a criminal law proceeding is the first step in a process that goes beyond the judgement, hence it particularly important for the child to expresses her/his views and to participate actively. Criminal law proceedings involving children do not just pursue punishment but seek out the possibilities for the child to be rehabilitated, the reason why acquittal or conviction are not necessarily the only outcomes of the verdict. All the professionals involved in the process must be aware of the range of alternative rehabilitation measures that are available for the young people as an alternative to conviction, and their awareness of these will serve the purpose of providing the child with effective information. Criminal law proceedings do not merely define the child's responsibility but may offer the opportunity to embark on a fresh educational process and to restore some balance within compromised family environments.

In civil law proceedings, the court always rules on a conflict of interest either internal or external to the child's family. In many cases the court faces a potential, non-explicit, conflict of interest but, in civil law proceedings, the judge's most relevant role is to pass rulings on parental authority, in some cases restraining it to a minimum or redefining it when useful for safeguarding the child's best interests, i.e. child abandonment and adoption cases, etc. Proceedings are rarely held in open court, being in most cases held in chambers in a *procedimento camerale*[240]. However, this begs the question of whether these proceedings offer adequate guarantees for the effective protection of children's rights. A positive response might initially be given because of their promptness compared to other procedural forms provided by the Italian judicial system and it has been proven that the longer the time required to resolve the issue, the less effective the outcome, particularly when the case concerns children. Secondly, the judge's impartiality is guaranteed and the prosecuting attorney is only entitled to take legal action[241] after a preliminary evaluation has been carried out by social services. This initial assessment of the child's situation serves the purpose of determining whether there is any possibility that the contingent problem might be solved without judicial intervention. In cases when parental conduct is such as to endanger the child's stability the social workers may report this to the prosecutor who will then appeal to the court of justice.

Clearly, interaction between prosecutors and social workers is essential. Social services observe the child's family environment and therefore their reports are of the utmost importance because they will be an essential part of the supporting material the judge will evaluate during the subsequent proceeding. This report will give information relevant to the judge's final ruling and all parties involved must be notified of the report in order to allow them to respond with notes and relevant documentation. In addition, the social worker can report verbally although a written report must still be submitted.

Parental authority can be seen as both a duty and a right since the parents have to exercise parental authority in order to ensure that the child's right to proper care is respected. Whenever the judicial authority intervenes to make any alteration to their original status, it is because the prosecuting attorney has taken the case before the law. Children's rights law involves a wide diversity of cases and hence the role of the prosecutor is crucial to defining the opportunity for judicial intervention. The

[240] See Articles 737 and following of the Italian Civil Law Procedural Code; Article 336 of the Italian Civil Code.
[241] See DPR 488/88.

prosecutor's evaluation is necessary for the judicial system to recognise a disadvantageous situation for the child and if s/he fails to do this, deeming an appeal to the court to be unnecessary, the judge will be unable to take any further steps. During the proceeding the parties are heard and they may be supported by lawyers. However, they may also decide to appeal without the latter[242] unless this involves an adoption case[243].

The interactional skills of the lawyer are essential in criminal law proceedings as s/he is the point of reference for a number of people involved in the proceeding. If s/he does not communicate actively, highlighting the most relevant legal aspects of the case, the effectiveness of the whole proceeding is endangered. In some cases, the information provided by the lawyer and her/his cooperation with the prosecutor may lead the child to embark on an educational path which will lead to the child's rehabilitation. It must be emphasised that proceedings involving children's rights are required to focus on the individual subject, namely the child, rather than on the settlement of a dispute over material goods or on the nature of the crime committed. For this reason, the active participation of lawyers is an indispensable means to an end which is the need to serve the child's best interests.

Interactions between lawyers, social workers, judges and prosecutors are all fundamental to safeguarding children's rights and each of them is a crucial actor in a process in which the child's best interests must be served. However, child participation will be in vain unless all these professionals cooperate with each other and work toward the same goal. Children's rights law does not aim to discipline the contestants, judicial proceedings involving children do not define winners and losers and there is but one main subject to protect and that is the child. It is therefore, possible to state that interaction and cooperation in children's rights law is no less important than the due implementation of codes and norms. All the interactions between the parties must be carefully considered since it will be the child who pays the price of any system failures.

4. Assessing child-friendly justice

The following paragraphs will highlight some of the most relevant issues reported during the interviewing process. It must be stressed that, from the results of the research into child-friendly justice, the North-South divide in Italy does not emerge as a crucial indicator of the fragmentary nature of the system. As is obvious, the recent budget cuts have weakened all the institutions involved, from the North to the South, worsening the situation of those that were already suffering from a structural deficit. Access to more substantial financial resources obviously implies a better functioning child protection system. However, it is not opportune to refer to a notable North-South polarisation and the urban scenario seems more relevant. Cities as conglomerates of individuals with many diverse social integration problems increasingly fail to provide their inhabitants with equal opportunities and the recent crisis seemed to have exacerbated the problem. Larger urban areas display a higher number of people in need of support measures and effective access to welfare and protection. On the other hand, the system does provide a swift indicator of the increasing phenomenon of social exclusion but when critical areas emerge, resources are not allocated more generously, on the contrary they are less substantial.

[242] The Court of Florence accepts and evaluates these kind of appeals.
[243] Free legal aid is provided in case of insufficient economic means.

4.1. Who are the children accessing justice?

Although this part of the research does not aim to produce qualitative results it seems of crucial importance to idnetify which children are in need of access to justice or at least to understand the gender balance, the most relevant age group and the most relevant marginalisation factors that expose their vulnerability and which need to be taken into account in order to address social issues in the right perspective.

4.1.1. Gender and age

According to the individual experience of those interviewed, most of the children accessing justice are boys.

However, it is important to highlight that, while in civil proceedings involving parental conflict, abused or neglected children, it is very difficult to attach relevance to gender balance[244], it seems fairly easy to determine that in criminal justice boys are the majority of cases, with a prominent role in comparison to girls, in terms of offences and misconduct.

The most relevant age group consists of children aged 16 to 18 but again it must be stated that the age balance may vary according to the type of proceeding. Most of the children involved in judicial proceedings overall are between 16 and 18 years of age, while young children are more often part of civil proceedings dealing with parental conflict of interests. In proceedings attempting to prove the abandonment of the child, the age drops consistently since most of the cases concern children of under 6 years of age. The situation is different in criminal proceedings in which only a residual percentage of children are aged under 16 and identified as young offenders. More than 90% of the children accessing criminal justice are 16 and older.[245]

4.1.2. Marginalisation factors

With regard to marginalisation factors[246] two trends are particularly interesting:

- The decrease in proceedings involving immigrant children
- The increase in proceedings involving drug abuse, psychological or psychiatric disorders.

In the first case it can be underlined how, compared to the last decade which marked an increase in immigrant children accessing criminal justice, the risk of social exclusion does not seem to increase in relation to ethnicity. Abuse, errant behaviour and parental neglect are therefore affecting both immigrant children and Italian children although good parental care seems to be a distinctive trait among some foreign communities. In urban areas where foreign communities are highly integrated, such as Florence, immigrant families are often stricter and more aware of the need to pursue education and to comply with the system, due to their desire to build a better future for themselves and for their children. The range of problems immigrant children face in Italy is therefore of a different nature, for example visa issues relating to their parents which are not relevant to the context of the present study.

In the second case, drug abuse, psychological and psychiatric disorders may affect both the children and their families. While criminal proceedings most often involve the child her/himself as a young addict, drug abuse within the family is one of the most common recurring factors leading children to access justice. Psychological and psychiatric disorders emerge as marginalisation factors leading to a judicial proceeding as a product of parental neglect. In other words, this trend indicates a vicious circle[247] that might have a serious effect on children and that is particularly difficult to break until the gravity of the situation is plain for all to see.

It is however, necessary to stress that this study involves only cases which have

[244] Particularly in case of parental conflict that might equally affect boys and girls.

[245] For comprehensive figures on criminal justice in Italy please see: http://www.giustiziaminorile.it/statistica/index.html

[246] In the interviewing process we defined "marginalisation factors" as those factors (such as abuse, ethnicity, disabilities etc) which might increase children's vulnerability. Not only might they endanger the social integration of children but they might be likely to produce a series of parallel side effects eventually needing the intervention of the judicial authority to protect the child. In order to highlight the most recurrent reasons for children accessing justice, it would be useful to understand ongoing social trends and encourage reflection on those social demands that need most urgent attention.

[247] Parents' drug use àparental neglectàchild psychological problems; parental neglectàminor's drug abuse; psychiatric disordersàparental neglect or inadequate understanding of the gravity of the problem.

been brought to the attention of the authorities. This implies a large number of hidden marginalised children who never receive any form of judicial support. It may be that the most marginalised, those who may need the most urgent response and the most effective intervention, are already outside the system and never ask for help[248].

4.2. Child participation

There is undoubtedly general concern about children' participation in judicial proceedings. Proof of this is the ongoing debate among all the professionals involved on the best ways of increasing children's participation without impacting heavily on their psychological vulnerability. Child participation is related not only to the quality of the information provided to the children and to the means by which information is provided, but participation is also a matter of what, how and where children are informed and how and where children are heard. In other words, it is not solely the pursuit of the active involvement of the child but it is, above all, a sensitive process enabling adults to reach children, listening to them rather than questioning them. It is through the active participation of children in the proceeding that adults should come to understand them. This is, in theory, the reason why participation is perceived as an unquestionable necessity but, in practical terms, it is very difficult to allow children to be heard without exposing them to potential trauma and thus the real problem seems to be the need to balance child involvement and child vulnerability.

In this regard two main trends emerged from the research.

- Some of those interviewed believe that children should not be exposed during the proceeding and prefer to minimise their participation in order to protect them from psychological trauma
- Others fully believe that hearing the children is the most effective means of deciding and ruling upon what is in the child's best interests.

Quoting Article 3 of the Strasbourg Convention:

"*A child considered by internal law as having sufficient understanding, in the case of proceedings before the judicial authority affecting him or her, shall be granted and shall be entitled to request, the following rights*

- *To receive all relevant information;*
- *To be consulted and express his or her views;*
- *To be informed of the possible consequences of compliance with these views and the possible consequences of any decision*"

With regard to information, we must first distinguish between

- direct information and
- indirect information.

Direct information is provided directly by the judge through the court's provisions, while representatives, such as the "*Curatore Speciale*", work as secondary sources of information, functioning as intermediaries between the child and the judicial world, allowing him/her to understand and interact with the other subjects involved.

It is vital to stress that the introduction of the role of the special guardian to the child has led to major improvements in the effectiveness of child participation. The role of the guardian appears to make an increasing contribution to making the proceedings run more smoothly, and therefore juvenile courts tend to appoint such a representative whenever the law allows them so to do, for example, in proceedings to declare the abandonment of the child or when parental conflict of interest is particularly critical.

[248] Among others, separated children who are less likely to get in touch with the authorities for fear of not being able to obtain a residence permit once they come of age. Following criminalisation of illegal residence in the country and the introduction of stricter regulations for the conversion of the residence permit under Law 94/2009 the number of unaccompanied children taken into care by municipalities/social services dropped significantly.

Other subjects, such as parents, social workers, lawyers, caseworkers and welfare workers are very often a parallel source of information for the child. Parents and their representatives[249] are in most civil law cases a primary source of information however, this might be a cause of emotional distress for the child, leading to a distorted perception of the facts and in some cases over-exposure to technical factors that the child has difficulty understanding. One of the problems encountered is how to correct distorted information and, in cases of acute parental conflict, after correcting the information, it is vitally important to explain to the child that the ruling will not depend entirely on his/her account.

Compared to civil law, criminal law proceedings are not protracted over years and are much more diverse in nature. In such cases, information plays a different role since the child has not only to reach a full understanding of the facts but also to be able to obtain a clear perspective on the re-educational path that awaits her or him. In these cases, the source of information might be lawyers but are more often social workers. There has been much comment on the increased difficulties involved in establishing a relationship of mutual trust with children when there are linguistic and cultural barriers and it can be very difficult to overcome these obstacles when providing immigrant children with information.

Information alone does not guarantee children full participation which can only be achieved through allowing them to be heard. Such hearings are complementary to the right to be informed, given the need to let children express their own view after they have received the relevant information. Hearings also require a relationship of mutual trust to be established between the adult and the child. While information is assessed on its quality and source, hearings need to be assessed by looking at procedures, time and environmental concerns. In order to allow children to express their point of view freely it is necessary to put them at their ease, without intimidating them. Furthermore, it is necessary to manage the hearing without forcing children to relive traumatic events over and over again as they give their account. Unfortunately, although there is a general consensus on the importance of environmental and psychological factors in such hearings, in practical terms, it is highly unlikely that the provisions of Article 3 of the Strasbourg Convention can be fully implemented since logistical and financial problems are a real issue and sufficient investment in creating an environment suitable for children's hearings is, at present, nearly impossible. In some cases hearings are held outside the court of justice, following agreement with social services.

Without suitable structures and specific training, there is an inherent risk in such hearings of exposing children to what is generally known as secondary victimisation. In the context of social justice, secondary victimisation occurs whenever the societal response to a victimising stigma[250] produces greater disabling effects than the original stigmatic condition itself. Secondary victimisation is not specific to children accessing justice but, in more general terms, to the societal treatment of victims[251]. In the case of marginalised children, societal blaming or ostracism may cause secondary victimisation and primary victimisation, such as that caused by child abuse, might lead to ostracism or other forms of secondary victimisation. In such cases, rather than favouring equality and justice and re-establishing balance, the system, although attempting to protect the victim, may lead to further limitations for the individual involved in the proceeding, with more severe victimisation leading to secondary victimisation. More specifically, it is necessary to stress that accessing justice creates a certain degree of psychological harm due to the stress caused to the victims by the

[249] Any adult exercising parental authority.

[250] A social stigma is an opinion formed by a group of people that has a major influence, leading to the ostracising of those with different opinions, cultural and physical attributes (ethnicity, illness, disability, etc.). It is a process in which the reaction of others spoils normal feelings of identity and the stigma induces the labelling of targeted groups and produces discrimination. See Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity*, Prentice-Hall, 1963; Bruce G. Link et Jo C. Phela, *Conceptualizing Stigma*, Annual Review of Sociology 2001 Vol. 27: 363-385; Émile Durkheim, *Rules of Sociological Method* (1895) The Free Press, 1982.

[251] For example: disabled people, mentally ill people, victims of rape or other socially stigmatised subjects.

proceeding itself. Victims, in this case children, are indeed always subject to both positive and negative effects from judicial proceedings.

The outcome of the ruling and the procedures children have been put through, might equally be the cause of secondary victimisation and therefore, despite the efforts made, the results can be poor and lead to a series of negative psychological effects on such children. Two further factors must be acknowledged in children's rights law. If adults may be free to decide whether they want to demand judicial recognition of their rights, children are per-se subject to judicial protection when their rights are endangered and in this situation it is the authority itself that takes the lead in attempting to protect the child. Moreover, interactional justice and the psychological stress induced by judicial proceedings are of utmost importance in proceedings involving children. The practical implications of the results are that appropriate measures to prevent and intervene in the event of secondary victimisation can be only be implemented with an appropriate allocation of both professional and structural resources.

Particularly problematic cases are those subject to both civil and criminal law. When abuse is reported or one of the child's parents is on trial before the criminal court, it is extremely important for magistrates, lawyers, social workers and psychologists to work in synergy. The risk is of children being heard multiple times giving the same account, something that can cause as much or more trauma than the primary source of victimisation. Repeated interviews or inappropriate reactions by adults may cause trauma and therefore workers committed to recognising the special needs of the child must be adequately trained[252]. Furthermore, investigations and removal from home, although necessary, can be devastating for the child.

The circumstances described above lead, in Italy, to a dichotomy in that some of the professionals committed to child-friendly justice prefer to minimise child participation because the system does not allow sufficient resources to be allocated to provide adequate environments and specialised training. By law, children aged 12 and over are always heard, but under the age of 12, children may be heard, and usually are, but this is not always deemed necessary. Attempts are also made to adapt the environment wherever possible, for example the Rome juvenile court has been provided with a special room for children's hearings. Remarkably good practice has been implemented in Rome over the last three years with a professional agreement reached between the judicial authority and the lawyers and the judge in charge of the inquiry, most often a psychologist[253], leads the hearing. Lawyers are allowed to be present at the hearing without questioning the child directly. Circumstances they wish to investigate further or questions they would like to ask are submitted by the lawyers to the judge before the hearing takes place and it is the judge who decides whether it is relevant to put them to the child.

One final comment on the effectiveness of child participation within the Italian system, concerns the response of the system once the judicial authority has come to a decision on the child. An implicit limitation of the system is that it is impossible for the judicial authority to follow up the outcome of the case once the proceeding is technically over. Information and the opportunity for children to express their point of view are not merely relevant prior to the judgment but they should also serve to make an effective improvement in the child's long-term living conditions. The outcome of the ruling is often disruptive of the relationship of

[252] See "Strange Language" as a telling account of the use of language as a powerful and punitive instrument. "Strange Language" is about the secondary victimisation of sexually abused children by the courts. It is recommended for barristers, magistrates, judges and welfare workers committed to a concept of justice which recognises and accommodates the special needs of child victim witnesses. Brennan, Mark; Brennan, Roslin E., Wagga Wagga, *Strange language: Child victims under cross examination (3rd ed.)*, NSW, Australia: Riverina Murray Institute of Higher Education (1988) 103 pp.

[253] The Juvenile Court is composed of both ordinary and honorary judges. The honorary judge does not have a law qualification but is chosen in consideration of her/his particular professional and personal expertise. Given the nature, story and evolution (see paragraph 2 and 3) of the criminal courts in Italy, most of the honorary judges in juvenile courts are psychologists.

mutual trust established with the child and s/he should be aware of the consequences s/he is going to face. Placement in a foster care family or in a shelter might be heavily traumatic events even if they occur in cases of acute parental conflict. After a decision on the case has been made, the judicial authority is unable to monitor further developments since it is the social services that work on the follow-up. The real issue therefore is whether the current allocation of resources, both professional and financial, allows the social workers to take adequate care of the children. Unfortunately, the answer has to be negative because budget cuts have weakened the response and the capability of social services to monitor such cases effectively and over the long term. Work overload has resulted in the need for social workers to be in charge of multiple cases at a time, in addition to which, the outsourcing of resources by municipalities implies personnel changes that can break the continuity and disrupt implementation measures.

A further issue is the expertise of the personnel working in this field who need specialist training and to be supported by a system capable of establishing and maintaining a solid network among experts. If know-how is poorly shared and interaction fragmented, the result is the further impoverishment of the already meagre resources with systemic failures unlikely to be corrected and efforts that often turn out to be in vain.

If it is true that the current scenario does not permit children a stress-free hearing, it is also true that, without appropriate child participation in such hearings, it will be practically impossible to reach a fair and satisfactory decision on the case. However, in approaching this problem, it is unhelpful to be forced to decide whether or not to expose the child to a hearing that may cause psychological trauma, but rather investment is needed, not only in monetary terms, in better interviewing techniques and more child-friendly hearing environments. It is a matter of fact that the principles of child-friendly justice have to be implemented in the light of the need to construct a more consistent judicial and social response.

4.3. Best interests of the child

Although it is undoubtedly true that, in theory, the judicial system operates according to what is assumed to be the best interests of the child, in practice it is very difficult to define what these best interests actually are. Providing information, ensuring adequate means of communication and allowing children to express their point of view are instrumental to the final goal of using all the information collected to guarantee that children's best interests are served. Italian children's rights law has been developing over the years from a set of core functions designed to serve social stability rather than to pursue children's best interests and the whole system was set up to operate social control over the most vulnerable and marginalised people within society itself, and children, like disabled people, women and other vulnerable individuals, are no exception. The most relevant achievement would therefore, be to apply systemic welfare measures to limit marginalisation. Over the years children's rights law has shifted its focus and it is now primarily orientated toward an uncompromising assessment of children's needs, employing all possible means in order to understand the underlying psychology of the people involved. Children are now being considered prime actors in judicial interactions, not merely subject to care but also capable of expressing their own point of view. In other words, children are active subjects in the proceeding, not merely passive agents.

However, this shift has not been a linear one and it is still debatable whether a real change of attitude has occurred on a cultural and social level. While the law reflects ongoing social changes, the conclusion may be that there is still a long way to go for Italian law to fully mirror upcoming social demands. Within the last decade, the judicial system has been attempting to balance its tradition of state control with a shift toward a psychological approach, the extreme ends of the theoretical spectrum. The truth is that attempting to combine judicial action with a truly effective psychological insight into children's views is a highly complex task. Once again, two main trends have emerged, reflecting the dichotomy highlighted with regard to child participation.

- Children are not fully capable of expressing coherent ideas and they have no overall perception of the outcomes of the procedure. Therefore, children's best interests must not be influenced by their own account of the facts.
- Child participation is a key element of child-friendly justice. No one knows better than the child him/herself what is in her/his best interests. Therefore, a child's best interests need to be determined according to his/her own point of view.

These trends are equally extreme in their consequences as are the theoretical frameworks behind the control approach and the psychological approach. Since the relative exposure of children to the judicial process is a potentially influential issue, it is of paramount importance that any testimony provided by children is appropriately filtered by the adult court representatives on duty. It can be extremely difficult to interpret children's best interests. A child's opinion of her/his own best interests is a thorny issue and the information provided obviously needs to be scrutinised to determine its value. A child is still, after all, a child and in many cases the child may well have been parentally manipulated to deliver a self-serving account. The child in question must not feel under undue pressure from the consequences of her/his testimony and must not feel that the verdict in the case hinges solely on the account s/he has given. Indeed, it is well known that, particularly in cases of acute parental conflict of interest, children are highly manipulated and their accounts must be carefully evaluated and filtered in order to determine their best interests.

While "interactional justice" has evolved in the last 10 years from a state control to a psychological approach, the judicial system has not kept a pace with this change. It is still frequently the case that the child's best interests are not being served and merely interpreted as what are actually the adult's best interests. By a curious twist of fate it seems that criminal law proceedings have evolved to be more efficient than civil law proceedings in terms of championing children's best interests. The Italian criminal law system is renowned for ranking rehabilitation above punishment for juvenile offenders but the current problems often stem from the post-verdict transfer of responsibility for care from the court to social services. The verdict acts as an important starting point for the rehabilitation process, but the follow-up measures and implementation of the process to its conclusion should be considered of the utmost importance. Paradoxically, once a young offender enters a young offenders' institute, the current system supervises the rehabilitation process adequately, upon leaving however, social services often have insufficient resources with which to conclude the rehabilitation process. The family should be considered an integral part of the rehabilitation process, since children often terminate their period of rehabilitation only to return to the same toxic environment that initially created the problem.

4.4. Representatives

Quoting article 9 of the Strasbourg convention

> "*In proceedings affecting a child where, by international law, the holders of parental responsibilities are precluded from representing the child as a result of a conflict of interest between them and the child. The judicial authority shall have the power to appoint a special representative for the child in those proceedings. Parties shall consider providing that, in proceedings affecting the child, the judicial authority shall have the power to appoint a separate representative, in appropriate cases a lawyer, to represent the child.*"

Italian law is absolutely watertight on the role of representatives. All the subjects interviewed agreed that the law is all that is required to guarantee the appointment of a chosen representative. It has been remarked that the appointment of the special guardian (*curatore speciale*) has been universally welcomed as a success by all the professionals in this field. The guardian's role is to represent the child and at the same time protect his/her interests in the event of parental conflict. This must not be confused with the role of the *tutore,* the designated legal guardian *in loco parentis.* When a special guardian performs well, this effectively guarantees the promotion of the child's best interests. The problem arises when the representative selected is not up to the required standard, as often happens due to a lack of funding for training. The current system simply designates a guardian rather than selecting him/her on the grounds of suitability. Currently, anyone wishing to be a guardian simply adds his/her name to a list, but this list provides no guarantee of specialist expertise in the field of children's rights. It is possible for a guardian to be theoretically perfectly suitable but inexperienced in the practical sense. The same problems occur with the role and function of "*tutore*", the reason why, in some cases, guardians are teamed with voluntary guardians (*tutore volontario*) with good results. However, as already stated, this should be considered an inconsistent solution to the structural lack of funding faced by the Italian judicial system which impacts heavily on the quality of each professional performance.

4.5. Training

Training is undoubtedly a problematic issue in assessing the implementation of child-friendly justice principles in Italy. There is a general consensus that training should be considered the most important factor, not only for a fair trial, but also for achieving consistent judicial and social results in child protection.

Problems highlighted in this area are strictly (but not solely) linked to the budgetary issues that have been addressed before. This research proves that systematic training of the professionals involved in children's rights law does not take place in Italy. Different professionals access training in multiple ways through non-coherent educational frameworks. For lawyers, training is most often self-funded, thus relying entirely on their individual willingness to be properly prepared to deal with children's rights law issues or on their personal motivation. Public-sector professionals and judicial personnel are sometimes required to undergo formal training due to their professional role, but in such circumstances, lack of motivation may result in ineffective training. Even when compulsory, this training is poorly designed, failing to provide effective information and to enable know-how to be shared among professionals. Public-sector social workers are overloaded with work and there seems to be neither the time nor the resources for adequate training. Private-sector social workers are equally left alone to find consistent and up-to-date training resources.

It can be stated that even the most dedicated professionals in children's rights law basically hone their skills and expertise through experience in the field. This means that, although they might in time become highly skilled, specialisation is still random and it is not focused through coherent systems and policies. In addition, due to the current economic crisis, training is almost certainty not considered a priority and budget cuts have affected the situation, impacting heavily on the already outdated performance of the educational system. However, the subjects interviewed state that budgetary issues are not necessarily an insurmountable obstacle and, although the lack of resources undoubtedly affects the system, what seems to be really needed is modernisation of the existing resources. It is also true that, more important than the lack of training resources, is the lack of any form of networking among the professionals involved. In this regard, the problem in Italy seems to be of a chronic nature in that, in most cases, there is some reluctance among the different professional categories to cooperate and work jointly to serve the best interests of the child. For example, social workers and lawyers scarcely communicate at all as they still tend to see each other as opponents rather than co-workers. It has also been remarked that the administrative personnel in courts of justice very often provide desk information although they are not required to undergo any training for this.

The crisis also impacts on training from another point of view. Cuts in social services personnel place a heavy burden on individuals with one social worker usually in charge of several cases, an unmanageable workload resulting in s/he being unable to dedicate sufficient time to each individual case. It is also not uncommon for lack of resources to cause insufficient time to be dedicated to each case, allowing no time for further dialogue between the personnel involved. Not surprisingly this leads to a lack of knowledge and information sharing that would favour the establishment of good practice.

In conclusion, it is clear that the Italian judicial system is facing a structural deficit, mainly, but not entirely attributable to the current economic crisis. While lack of resources is the most recent problem, structural inefficiency and the inconsistent use of the existing resources also jeopardise the effectiveness of the system.

4.6. Non-judicial protection of rights

Quoting art 12 of the Strasbourg Convention

> *"Parties shall encourage, through bodies which perform, inter alia, the functions set out in paragraph 2, the promotion and the exercise of children's rights."*

In Italy a good example of children rights protection through non-judicial means is represented by the Public Guardian for Children Office (*Pubblico Tutore dei Minori del Veneto*, UPTM) in Venice. UPTM is an independent body instituted by regional law no. 42/1988 whose function is to protect children's rights in the region of Veneto. Its main operations include raising awareness of children's rights, promoting educational programmes, favouring child participation, training specialist personnel to work in the field and, last but not least, enhancing communication between the actors and institutions involved in any case relating to children rights. UPTM works to ensure children have effective representation, providing a support team of psychologists, social workers and law experts and aiming for better implementation of the principles contained in the NY and Strasbourg Conventions. The service fosters child participation through education and research and provides suitable tools for information exchange and the dissemination of good practice. All

activities are monitored to ensure that good results are achieved, bridging the gap between social services, judicial authorities and the education system. The number of children accessing UPTM services has increased by 13% within the past year.

In the field of child information and active child participation UPTM leads effective training programmes for guardians and special guardians. It ensures information is provided to children in order to balance the need for protection with the need to enhance their involvement through a participatory approach. Moreover, the service has contributed to laying down a set of general standards for the training of representatives when performing their duties in any proceeding involving children. By promoting research, UPTM has attempted to improve the quality of the services on offer, emphasising the importance of networking among professionals involved in the field, not only in regard to sharing know-how but also as a crucial way of achieving better results in child hearings. Acknowledging the importance of a psychological approach to child participation, UPTM actively seeks ways of transforming judicial hearings into a real opportunity for listening to children. This body has proved extremely successful at coordinating action and activities.

Interesting results have been achieved through a pilot project that UPTM carried out in the context of the EU DAFNE Project. It resulted not only in the willingness of the children to be heard but it provided a valuable resource for gathering information to be used in the near future in training programmes. It is planned to set up a permanent committee to monitor the quality of child representatives' performance. From the experience of UPTM it emerges that child participation is never sufficiently implemented, but in order for successful results to be achieved, an essential part of the process is raising awareness of rights among society as a whole. In other words, access to justice should not be looked upon as a stand-alone issue and educational measures must be taken to ensure children become full actors in society. In most cases, social exclusion is also a problem to be tackled within families but the system fails to consider social support for families as an important measure to prevent children becoming marginalised. Focusing on the family environment will help to change the current mentality, freeing children from the sort of isolation that is often only recognised when it is too late, or when the problem the child is facing reaches a climax and therefore needs to be solved through judicial intervention. Education and access to justice must be reconsidered with child participation and implemented much earlier than at the beginning of a legal proceeding. A real understanding of children's point of view must start at school or in environments other than the law courts. Justice does not have to be considered the only tool for guaranteeing children's rights. This is also true when defining a child's best interests which cannot be determined through procedural norms alone, but which requires a careful assessment of social, family and cultural factors.

UPTM is active in training programmes for guardians in cases involving unaccompanied foreign children in which a basic understanding of children's rights law is not sufficient. Furthermore, the exchange of knowledge and experience is fostered through meetings of guardians. In this context, training is considered a long-term process, a form of lifelong learning that must be supported and incentivised. Police officers, social workers, lawyers and judges must all develop a mutually comprehensible language together with the communication tools to be

used in cases involving children in order to achieve fully interactive justice. Unfortunately, even the most up to date educational projects are being frustrated by the ongoing financial crisis.

The Veneto region has chosen to invest in research and development for child protection. On a social scale these investments have not been in vain since the degree of social inclusion achieved through effective child-friendly policies is higher than in the rest of Italy. Currently, the percentage of children placed away from their families is 2/1000, one of the lowest figures in the whole country.

At this point it seems of the utmost importance to acknowledge that the system's failures can and must be corrected through the beneficial activities of non-judicial bodies such as UPTM. All the actors interviewed recognise their importance and hope for a wider-reaching social policy on children's rights which must take into account factors other than the mere application of norms and procedures. The UPTM experience has proven to be enlightening and successful on a national scale. While the judicial system should not be overloaded with tasks that lie outside its primary function, the practice of resorting to the court of justice as a remedy for social failures seems to have been a chronic condition for the state of Italy. The current budget cuts do not leave any doubts about the likelihood of a worsening situation even if the juridical and social debate on child protection has definitely moved to a different, more self-aware level.

It must also be stated that non-judicial bodies and the promotion of children's rights through non-judicial means should not be confused with a judicial response. Judicial authorities and non-judicial bodies are to be considered equally essential in the promotion and protection of children's rights. While the latter should take action for any issue pertaining to societal change and the promotion of rights, the former must always be considered as fundamental to claiming, restoring and fully protecting children's rights from abuse that cannot be prevented or mitigated by prevention policies and that cannot be solved through any other means than by judicial proceedings. In other words, only synergic action involving education, prevention and protection seems to be effective in achieving consistent results in children's rights law. The role of non-judicial bodies should be to foster a higher degree of social awareness of children rights, enhance child participation and, whenever possible, attempt to reduce the pressure on the judicial system. Bodies like UPTM should serve as active support, external and yet with the power to ensure the effectiveness of child protection before the judicial authorities. They should not and cannot replace the latter but should be recognised as an essential investment for the implementation of more consistent child-friendly justice. As has already been remarked, legislation mirrors social change, but it does not impose itself by setting standards and this is the reason why a comprehensive child protection policy should commence before justice is accessed, since child protection must be considered a priority within society. It is only through a cohesive approach that results will be achieved, through careful and efficient use of resources rather than solely through implementing regulations. This requires field research, the exchange of information and know-how, a manageable network of professionals involved in the field, all of which must be considered feasible measures for maximising the efficiency of the system in the near future.

Concluding Remarks

The results of this field research make it possible to highlight some crucial issues relevant to child-friendly justice and, in more general terms, to children's rights law.

These conclusions will be of use to all professionals involved in the field and they will eventually serve the purpose of providing a valuable starting point for addressing future solutions.

The most relevant conclusions of the research in Italy can be summarised as follows.

- Funding issues
  Most of the conclusions listed below are directly or indirectly linked to the budget cuts that are having a serious effect on the Italian judicial system. The lack of financial resources impacts on a number of factors, jeopardising the attainment of consistent goals. While this may not be considered the sole relevant obstacle to achieving child-friendly justice, it is undoubtedly the most relevant current problem.

- Training
  Limited resources impact on a system which was already lacking adequate training and educational programmes. Training is in most cases self-funded. Experience is usually gained through extensive years of practice without any formal specialisation in children's rights law.

- Time, allocation of professional resources, motivation
  The professional resources allocated to the relevant services are insufficient. Both social workers and judicial officers/judges/magistrates are overloaded with work, resulting in their inability to keep adequate track of each case.

- Networking.
  As with training and educational programmes, networking is one of the key factors in strengthening the action taken to safeguard children's rights. In order to achieve better results, professionals involved in the field should be able to communicate effectively and share know-how through well-organised professional networks. Inadequate networking may result in an unnecessary waste of time and resources. Lack of communication often slows down the process or worse, leads all the subjects involved in the proceeding to relate to each other as opposing parties instead of working as a team to achieve the child's best interests.
  The system does not provide for nor plan to introduce any form of incentive to boost networking among professionals.

- Child information and child participation.
  Preventing children from suffering serious psychological stress during legal proceedings implies the need to provide an adequate environment and highly trained professionals. The current limited resources do not permit any investment in such measures. Poor environmental and training standards result in a systemic reluctance to let children participate actively in proceedings. The system seeks to protect the child by minimising participation rather than exposing him/her to such stress.

- Representation.
  The system does not properly select nor train professionals to become guardians or special guardians. Results are therefore jeopardised by the professional suitability of the individuals who take the role.

- Mentality and social change
  Children are overprotected, seen as a weak link, vulnerable subjects incapable of expressing their point of view, therefore it is assumed that adults' best interests must often match those of the child. A more sensitive psychological approach to the child should provide a better perspective on this issue. It should focus on accessible ways of reading and interpreting the child's point of view, rather than disregarding children as incapable of sufficient understanding. Providing in-depth training on subjects which are not solely legal, i.e. psychology or psycho-pedagogy, could ensure both adequate protection of children's rights and children's active participation in the proceedings.

- Non-Judicial Bodies
  Finally, it must be emphasised that one of the most relevant conclusions to be drawn from this research is the importance of establishing and funding non-judicial bodies as indispensable services for successful implementation of the principles of child-friendly justice. These bodies should not however, overlap the established prerogatives of the judicial system for safeguarding rights. They would play a crucial role in education and training programmes. Unfortunately, in the current situation, non-judicial bodies seem to be considered a mere added-value item and thus something to be sacrificed at a time of major financial crisis. Merely looking at successful examples, such as UPTM in Venice, proves this assumption wrong and such institutions may well be, in the long run, the most successful way of raising awareness of children's rights and, at the same time, providing a resource capable of preventing the overload of the judicial system.

Spain

1. Introduction and methodology

This research focuses on groups of children, either accused of an offence or detainees, those who are victims of violence and, in particular, unaccompanied children. Unaccompanied children have an exclusive section dedicated to them, as this is generally considered to be the main group of children at risk of social exclusion in Spain today. This situation necessarily reflects the difficulties they face in access to justice and to the exercise of their procedural rights.

The methodology followed in this research agreed upon by all the entities participating in the project. We have chosen a qualitative research methodology through semi-structured interviews that make it possible to detect the issues and principal factors that are currently of most significance and relevance to the process of intervention for children at risk of social exclusion. The field work was designed with the aim of interviewing the diverse and heterogeneous subjects that are today involved in intervention for children subject to social exclusion. In order to do this, we interviewed social workers and legal and juridical experts from different fields relating to child protection, actors who also had to meet some territorial diversity criteria in order to be able to present the different positions and different situations of government administrations and legislation in this respect. The questionnaire was designed and developed jointly by the different entities involved in the project and the field research was conducted between September and December, 2011. The interviews[254] were conducted by the research team and, after the process of transcription, the issues that appeared central to analysing and understanding the situation of children were reflected in this report.

2. General issues

Responsibility for regulating the basic conditions that guarantee children equality in the exercise of their rights was assigned to the state by the Spanish Constitution of 1978 in Article 149.1.1. Thus, the state legislator, under the terms of Act 1 of January 15th 1996 on the Juridical Protection of Children (hereinafter LOPJM 1996), is required to construct the general framework for the protection of children. In the explanatory memorandum to this Act, it is stated that it is the law which "regulates the general principles of action/intervention in situations of social vulnerability". LOPJM 1996 is the standard that has served as the point of reference for the Autonomous Communities when regulating this matter.

Although there are sufficient legal instruments to guarantee the rights of children in the judicial sphere, there are no instruments or necessary financial and human resources for them to be effective (lack of means, sensitivity, capacity, personnel, etc.). There is often a total lack of awareness of this matter among the government employees and other agents involved, particularly regarding victims of crimes.

[254] Twelve in-depth interviews were conducted with different actors in the child protection system specified in the research methodology. The profiles of the respondents were lawyers, prosecutors, legal experts, educators and technical centres and social workers within the protection system. All are specialists in this field and directly linked to the judicial systems and welfare services for children at risk of social exclusion. After pooling the main results of the qualitative interviews, we can see that the central issues to emerge from the theme of this study feature repeatedly in the interviews.

The economic crisis is likely to increase conflict and tensions, particularly within the family and in schools, since family and school conflicts often result in social tensions that lead to judicial intervention. The crisis is affecting the processes of access to justice for children in at least two senses. On the one hand, the decline in economic, social and working conditions is aggravating the situation of families and increasing the risk of social exclusion among children, a new scenario that makes the situation for the child protection system more problematic. On the other hand, not only have social services not been granted more resources to deal with this new situation, but, the crisis has generated a dramatic change in the human and financial resources that can be called upon to carry out work in the child protection field, exacerbating a situation in which resources were already scarce enough. Working conditions for professionals working in this area are also deteriorating as a consequence of the crisis and the privatisation process producing a high staff turnover of those professionals who monitor social and judicial processes involving children[255]. In this regard, it is worth mentioning that LOPJM 1996 states, in Article 11.1. p.3, that "the essential content of the rights of children is that they should not be affected by a lack of basic social resources".

In practice, there is a situation that has been described as a kind of "institutional abuse" that influences children's relationship with the Spanish courts. Part of this stems from the fact that a positive reading of their involvement with the judicial authority is not transmitted to children. Although this is a situation that also affects adults, it is more pronounced in the case of children. This kind of "abuse" affects how they testify and it can also affect the content of the evidence and it is, in turn dependent on the training and level of awareness of those involved in the case. Child victims should be treated with care, but usually are not and they often have to face unfavourable conditions in all the areas and with all the personnel they encounter in the justice system, such as police, prosecutors, technical staff and court officers. This sort of "abuse" is more serious in the case of unaccompanied children because there are also language and therefore comprehension problems[256].

The feelings that children at risk of social exclusion have toward the judicial system and the police is often one of distrust and fear and on many occasions children and their families perceive the police as a threat to rather a guarantor of their rights. In this context, many children and their families would not think of going to the police in situations of abuse or risk because their experience of the judicial system is of persecution or harassment and the police are perceived as the enemy to be avoided. [257] One of the principal difficulties when dealing with young children in the justice system is that the gaps in their capacity and relationship with justice have to be filled through the mediation of the very people who have generated their risk or injury[258] situation. In the case of adolescents, difficulties arise from their own vulnerability, the absence of parents or legal representatives or open conflict related to the perception of "danger" that society often links with problematic young foreigners[259].

3. Participation

A. Appropriate mechanisms for access to justice

The 1989 United Nations Convention on the Rights of the Child (UNCRC)[260] established the right of participation, as embodied by procedural participation.

[255] As reported in the interview with the educational social worker in the Madrid child protection system.
[256] As reported in the interview with the juvenile lawyer and criminal law expert in Madrid.
[257] As reported in the interview with the university expert in juvenile law and activist in an organisation dealing with intervention for children subject to in social exclusion in the Community of Madrid.
[258] As reported in the interview with the Fiscal Coordinator in the Office for Children in Madrid.
[259] As reported in the interview with the Fiscal Coordinator Office for Children in Madrid.

Although the convention does not deal with the special procedural circumstances that should surround the child victim or witness, children are still placed at the centre of the protection system. The principles established by the UNCRC constitute an informative legal framework for Spanish law and jurisprudence on the issue, including the procedural aspects relating to children[261].

As regards the group of children detained or accused of an offence, Organic Law 5 of January 12th 2000, governing criminal responsibility of children (hereinafter also LORPM 2000), establishes the general legal framework. This Act has undergone four amendments, two even before it entered into force, with Organic Laws 7 and 9 of December 22nd 2000, and two shortly after it came into force, with Organic Laws 15 of November 25th 2003 and 8 of December 4th 2006. Further developments were introduced by the regulations approved by Royal Decree 1774 of 30th July 2004. The Circular 9/2011 from the Attorney General's Office[262] established the general principles constituting the juvenile justice system: In first place, is the principle of the best interests of the child. One of the most important implications of this is that the entire system hinges both on the inevitability of a punitive response and on restoring the child to society, requiring educational guidance measures and their implementation in order to facilitate the goal of training such children to be responsible citizens, respectful of others and legally and socially competent. A corollary of this principle is the need to introduce the principle of flexibility into this section of the judicial system, affecting the selection of the particular measures to be taken, their duration and how they are to be implemented (the possibility of cancelling, reducing or replacing the measures imposed in response to changes in the law) also involving de-institutionalisation (imprisonment as the last resort) and dejudicialization (using the principle of opportunity in its many variants).

In second place, the principle of victim protection, particularly emphasised in the preamble to Organic Law 8/2006, when it states that "attention to and recognition of the rights of victims and those affected will be enforced" on the basis that the principle of the best interests of the child is not "unique and does not exclude other constitutional assurances necessitating observance of all punitive or corrective rules." Thirdly, on a procedural level, is the principle of speed. This principle should guide the actions of the juvenile section of the prosecutor's office, without prejudice to respect for the guarantees and the time for the reflection necessary for any decisions made about a person still in the process of maturation. This principle is necessary for achievibg its inherent socialising goals."

According to the Law on Criminal Responsibility of Children, these children are entitled to access justice through their legal representatives, parents or guardians or institutions in an equivalent position, who in turn have the duty to act for the benefit of children. For this reason, public bodies must provide appropriate support for the effective exercise of the rights of children. Under the terms of the Act, children may, "seek protection and guidance from the competent public entity, notify the Public Prosecutor of situations that violate their right to lodge their complaints with the Ombudsman and to apply for the available social resources[263]". Thus, from 2000 LORPM has placed the public prosecutor in the role of the cornerstone upon which the whole procedure involving children rests. In addition to the prosecutor's role as defender and guarantor of children's rights, reference must be made to the possible intervention of the general ombudsman or the children's ombudsman in a regional context. Children may appeal to the general

[260] The UNCRC was ratified by Spain on November 30 1990 and is part of the Spanish legal system in accordance with Article 96.1 of the Spanish Constitution. Moreover, in 2002 Spain ratified the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and the use of child pornography, produced in New York on May 25 2005 (BOE no. 27 of January 31 2002). In November 2010 Spain ratified CETS Convention no. 201 of October 25 1997, from the Council of Europe on the protection of children against sexual exploitation and sexual abuse (BOE no. 274 of November 12 2010).

[261] ADROHER BIOSCA, S. (2011) "El marco internacional de protección del menor en el proceso judicial" in *Los menores en el proceso judicial*, Tecnos, p. 37.

[262] Circular from the State Attorney General 9 / 2011 on the criteria for the specialist prosecution unit for children.

[263] Article 10.1 & 2 LOPJM 1996.

ombudsman to guarantee and defend their rights. Moreover, the Autonomous Communities have created the institution of Ombudsman for Children, an office that has wide powers of action but these are limited to the particular autonomous territory. Children may submit complaints, without the representation of an adult, about factual circumstances or situations that pose a threat to or violate their rights.

As regards the group of child victims of violence, certain procedural aspects have to be taken into account. Article 795 of the Criminal Procedure Act states that speedy trials are necessary for crimes of coercion, threats, injury or physical or mental violence committed against children by those people who hold parental rights over them or who provide guardianship or foster care or any people living with the child. On the other hand, judicial proceedings should be conducted in a manner that is appropriate to the situation of the child and her/his general development, with the goal of preserving his/her privacy.[264] In this sense, there are repeated criticisms, particularly in cases of sexual abuse, of the institutional maltreatment and secondary victimisation usually suffered by children during court proceedings[265]. While the purpose of such procedures is to punish the miscreant, they can adversely affect the child victim, when her/his credibility is in doubt, thus creating stress and anxiety[266] that keeps the wound open for a long time. However, in 1999 and 2006, criminal proceedings were reformed to improve the protection of children who are victims or witnesses. Organic Law 14/1999[267] introduced into Spanish law the opportunity to question a child outside the courtroom to avoid confrontation with the accused. Organic Law 8 of 4th December 2006, which amended Organic Law 5 of January 12th 2000 regulating criminal responsibility of children, modified the Criminal Procedure Act to make it possible to adapt some aspects of criminal procedural rules to protect child victims and witnesses[268].

Article 448 of the Criminal Procedure Law (LEC) states that: "When the witness is a child, the judge, according to the nature of the offence and the circumstances of the witness, may agree on a reasoned decision, following an expert's report, to avoid the visual confrontation of the witness with the defendant, using any technical or audio means that makes it possible to put this into practice."[269]. Spanish case law has acknowledged the accredited fact that if children have to attend a hearing and be questioned, this can cause them serious psychological harm.[270] Case law also acknowledges that testifying in the trial should not be possible if it is likely to have serious consequences for the mental health of the child victim of crimes with a sexual content[271]. In cases of crimes against sexual freedom with very young victims, under certain circumstances, reference may be made to the testimony of a parent or third parties[272]. However, it is possible to qualify the reference to witnesses without questioning the victim[273].

Regarding statements from children, Article 433 of the Criminal Procedure Act states that it may be filed with experts and always in the presence of the prosecutor. Those exercising parental authority, guardianship or custody of the child may also be present, unless they are the accused or if the judge rules otherwise, in exceptional circumstances, whose reasons must be stated. The judge may also order the statement to be recorded and the rules favour the use of such technical media as videoconferencing, regardless of whether the judge considers this necessary[274]. Child witnesses should not have to confront the accused before the expert report has been submitted unless the judge or the court deems this necessary and not harmful to the interests of witnesses[275].

[264] Article 9 LOPJM 1996

[265] GÓMEZ BENGOECHEA, B. (2009) "Infancia y violencia" en *Infancia en España: nuevos desafíos sociales, nuevas respuestas jurídicas*, F. VIDAL y S. ADROHER (Coords.), Comillas, Madrid, p. 6.

[266] SAVE THE CHILDREN (2002) "Niños y Niñas víctimas de abuso sexual y el procedimiento judicial", Madrid, pp. 82-88 (www.savethechildren.es).

[267] Organic Law 14/1999, of 9 of June, amending the Criminal Code of 1995, protection for victims of abuse and the Criminal Procedure Act, which amends several articles of the same (Articles 448, 707 and 713) designed to protect the child victim or witness.

[268] Articles 433, 448, 707, 731. The consequences of this reform process have been developed by Circular 3 / 2009 from the Attorney General on the protection of child victims and witnesses.

[269] In this sense, see also Article 707 of Civil Procedure Act.

[270] Judgements of the Supreme Court March 8, 2002 and June 1, 2002.

[271] Supreme Court Judgement of March 10, 2009, decision of the Provincial Court of Barcelona of July 6, 2009

[272] In this sense, Auto Sevilla Provincial Court 370/2008, of June 13.

[273] Supreme Court Judgement of June 13, 2006 and December 10, 2009. This last sentence states: "The principles of child and victim protection have been included in the Spanish legal system to ensure that direct testimony is consistent with the preservation of privacy, and designed to reduce, as far as possible, the risk of such negative effects form the procedure as victimisation or secondary victimisation."

[274] ADROHER BIOSCA, S. (2011) "El marco internacional de protección del menor en el proceso judicial" in *Los menores en el proceso judicial*, Tecnos , p. 56.

[275] Article 713 Criminal Procedure Act.

B. Information about rights

Article 5 of LOPJM 1996 establishes the right of children "to seek, receive and use information appropriate to their development." Today, children are generally aware of many of their rights and where they can go for assistance, leading to a gradual improvement in the information given to children compared to the past. However, there is still a lack of information for children at risk of social exclusion. Although in many cases they are aware of their rights, there has been found to be a serious shortfall in the information given to children, particularly adolescents, about their legal rights[276]. In criminal cases, in particular, in which children have been arrested or charged, giving them information about their rights is a compulsory procedure, in both written and oral form, in a simple, informal manner that is comprehensible to the child. In other areas of the law, there are no clear guidelines for providing information on the procedural rights of children, or the rights of children and young people in general[277].

While children are informed of their rights, they are often limited to reading them and it depends on the sensitivity of the person providing this information and their willingness to ensure that children are properly informed and understand what their rights are.

C. Right to be heard

Children are always entitled to be heard in the family and any administrative or judicial proceeding in which they are directly involved and which leads to a decision affecting their personal, family or social life, when they have sufficient capacity and, in all cases, for those over 12 years. In addition, in court proceedings children's hearings are carried out in a way appropriate to their situation and maturity, taking care to preserve their privacy. This ensures that children can exercise this right for themselves when they have sufficient capacity, or through the person designated to represent them and when this is not possible or not in the best interests of children, their views can be made known through their legal representatives, provided that they do not have any conflicts of interest in relation to the interests of the child, or through other persons whose professional role or relationship of special trust with the child ensures the message is transmitted objectively.

It should be noted that Article 9 of LOPJM of 1996[278], which establishes the right to be heard, has the character of an Organic Law and sets no limit of age or maturity on the exercise of the right to be heard and to meet the obligation to give children a hearing in proceedings affecting them. Therefore, children have the right to be heard, in a way that is appropriate for their age and maturity, without the age limitation of 12 years[279].

It is obligatory for children accused in criminal proceedings to be heard promptly by the attorney, prior to sentencing by the judge[280]. Children's hearings are taken into account when the judge deems it to be in the best interests of the child, without consulting the child on the form in which s/he would like to be heard. Their reasons and their "interests" are specified on the basis of the psychological expert's report, the available information and the child's family[281]. Hearings aim to avoid excessive procedural formality, using simple language the child uses and understands. If the child is younger than 12 years old and is sufficiently mature s/he can be heard through other indirect media if necessary. Of great importance is the psycho-social team of the legal authority which works together to treat both parents and children. While recognizing the right to be

[276] As reported in the interview with the lawyer and social worker (social worker in the child protection system in the Autonomous Community of Andalusia) in Madrid.

[277] As reported in the interview with the Fiscal Coordinator, Office for Children, Madrid.

[278] Article 9 of LOPJM 1996 states the right to be heard.

[279] Ombudsman Report (2009) "Atención a menores con problemas de conducta y en situación de dificultad social", p. 50.

[280] The situation may change in other areas. For example, in civil proceedings for annulment, separation and divorce, the child is not required to be heard in connection with her/his custody (Art. 92.2 Civil Code and 770 Civil Procedure Act).

[281] As reported in the interview with the Fiscal Coordinator, Office for Children, Madrid.

heard, no specific formula has been established and this depends on the judge's own attitudes and experience[282]. Children are not always properly heard in family matters, in particular, in cases of violence in the family, since it could be in the interests of the parents for the child not to be heard. Hence the cardinal importance of the role of the prosecution as a guarantor of the rights of the child[283]. Some interviewees brought up the subject of family proceedings in which the child suffers "secondary victimisation" in that s/he often believes that parental status will depend on his/her statement. The form in which the child has to make appearance needs to be regulated and a protocol should be drawn up for these cases, as is done for children charged with committing a crime[284].

When making decisions on admission to residential care facilities for children with behavioural problems and social difficulties, in contrast to the provisions of LOPJM 1996, this right is barely recognised and participation is the least significant part of the process. During the complex bureaucratic processes, children are reduced to mere passive players with the result that, on reaching the age of majority, they are not ready or able to take charge of their own future. The Ombudsman points out the ambiguity in the incoming guidelines for children in residential care facilities and, in Spain, a specialisation in child psychiatry is not even regarded as the preferred professional background. The lack of comprehensive planning, coupled with poor management, has negative consequences that are "unfortunate" for children with no diagnosis made, leading to school failure, etc.[285]

D. Taking into consideration the opinions of children

If the child is too young, his or her capacity to form his/her own opinion and his/her participation are not considered. This issue should be of great concern since adolescents are increasingly able to take an active part in any decisions determining what is to be understood as in his/her "best interests".[286].

4. Best interests of the child

A. Best interests of the child as a primary consideration in decisions involving children.

The principle of the child's best interests is the centrepiece of the legislation and practice relating to children in Spain. It is a principle that is binding on all public authorities from the legislative to the judicial authority, and it is compulsory for the government, public administrations and individuals. Article 2 of LOPJM 1996 states that: "In the application of this Act the best interests of the children must prevail over any other legitimate interests. All measures taken under this Act shall have an educational character." Article 11.2(a) of LOPJM states that one of the guiding principles for the conduct of government is "the supremacy of the interests of the child" and the interests of the child must prevail in all proceedings and actions. The preamble to the Act on Criminal Responsibility of Children establishes that this interest "must be assessed, using technical and non-formalistic criteria, by teams of professionals in the field of non-juridical sciences[287]." The best interests of the child must be attended to in all punitive-educational measures and in the flexible adoption by the court of the most appropriate measures, given the nature of the case and the personal development of the person during the execution of the measure. [288]

[282] As reported in the interview with the Advisor to the Children's Ombudsman Technical Committee in Madrid.
[283] As reported in the interview with the juvenile lawyer and criminal law expert in Madrid.
[284] As reported in the interview with the Advisor to the Children's Ombudsman, Technical Committee in Madrid.
[285] Ombudsman's Report (2009) " Atención a menores con problemas de conducta y en situación de dificultad social ", pp. 19 and 25.
[286] As reported in the interview with Fiscal Coordinator, Office for Children, Madrid.
[287] Preamble to LORPM 2000.
[288] Article 7.3 of LORPM 2000.

Best interests are more likely to be considered in the administrative courts. Often however, the interests of the child are not identified as "what is best for the child", but rather "what is not as bad for the child.[289] Sometimes the child's interests are subjugated to those of an adult. For example, in family matters when this principle is in conflict with the interests of the biological parent, parental rights are often found to prevail over the rights of the child[290]. The best interests of the child are taken into consideration by the law, but not in its application and, in practice, the interests of the child are less important than other interests, despite the fact that the legislation states that the child's are the principal or primary interests to consider[291]. In cases in which children are victims of any kind of abuse, they should be treated with particular care, but often they are not and they have to face a variety of different conditions when being interviewed by the police, the prosecutors, the technical team and the court. This kind of "abuse" is even more serious when the case involves a foreign and unaccompanied child because of the additional language barriers and comprehension difficulties. The child's best interests are a key component in any case and they have to be considered in any circumstances that could affect the child's situation. However, this sometimes turns out to be just a general statement of principles that cannot be achieved, with the best interests of the child being considered less important than the greater interests of the adult, while sometimes the best interests of the child have been recognised, but cannot be served due to lack of resources (personal or financial means).

B. Independent review of the overriding interests of the child

How should the best interests of the child be determined in each particular case? This is without doubt one of the most important issues covered by this research. We are faced with an indeterminate legal concept to be specified at the time of application. For the Supreme Court, the principle of the best interests of the child presupposes that the legal rules should be interpreted in favour of the child[292]. In this regard, "it must seek, above all, the benefit or interests of children, in order ensure their personal fulfilment and that their rights are served, over and above the legitimate interests of the parents". The protection of younger children should govern the application of the law[293] . As noted by the Ombudsman, serving the best interests of the child requires a guarantee that their fundamental rights are protected, taking into consideration, not only their present but also their future in order to facilitate their full development as people[294].

The independent review is obtained from the psychosocial reports provided by the technical teams who are required to assess the child's situation and report to the public prosecutor and the juvenile judge in criminal proceedings. In civil proceedings, the psychosocial teams attached to the Courts of First Instance and the Family are responsible for the reports. While there may be excessive judicial follow-up of the information and technical criteria, sometimes members of the technical teams are found to be insufficiently qualified in terms of the analysis and treatment of children[295].

C. Taking into consideration the opinions of children

As already stated, children have the right to be heard in all proceedings affecting them[296]. The Ombudsman has highlighted the need for the child to be involved and to participate as an active player in the determination of her/his best interests. In order to do this, not only does he/she have to be heard but also his/her opinions should be taken into consideration, even though this does not mean that his/her interests should necessarily coincide with the wishes expressed[297].

[289] As reported in the interview with the Fiscal Coordinator, Office for Children, Madrid.
[290] For example, in cases where children are returned to their parents after years of hosting with another family.
[291] As reported in the interview with the juvenile lawyer and criminal law expert in Madrid.
[292] Supreme Court Judgement of April 20, 1987.
[293] *Audiencia Provincial* of Asturias, Judgement of 26 of September of 2002.
[294] Ombudsman Report (2009) "Atención a menores con problemas de conducta y en situación de dificultad social", p. 49.
[295] As reported in the interview with Fiscal Coordinator, Office for Children, Madrid.
[296] Article 9 of Law 1 of January 15 1996 on the Legal Protection of Children.
[297] Ombudsman's Report (2009) "Atención a menores con problemas de conducta y en situación de dificultad social", p. 49.

In criminal proceedings the law requires the child to be heard by the judge or court "before adopting any resolution concerning her/him personally."[298] In addition, the detained child is entitled to a private interview with his/her lawyer prior to and on completion of the evidence gathering process[299]. In juvenile cases there is more opportunity for the opinion of child defendants to be evaluated that in field of adult criminal justice, given, in particular, in the role played by mediation and other solutions made available to the court by the system. In civil proceedings, the opinion of an adolescent child is taken into account and often, but not always, this is the determining factor in the decision. The increasing ability of adolescents to form their own opinions and participate decisively in determining what should be understood by their best interests should be taken into more careful account[300].

D. Psychological, social and economic aspects of the child

The psychological, social and economic aspects of the child, should be taken into account. This is accomplished, with varying degrees of accuracy, in the studies carried and analysed, using the technical and psycho-social recourse,[301] analysed by specialists in the areas of education and training.

In case of juveniles detained or accused of an offence, not only is it necessary to attend "to the evidence and legal assessment of the facts, but in particular, to the age, family and social circumstances, personality and interests of the child, as revealed in the two most recent reports from the technical and public entities charged with child protection, when they are aware that the child has previously been under temporary or permanent injunction[302]". At the same time, the sentence must assess "the data on the child's personality, situation, needs and family and social environment, his/her age at the time of sentencing, and the fact that the child has not previously committed deeds of the same nature."[303]

With regard to children who have committed crimes against sexual freedom, the Circular from the State Attorney General 9/2011 points out that: "In general terms, as is inherent in the system of the LORPM, when the facts are criminally relevant, it is the specific psychosocial and family circumstances of the child that provide the foundation for the response to each scenario, assuming that the particular heterogeneity of sexual behaviour of children and adolescents justifies that the assessment made by the technical team is as complete as possible, so that, when necessary, a response and a therapy that best suit the specific needs of the child are proposed. Stereotyped responses should be avoided, in order to arrive, in each case, at the best solution from the range of possibilities that LORPM offers, weighing the inherent characteristics of children as evolving beings and avoiding operating with specific frameworks of the Criminal Law for adults, taking into consideration the high risk of labelling and stigmatising involved in formal sentences relating to sexual crime. (...) On the other hand, when news of the abuse reaches the Attorney without prior complaint (...) he/she must weigh the conflicting interests both of the child victim and of the child who is the author, having the option of not proceeding with the legal procedure when it can be concluded that neither the interests of the one nor of the other justify the initiation of the case. (...) In addition, as part of the assessment of the facts, particular attention should be paid to the report from the Technical Team, which may be very informative as to whether the child has psychosocial and educational problems that require intervention, or if such factors are not present". The preparation of the report by the

[298] Article 22.1.d) LORPM 2000.
[299] Article 17.2, in fine and 22.1.b) LORPM 2000.
[300] As reported in the interview with the Fiscal Coordinator, Office for Child, Madrid.
[301] As reported in the interview with the Fiscal Coordinator, Office for Children, Madrid.
[302] Article 7.3 of LORPM 2000 .
[303] Article 39.1 of LORPM 2000.

Technical Team on "the psychological, educational and family circumstances of the child and her/his social environment", is an essential requirement of the procedure[304]. Article 4.1 of the Regulation on LORPM provides that "the technical teams shall consist of psychologists, educators and social workers"[305], enshrining in law the composition of such teams, as has existed since 1988. In principle, the report should be issued by all three professionals and the absence of such a report leads to annulment of the proceedings. The Circular from the State Attorney General 9/2011 states that if the signature is missing or if the does not contain the response from one of the experts, the whole report must be qualified since some of the required aspects may have been omitted, thus influencing the proper understanding of the child's socio-psychological context and upbringing. However, it cannot be assumed that it is always essential for the child and his/her family to be interviewed by all three members of the team, either simultaneously or successively. It is necessary to call upon the participation of non-legal professionals (educators, social workers, psychologists, counsellors in secondary education, the social structures set up by religious faiths) and on people very close to the child, rather than simply the official court team, since they are the people who work directly with children. The economic crisis has led to NGOs and associations involved with children cease their operations altogether or limit their activities to child support, making it difficult to obtain essential reports that would affect the conflict situation of the children[306]. However, people involved in decisions relating to the children currently receive specific training[307].

5. Rule of law

A. Right to personal and own legal assistance

Article 10.1 of LOPJM 1996 states that: "Children are entitled to receive from public administrations appropriate assistance for the effective exercise of their rights and respect for these should be guaranteed". The Spanish Civil Code states that parents who hold parental authority have legal representation of their children who have not reached the age of majority. However, there are some exceptions to this, relating to the personal and other rights that the child, in accordance with the rules governing maturity, can exercise by himself/herself and in situations in which there is a conflict of interest between parent and child and also relating to property excluded from administration by the parents[308]. With regard to the right to their own legal assistance or advice for children who have been arrested or accused of an offence, from the moment the case is opened, in compliance with the Law on Criminal Responsibility of Children, they have the right to be informed by the judge, the public prosecutor or police officer of their rights, and to apply for the assistance and services of the technical team assigned to the Court of Children [309]. They therefore have the right to appoint a lawyer to defend them and to meet privately with her/him before testifying[310]. However, this is an issue in need of further development and therefore the International Juvenile Justice Observatory has launched a promotional campaign entitled Legal Assistance for Children in Conflict with the Law[311] which attempts to raise awareness of the problem and to ensure international and interdisciplinary legal assistance is given to juvenile offenders. The Circular from the State Attorney General 9/2011 indicates that the presence of parents or legal guardians of children who have been arrested or accused of an offence is a right guaranteed under LORPM. While Spanish legislation reflects the recommendations of in-

[304] Article 27.1 of LORPM 2000.
[305] Regulation approved by Royal Decree 1774/2004, of 30 of July.
[306] In the absence of social support networks it is social workers who try to fill those gaps individually. Thus, it often depends on the goodwill of the people involved. Despite the children being in need of protection teams, the widespread perception is that society needs to protect itself from such children. This perception leads to the adoption of very repressive policies for children, often without providing the data and statistics to justify this repressive orientation. As reported in the interview with the juvenile lawyer and criminal law expert in Madrid.
[307] As reported in the interview with the IJJO expert in Madrid.
[308] Article 162 of Civil Code.
[309] Article 22.1) c) and f) LORPM 2000.
[310] Article 22.1.b) LORPM 2000.
[311] View IJJO Campaign: http://www.oijj.org/legal/es_index.html. This campaign was intended above all to create a global database of national and international legislation on the right to legal assistance for children, to demonstrate the failure of some states to comply with international standards and to encourage states to update their national legislation on juvenile justice in the spirit of the Convention on the Rights of the Child by creating independent and speedy access to legal aid for each child.

ternational law on this subject, it is not an absolute right and it is not mandatory throughout the entire process.

With regard to criminal justice, a distinction has to be made between cases involving or not involving detention. For juvenile detainees, Article 17.2 of LORPM states that "any statement made by the detainee should be made in the presence of her/his counsel and those who exercise parental authority, guardianship or custody of the child, except for cases in which the circumstances warrant otherwise." Therefore, the statements made by the detained child, both in the hands of the police and before the prosecutor, must be made in the presence of parents, guardians or representatives. This legal requirement is expressly limited to the accuracy of the statement. For all other cases or proceedings, regardless of whether children are deprived of their freedom, the provision contained in art. 22.1.e) of LORPM applies, which considers the attendance of legal representatives as a "child's right to emotional and psychological assistance at any stage and extent of the procedure, with the presence of a parent or other person that the child indicates, if the juvenile court judge authorises their presence." The Circular from the State Attorney General 9/2011 clarifies, that, although this article refers only to the juvenile court judge, it should be understood that it attributes the same power to the prosecutor during the pre-trial stage.

With regard to representation of children who have been arrested but not charged, in accordance with Article 22.1.e) of the LORPM, it is habitual practice, during the taking of evidence for the prosecution, for parents or guardians to be present, but their presence is only tutorial when the declaration of the accused and arrested child is made. Assistance is conceived as a right of the child, not as a prerequisite and therefore the Circular from the State Attorney General 9/2011 states that "when weighing this up, the prosecutor must consider, in the presence of the counsel assisting the child, his/her situation, his/her age and maturity and the causes of the absence of the representatives, informing her/him of her/his right to attendance pursuant to Art. 22.1.e). In taking account of all the circumstances, if it is considered that the child has enough discernment, when exercising this right, to waive the presence of parents or guardians, then, having recorded this waiver in the statement, the prosecutor can proceed to receive the statement without the legal representative".

B. Terms for legal assistance

Children are entitled to free legal assistance under the same conditions as adults, i.e. when sufficient means are lacking[312], in which case the court appoints an attorney from the Spanish equivalent of the Bar Association. For unaccompanied children, there is no reason for the right to legal aid to be denied or limited because they are children and the crucial determining age for unaccompanied children is yet to be set[313].

In criminal proceedings, children have the right to their own legal assistance and if they dispute the attorney appointed they can change him/her. In civil proceedings, the legal assistance granted to children is usually the same as that of the parents, guardians or legal representatives. In all cases of proceedings involving the rights of children, the Public Prosecutor is required to act, provided that he/she is responsible for defending the rights of the child[314]. In cases of conflict of interest between the parents and the child in the same proceeding, the child is entitled to an independent guardian or legal representative[315]. A judicial counsellor

[312] As reported in the interview with the Fiscal Coordinator, Office for Children, Madrid.
[313] As reported in the interview with the juvenile lawyer and criminal law expert in Madrid.
[314] As reported in the interview with the Fiscal Coordinator, Office for Children, Madrid.
[315] As reported in the interview with the juvenile lawyer and criminal law expert in Madrid.

must be named, as in other proceedings, to assist the child in the proceedings as his/her parents, guardians and legal representatives would have done. In criminal proceedings against children the most frequent cases of incompatibility are those of domestic violence when the parent is the one affected by the deed[316]. In this conflict, the representative must be sought within the circle of relatives, legal or de facto guardians, or people who the child may designate. When choosing such people, they must not have a criminal record and they should be considered qualified to represent the child. If there is no such representation and if the child is detained, the provisions of Article 17.2 of the LORPM are applied and a subsidiary representative of the child is appointed when the statement is made by a prosecutor other than the instructor. This constitutes a contradiction, given the constitutional principles of unity of action and hierarchical dependency under both acting prosecutors[317]. If a conflict of interest exists with only one parent, by law, the other may represent the child, without a special appointment, in order to support the child's capacity[318].

In cases of conflict of interest between parents and the child, Circular 9/2011 of 16th November states that counsel is to be appointed for the child charged with this/her parents, guardians or legal representatives, when they are victims of the allegations against the child. Since these are cases in which the child's right to a defence may be compromised, the circular states that prosecutors promote the appointment of a defence counsel for the child through the legal aid scheme. This will occur unless the child, with a sufficient degree of discernment and a proper understanding of the significance of the act, assumes the lawyer proposed by his/her legal representatives. When a child is arrested or charged with a criminal offence, it may not be appropriate for parents or relatives, as legal representatives, to be present when the child makes her/his statement because of their incompatibility with the child him/herself, if they are victims of the said crime, or because there are other circumstances that indicate otherwise (cases of incompatibility, when the child and the person seeking outside representation are co-authors of the deeds, in cases of domestic violence, etc.). It is the responsibility of the Public Prosecutor to prevent these situations occurring, because, according to Art. 6 of LORPM, the Prosecutor he is responsible for "the rights that are recognised by law to children in addition to being responsible for monitoring any activities that should be conducted in their interest, and for observing the guarantees provided in the legal procedures." Among those rights, the right to a defence is preeminent, particularly within the juvenile justice system. Thus, the Public Prosecutor, promotes the appointment of a defence counsel, in the role of legal practitioner, as stated in Art. 22.2 of LORPM. It is also appropriate to appoint an attorney from among the legal representatives when the juvenile defendant, having a sufficient degree of discernment and proper understanding of the significance of the act, assumes her/his own defence.

C. Specific training

The training of the different members of the protection system is of particular importance, particularly in relation to judicial proceedings. The extent to which children receive adequate information about their rights and the alternatives and consequences of judicial action will depend on the extent to which professionals, foster families and sometimes their own families have a been well trained and informed on these issues[319]. Judges who hold positions on the Boards of Child High Courts and the Juvenile Courts and Public Prosecutors receive specific training in child-related matters. Similarly, each Prosecution Office has a Juvenile

[316] As reported in the interview with the Fiscal Coordinator, Office for Children, Madrid.
[317] As reported by the interview with the Fiscal Coordinator, Office for Children, Madrid.
[318] Articles 162, 163 and 299 of Civil Code.
[319] As reported in the interview with the lawyer and social worker in the children's social protection system in the Autonomous Community of Andalusia, Madrid.

Section with specialist members. However, the Spanish equivalent of the General Bar Council ensures that approved courses are offered for training those lawyers who wish to acquire expertise in the field of child-related law[320]. For prosecutors and juvenile judges, specific training is, in principle, voluntary. However, there are indirect mechanisms, related to career promotion, to motivate them to receive such training. In addition, legal careers are differentiated by specialisation and this has led to a growth in selected continuing education courses. Lawyers acting for children have their activities coordinated according to the principles of unity and dependence, by a specialist unit of the Attorney General's Office which is responsible for the technical support and the training of juvenile prosecutors[321]. It should be noted that the creation of specialist teams working with children in the courts represents a step forward for the involvement of children in court proceedings. Such professionals also have technical skills in dealing with children and legal knowledge enabling them to improve the protection of children during court proceedings. However, there is problem with the scarcity of resources and professionals in relation to the task.

Although people involved in decisions about children receive specific training, there is often indifference, neglect and lack of importance given to non-judicial professionals. However, some notice is taken of the importance of their participation in making decisions that affect groups of children at risk of social exclusion[322].

D. Information to the child about the court decision

Such information must be provided in plain language that children are able to understand and it must be delivered in a pedagogical manner. This regularly happens in the juvenile criminal system but, in the civil sphere, the situation changes, because the child usually appears under the representation of parents, guardians or legal representatives and these are usually the people who receive the information[323]. When the person involved is a child accused of an offence or detained, once the decision on the child has been taken, he/she is informed "in language which is understandable and appropriate to his/her age".[324] The judge asks "the child if s/he admits to being the author of the deeds and if s/he agrees with the requested action and civil liability. If s/he indicates his/her acceptance, after hearing the counsel for the child and the person or persons against whom a civil action is directed, the judge may issue a decision, but if the lawyer does not agree with the admission provided by the child, the court shall decide on whether to continue with the hearing."[325]

6. Alternative measures to court proceedings

Among the alternative measures to court proceedings for children charged, filed or detained, the court's redress of the damage, based on prevention, leads to the dismissal of the case. Thus, in the court, redress of the damage predominates over educational criteria and re-socializing. The Circular from the State Attorney General 9/2011 highlights the wide acceptance of court settlements by both victims and juvenile offenders. For the victims, this presupposes the possibility of moral redress, while avoiding prosecution, thus avoiding the stigmatising effects of prosecution for the child offender. The Circular also indicates these measures (apology, repair or educational activities[326]) as a possible solution to certain criminal offences that reflect such social problems as bullying. For such alternative measures,

[320] Final Fourth provisions of LORPM 2000.
[321] As reported in the interview with the Fiscal Coordinator, Office for Children, Madrid.
[322] As reported in the interview with the juvenile lawyer and criminal law expert in Madrid.
[323] As reported by the interview with the Fiscal Coordinator Child Hall in Madrid.
[324] Article 36.1 of LORPM 2000.
[325] Article 36.2 LORPM 2000.
[326] Article 19 of LORPM 2000.

the child offender and the victim reach an agreement and the compliance of the child terminates the legal dispute initiated. Alternative measures apply when the offence the child is charged with constitutes a lesser offence or a misdemeanour and when the child apologises and the injured party person accepts this and grants forgiveness. When the measure involves repair, the agreement does not merely produce psychological satisfaction, but requires the child to carry out the agreement contracted with the victim to repair the damage caused, either through work for the benefit of the community, preferably through action appropriate to the needs of the subject, whose beneficiary is the victim or other affected parties [327].

The technical team perform the function of mediating between the child and the victim or affected parities and then inform the public prosecutor of the commitments made and the degree of compliance[328]. The team also informs the child of the measures to be taken, commitments made and the degree of compliance. If it is decided to adopt an alternative measure, the child has to be heard in all proceedings. In order to reach an agreement and conciliation with the victim, the reasons why the acts committed are socially unacceptable should be explained to the child in a concrete and clear manner, to enable her/him to understand the commitment to repair the damage. The goal is for the child to understand that the community or certain individuals have suffered unjustifiably as a result of the negative consequences of his/her behaviour[329]. Children are informed and consulted on these measures since the knowledge and cooperation of the children involved is a prerequisite for articulating the court settlements. The views of children are taken into account, both directly and indirectly, through the information provided by the technical team working on the case.[330] The child receives legal advice about the timing of the alternative measure since this is legally required once the legal action is initiated.[331]

7. Unaccompanied children

Migrant children, particularly unaccompanied children, represent a particularly vulnerable group of children at risk of social exclusion and this vulnerability increases if they need any international protection status. Migrant children face a complex system of different institutions, authorities, social actors and technicians, often without the necessary coordination between them.[332]

Immigrant children are entitled to public protection on equal terms with Spanish children. The Spanish Constitution of 1978 states in Article 39.4 that: "Children shall enjoy the protection provided by the international agreements that safeguard their rights." For that purpose, international agreements have to be ratified and officially published in accordance with Article 96.1 of the Spanish Constitution[333]. The Constitution does not differentiate between foreign and Spanish children, since the international instruments relating to children's rights expressly preclude the possibility of discrimination on grounds of nationality[334]. Spanish law defines an unaccompanied foreign child as a child under 18 years who is a third country national and arrives in Spain without an adult responsible for her/him, whether by law or according to custom, when there is risk of the vulnerability of the child, "while such a person has not effectively taken charge of the child", or once s/he is in that situation in Spain[335].

One of the most important questions is determining the age of the person in order to identify the applicable legal regime and, if s/he is a child, this will require

[327] Article 19.2 of LORPM 2000.
[328] Article 19.3 of LORPM 2000.
[329] Preamble of LORPM 2000.
[330] As reported by the interview with the Fiscal Coordinator, Office for Children, Madrid.
[331] Article 22.1.b) of LORPM 2000.
[332] The Ombudsman's report (2011) "Menores o adultos? Procedimientos para la determinación de la edad" places particular emphasis on the need for a coordinated effort (p. 125).
[333] Article 96.1 of the Spanish Constitution provides: "International treaties, once officially published in Spain, shall form part of domestic law."
[334] Article 2 UNCRC of 1989.
[335] Article 189 of Royal Decree 557/2011 of 20 April, approving the Regulation of Organic Law 4/2000 on the rights and freedoms of foreigners in Spain and their social integration, amended by Organic Law 2/2009 (hereinafter, RLOE 2011). On the notion of unaccompanied foreign children see PALM OF TESO, A. (2011) "The legal status of 'unaccompanied child'. Aliens in our law, common definition in the European Union. The Islamic law Kafala "R.V.A.P. n ° 90, pp. 101-138.

the mandatory declaration of abandonment and subsequent assumption of guardianship by the Public Administration. When the state security forces locate an unaccompanied child whose under age is beyond doubt, either through documentation or physical appearance, s/he will be handed over to the child protection agencies.[336] Age is normally determined, in the same manner as his/her identity, by a document such as a passport or any other document which the foreigner's national legislation regards applicable in this situation[337]. However, if children are undocumented and it cannot be established with certainty that they are under age, the independent child protection services will give them the immediate attention required, in accordance with the legislation on protection of children[338], and the Public Prosecutor must be immediately informed of the presence of such a child[339]. The prosecution will then have to determine the child's age with the collaboration of the health services that will perform the necessary tests with urgency and priority[340]. In this sense, Spanish law attributes to the Public Prosecutor the task of processing applications for age determination and therefore, the Attorney General has established the guidelines to allow prosecutors to perform this task[341].

With regard to the medical tests to be performed, the LOE amended in 2009 refers to the need to obtain the "necessary evidence" (Article 35.3) without specifying what this is. This is indeed a delicate and controversial issue since no scientific method exists for determining age with accuracy. Several techniques can be used, perhaps the best known being what is known as the Greulich and Pyle test, based on radiological analysis of the bones of the wrist and left hand. The results obtained are compared with tables prepared from statistical studies that attribute different ages to the state of bone development[342]. Medical reports on age determination must specify the percentage of uncertainty or deviation, because the prosecutor will not issue a decree determining the age in the absence of an adequate medical report. The lowest of the possible ages established by the medical report will always be assumed provisionally[343]. The child must be informed of his/her rights and the nature and purpose of the tests to be performed to determine age. In this context radiological tests are considered mildly invasive. If the child does not object to such texts, there is no need for judicial authorisation, in cases in which the Public Prosecutor authorises the tests. If the child objects, the prosecution may not carry out the test with such a refusal possibly being taken into account as a factor or additional evidence in determining age, although all the data on file must be taken into account. The basic aim is to avoid treating a true child as an adult which could happen if refusal to submit to the test is automatically considered a decisive indication of adulthood (age of majority).[344] If, subsequent to the prosecutor's decree, new data questioning the established age become available, the public child protection services carry out further tests to determine age. In such cases, the child's consent is also required, either provided by the lawyer (*judicial defender*), if the child is under 16 years and not sufficiently mature, or by the child himself/herself, if s/he is over 16 years of age and sufficiently mature[345].

All decisions relating to children, adopted by public administration bodies and other agents or stakeholders, should take into consideration the prime principle of "best interests of the child" (Article 3 of the Convention on the Rights of the Child, 1989). This must be the guiding criterion for all actions involving children and this principle must be specifically reflected to avoid it being relegated to the status of a mere ornament. In this context, taking as the primary consideration the child's best interests, when evaluating the procedure for determining age, a

[336] Article 190.1 of RLOE 2011.

[337] DURAN RUIZ, F. (2007) "Las Administraciones Públicas ante los menores extranjeros no acompañados:Entre la represión y la protección,"Revista electrónica de la Facultad de Derecho, Universidad de Granada, p. 11, (available in www.refdugr.com).

[338] Article 190.1 of RLOE of 2011.

[339] There is no need to involve police officers alleging materially less than the court agencies. If the child consents to submit to medical evidence, social services may agree to take a child without the further involvement of the Prosecutor. The consultation document from the Attorney General 1/2009 raises certain issues relating to tests for determining the age of unaccompanied children (hereinafter, Consultation 1/2009).

[340] Article 35 (3) of Organic Law 4/2000 on the rights and freedoms of foreigners in Spain and their social integration, following its amendment by SO 2 / 2009 (hereinafter, LOE amended in 2009).

[341] For example, Instruction 2/2001 of June 28, on the current interpretation of Article 35 of the LOE 4 / 2000; Instruction 6/2004 of 26 November on the legal treatment of unaccompanied children; Consultation 1/2009, concerning certain aspects of records for determining the age of unaccompanied children.

[342] Another method is the TW-2 test, which takes into account skeletal maturity by radiography of the hand. These techniques allow an age estimate with a margin of error of two years. Vid. DURAN RUIZ, F. "Public administrations to unaccompanied children: (...)", op. cit., p. 15.

[343] Reports with expressions such as "approximately 18" or similar cannot be approved. No.4, Conclusions of the meeting of prosecutors and immigration specialists in children, April 20, 2010, Madrid. In this sense, if the age determination process establishes a range of years, article 190.4 p. 2 º RLOE of 2011 provides that "the alien shall be considered a child if the lower age in the range is below 18 years."

[344] Consultation 1/2009.

[345] Conclusions of Meeting about special tax and immigration, April 20, 2010, Madrid (no. 5). See also Article 9 (3) (c) of Law 41/2002, of November 14, about patient autonomy and rights and obligations with regard to information and clinical documentation: "When the child patient is not intellectually or emotionally capable of understanding the scope of the intervention. In this case, the legal representative, after hearing his opinion if he is twelve years old, will give the consent. In the case of emancipated children or those of sixteen years old, there is no need to give consent by proxy. However, in cases of serious risk, at the discretion of the physician, parents will be informed and their views will be taken into account when making the corresponding decision ".

restrictive approach should be taken to bone-measuring tests, limiting their application to those cases where there is doubt about age and no age can be established by documentary means.

The person subject to an age determination procedure must have an independent legal counsel from the beginning of the process. For migrant children, especially unaccompanied children, legal representation is established automatically (due to an administrative declaration of abandonment of the child) by a regional public child protection entity. Children should, by law, be able to rely on such guardianship and the right to legal representation and defence being granted by the Autonomous Community. The main obstacle to this is such children's lack of confidence in the protection provided the Administration. For this reason they, and the majority are boys, tend to make it difficult to discover, for example, the necessary information about their country of origin or family, in order to prevent any possibility of return. Thus far, the effectiveness of the rules depends on the sensitivity of lawyers and administration officials, and unfortunately, when children are involved in conflicts they become a "nuisance" and questions are asked about what to do with them. At this point, two issues are in play: their right to legal defence and protection as children. In the case of foreign children, xenophobia and racism sometimes also result in worse treatment. One the one hand, unaccompanied children are often more mature, usually because of their life experience, but on the other hand, their cultural or educational level is different and they may lack sufficient training and only a minimal education, having had little opportunity to acquire this in their country of origin[346]. The second issue, the right to free legal assistance for unaccompanied children, Article 22.1 of the LOE amended in 2009, recognises that "aliens in Spain," without specifying their legal status, "are treated in the same way as Spanish citizens." This Law includes all children, and all processes to which they are party, regardless of the jurisdiction in which they are being dealt with, and they are also entitled to an interpreter "if they do not understand or speak the official language used." It should be noted that the intervention of the interpreter is required, not only when the child does not speak the official language, but also when s/he does not understand this language. In addition, such legal assistance will be free if sufficient resources are lacking, according to the legal criteria of the regulations governing the right to legal aid[347]. In the case of stowaways, the Supreme Court understands that providing insufficient information about rights (the usual form used by the administration without directly asking if they want to be stowaways in Spain and enjoy the free legal aid) is a violation of their fundamental right to effective judicial protection under Article 24 of the Spanish Constitution, in relation to free legal aid[348]. As regards the ability to act in the process of repatriation in the case of children, including unaccompanied children under 16 years old with sufficient judgment, who have expressed their opposition to the recommendation of the person with guardianship or representation, the procedure is to be suspended procedure until a defence attorney is appointed to represent them[349].

Unaccompanied children who are asylum seekers are at increased risk of social exclusion. The Asylum Law of 1984, amended in 1994, did not contain any provisions on unaccompanied children. However, the new Law of 2009 dedicates Chapter V to children and other vulnerable persons, in that the preamble states: "the law broadens and strengthens the guarantees originating from the principle of the child's best interests". This, in principle, deserves a positive valuation, representing a qualitative leap with respect to the previous legislation, in that

[346] As reported in the interview with the juvenile lawyer and criminal law expert in Madrid.

[347] Article 22.2 of the LOE amended in 2009. See Law 1/1996 of January 10, on legal aid .

[348] Supreme Court Judgment of October 6, 2008. See also Judgment of the *Tribunal Superior de Justicia* of Galicia of May 25, 2011.

[349] Article 35 (6) of LOE amended in 2009.

applications for international protection of particularly vulnerable persons receive different treatment and their specific situation is taken into account. Unaccompanied children are included among the persons who are in a special situation of vulnerability, together with children in general, the disabled, the elderly, pregnant women, single parents with children or people who have experienced torture, rape or other serious forms of violence. Law 12/2009 of 30 October, on Asylum and Subsidiary Protection (hereinafter Law 12/2009 on international protection) states, in line with the legislation on immigration, that the Public Prosecutor promotes the process of determining the age of the alleged children, with the collaboration of the appropriate health services. Refusal to submit to such a medical examination will not prevent the decision being made on the application for international protection[350]. However, when necessary, in the interview, special treatment will be given based on the gender of the applicant or on the "other circumstances provided for in Article 46 of this Act" (Article 17.5 of Law 12/2009 on international protection). Therefore, differential treatment is also provided for reasons other than gender, particularly age, with special attention to unaccompanied children, requiring specially trained professionals.

Article 190.5 of the RLOE of 2011 requires the child protection service responsible for the report, to leave a written record of compliance with this process," truthfully and in appropriate language" for the child, the content and procedure of the right to international protection, in addition to child protection legislation. When unaccompanied children apply for asylum in Spain, the competent authorities (i.e. the Autonomous Communities) have to notify those responsible for the child of this. Specific problems can arise in asylum applications from unaccompanied children. A lack of training of the personnel of the host institution adds to the belief that documentation as a foreign child is incompatible with that of an asylum seeker and therefore these institutions have succumbed to the widespread and unfounded belief that children with a residence permit should not be able to continue with their asylum application at the same time. Many educators recommend that children do not seek asylum to avoid being compromised in the light of this alleged documentation incompatibility. One factor that probably contributes to this assessment is that the delay in resolving an asylum application means that the child may reach adulthood without having regularised their stay in Spain. Since it is considered that the child is already documented by the asylum seeker card, his/her residence is not processed, unlike the procedure for all other unaccompanied children. In addition, the processing of children's asylum applications suffers the same delay as that for adults, despite the fact that this should have particularly preferential treatment. Moreover, although the child protection service is responsible for informing children of their right to seek asylum or subsidiary protection (Article 190.5 RLOE 2011), it is the duty of the state administration to decide whether to initiate the process of repatriation and, to that end, it will contact the diplomatic representation of country of origin (Article 35.5 LOE amended in 2009). However, if the person concerned is an asylum seeker, that contact should not take place, but current legislation does not establish mechanisms for communication between the child protection service and state administration. In order that this lack of communication does not impact negatively on the child, the necessary legal joint management instruments need to be reinstated. Upon detecting the presence in Spain of an unaccompanied child, a process is started whose initial aim at is the child's reunification with her/his family and, therefore, his/her repatriation and, if this is not possible, his/her stay in Spain is approved. All

[350] Article 48.2 of Law 12/2009 on International Protection: "2. In cases in which minority cannot be established with certainty, this will be immediately reported to the prosecution which shall provide for determination of the age of the alleged child, involving the collaboration of the appropriate health services as a matter of urgent priority, to undertake the necessary tests. Refusal to submit to such medical examination will not prevent the decision being made on the application for international protection. In the case of children, the prosecution will put them under the care of the competent protection service".

these measures are instituted, apparently, according to the principle of the best interests of the child[351]. If the existence of a risk or danger to the integrity of the child is detected, the principle of non-return is applicable. Therefore, when a risk or danger to the integrity of the child is detected, the process of international protection must begin and guarantee, as the minimum, non-repatriation. Requests for international protection lodged by unaccompanied children should be dealt with using the emergency procedure in which the period required for the usual procedure is reduced by half[352].

Although the previous Asylum Act was silent on this issue, current Law 12/2009 on international protection, states that: "with immediate effect, measures shall be taken to ensure that the representative of the child named in accordance with current legislation on child protection acts on behalf of the child and assists him/her with respect to the examination of his/her application for international protection"(Article 44.3). However, the asylum procedure for unaccompanied children is governed by the same rules that apply to adults in that, under the terms of Article 8 (4) of the Asylum Law of 1995, asylum seekers found on national territory have the right to legal aid and a interpreter to formalise their application and throughout the procedure. Legal counsel and the interpreter must have specific training on children and asylum issues.

8. Conclusions

a) In general terms, Spanish legislation on children is sufficient with a legal system that defends and guarantees the rights of children. However, it emerges that the human and financial resources required to ensure the effective implementation of protective legislation are scarce or are at a very early stage of development. Therefore, although the improvements needed have been identified and progress made in recent years in protecting the rights of children, there is still a long way to go. There is a lack of networking and coordination between the different agencies working within the child protection system, such as the professionals in the protection system and the technical teams of the juvenile courts. This lack of coordination is also the result of the lack of resources and training. With regard to training, it is necessary to address the need for specific training for the various members of the protection system in matters relating to the judicial process, in order to guarantee that children receive sufficient information about their rights, opportunities and the alternatives to and consequences of judicial action, and also to ensure that professionals, foster families and sometimes his/her own families receive training and information on these various aspects[353].

b) We need to improve the image that children at risk of social exclusion have of the judicial system and police. The juvenile police service, GRUME[354], has helped to improve the access of children at risk of social exclusion to justice, becoming a point of reference for the education of professionals and social workers in contact with children and reducing the mistrust of children in situations of social exclusion. GRUME often works closely with the local social services.

c) Although the LOPJM of 1996 states, in Article 13.1, that citizens and authorities have a duty to report dangerous situations or the possible abandonment of a child, this duty is not always complied with. In general there has been a

[351] Article 35 of LOE amended in 2009.
[352] Article 25.1.b) of Law 12/2009 of international protection.
[353] As reported in the interviews with the social educator (working in the Madrid child protection system) in Madrid and with the lawyer and social worker (working in the child protection system in the Autonomous Community of Andalusia) in Madrid.
[354] Children' Groups within the police force (known as GRUME) are incorporated into the Provincial Brigade of the Judicial Police. These were first created in 1986 in Barcelona, followed by Madrid in the same year and a year later, in 1987, in the Valencia. In 1988 they were established in Granada and Zaragoza and almost all provincial capitals and other cities with special emphasis on issues related to children have their own police force. GRUME functions are twofold: protection of child victims of any abuse, either physical (including sexual abuse) or psychological, and protection of juvenile offenders. They collaborate with the public and private institutions involved with children.

substantial improvement in the opportunities for detecting a situation of risk. For example, through teachers and other professionals in the education system, social services, GRUME or family members.[355].

d) Although both the criminal law and the child protection services acknowledge children's rights (to be heard, to a legal defence, to know the status their case, etc.), respect for and enforcement of these in practice depends largely on the sensitivity of the actors or stakeholders.

e) Improvements have been made to judicial proceedings, for example, advances in the way or the times in which a child should testify and the introduction of technical teams to work with children faced with a trial. However, in spite of these improvements there is much to be done in this field. As a case in point, in many criminal cases, children have to testify several times on the reported abuse situation.

f) As regards the specialist teams attached to the courts, these represent a clear step forward for the participation of children in court proceedings. In addition to their technical and professional skills in dealing with children, their legal knowledge ensures better care and respect for the rights of children during court proceedings. In this regard, the paucity of financial and human resources, for example, the number of professionals available, in relation to the task represents a serious problem.

g) One problem relating to the reporting of situations of abuse or access to the protection system, is the uncertainty and mistrust of the alternatives for the future. For example, when reporting abuse carried out by parents and educators, there is a lack of certainty that the alternatives are likely to be better. Sometimes, for example, children have to return home or return to the centre where they used to live. The weakness or inconsistency of the alternatives that are offered after completion of the legal procedures can deter children from collaborating with the law[356].

h) There is a lack of coordination and a pronounced lack of compliance with judicial decisions and the effects of legal proceedings on children. A lack of follow-up on the family or the professionals in the reception centres is often related to a lack of expertise and information on these issues, combined with the slowness of the processes and decisions, or frequent staff turnover among professionals in the protection system[357].

i) It is doubtful that the system will result in the rehabilitation of children or offer opportunities for recovery[358]. Alternative measures are rarely paid sufficient attention, and legal proceedings tend to be the preferred option, despite there being alternative measures that can themselves be steps in the proceedings. Criminal law does not practise with sufficient frequency the principle of minimum intervention leading to the use of alternatives to legal procedures, for example, school mediation in cases of school violence). With the economic crisis the means are lacking, thus making this work more difficult. While lawyers should inform the child of these alternative measures and children should be provided in schools with information about the possibility of using such measures or other ways of resolving conflicts[359], this is not done at all or

[355] This view was reflected widely among those agents of the social intervention system who were interviewed during the fieldwork.
[356] As reported in the interview with the lawyer and social worker (working in the child protection system in the Autonomous Community of Andalusia) in Madrid
[357] As reported in the interview with the social educator (working in the Madrid child protection system) in Madrid.
[358] This view was reflected widely among those agents of the social intervention system who were interviewed during the fieldwork
[359] As reported in the interview with the juvenile lawyer and criminal law expert in Madrid

only in exceptional circumstances and its implementation would require changes to school structures, relatives, the police, etc, that do not yet exist[360].

j) Currently, the most complex problem is providing legal assistance to immigrants. Preventing access to legal aid leads to helplessness and denies access to justice. While this also occurs with adults, it is much more severe in the case of children and crucial in the case of unaccompanied children. Despite the theoretical equality that exists between Spanish and foreign children in terms of access to justice, the legal status of unaccompanied children, and more so if they are asylum seekers, presents a problematic view of children's relationship with the judicial system. For accompanied foreign children, their particular irregular situation is the obstacle to their resort to the courts, since they fear that, if their situation is known, they will be expelled. Among foreign children, the lack of documentation is a determining factor for their exclusion from public services and facilities, and their distancing from access to justice[361].

k) With regard to the asylum procedure as applied to unaccompanied children, cooperation and coordinated action by the regional and state administrations is required, since their different responsibilities may conflict with the interests of the child. Furthermore, although Spanish law considers the asylum procedure to be compatible with the processing of the child's residence permit, in that they could be performed simultaneously, in practice the regularisation procedures for children are not initiated if they apply for asylum. It is considered that the child is documented with the yellow card given by the Office of Refugee and Asylum (*Oficina de Asilo y Refugio*) as an asylum seeker and therefore no account is taken either of the principle of "best interests of the child" or of the need for special protection for those who are in severe distress, such as unaccompanied children.

[360] As reported in the interview with the juvenile lawyer and criminal law expert in Madrid.

[361] As reported in the interview with the Fiscal Coordinator, Office for Children, in Madrid.

Part Three

The Activities with children

The Ateliers with children

The atelier represented an important moment in the project, on one hand giving the possibility to children to participate and express their points of view on access to justice and the real enforceability of rights; while on the other hand allowing researchers to compare the results of field research with what the children had to say.

They were organized starting from the basic principles of the project, that is the real access to justice for disadvantaged children and the in-depth knowledge of the rights by the young participants, not only as a moment of activity for the kids, but of real participation.

The participatory atelier had the distinction of being focused from the beginning, involving of children themselves in all phases of design and implementation of activities, with the goal of knowledge and information on the one hand, and on empowerment on the other hand, defined as completion of a higher degree of awareness about their condition of life, and ability to effectively orient their growth path.

The main purpose of the participation of boys and girls is to give them a sense of responsibility as individuals and as members of the community in which they live. Participation gives them an opportunity to influence the actions and decisions that affect their lives, as well as becoming active citizens.

It's essential to give them the opportunity to participate in decision – making processes, to allow them to express their ideas and points of view seriously considering what they express, according to their age and level of maturity.

Listening to children and teenagers contributes to the quality of the decisions that the adults need to make for them. To make such decisions it is necessary to gather information, not only information about the facts and concrete things, but also about intentions and motivations. Talking to a child is a form of negotiation that helps the adult to improve the quality of his/her decisions.

Participation, like listening, is an essential human right, not a privilege nor a concession; every child and every boy or girl has the right to participate in all matters of his/her concern.

He/she has the right to access and receive significant and safe information, to express his/her points of view, to be involved in decisions of his/her concern.

The principle of participation therefore brings the recognition that children and teenagers are the bearers of skills, knowledge and abilities and are able to transfer them into society.

From these basic and shared principles operators have organized the three ateliers. The three ateliers with the boys and girls were held in Athens, Madrid and Rome.

[362] As stated in art 9 and 10 of 1996 Strasbourg Convention on Exercise of Children's Rights

[363] The categories of children that according to the COM (2011) 60 are particularly vulnerable and at risk of social exclusion are: children at risk of poverty, children with disabilities, children victims of violence, sexual exploitation and trafficking, Roma children, children asylum seekers and children with no parental custody

The three groups of boys and girls were very heterogeneous and the activities diversified and personalized, but always there were exchanges of information and materials between the three groups, thanks to the supervision carried out.

In Athens the group consisted of five unaccompanied boys, 2 from Afghanistan, 1 from Pakistan and 2 from Eritrea, living in a house / hostel in the centre of Athens, and 5 girls, four from Greece and one from Poland. They all live in a public institution for girls in Athens.

In Madrid the group was formed of 5 girls who were born in Morocco but brought up in Spain.

In Rome the group consisted of 8 teenagers who took part in the meetings on a regular basis, plus others who attended more sporadically. They were mostly boys, with only 2 girls among the regular participants, one from Morocco and the other of Roma ethnicity. The boys were from Italy, Bangladesh, Romania, Gambia and Ecuador.

The final product was a video that tells the activities of the three ateliers and a videoclip of a rap song written by the same guys, Intended for use as source of information for other children.

Below are the reports which describe in more detail how the individual atelier were articulated.

Atelier in Athens

Workshop duration: September 2011 – November2011

Short description of the context

For children at risk of social exclusion, and especially children affected by migration and poverty (the group focused on in this project), access to justice can be a long process, full of obstacles. In this context, the importance was acknowledged of promoting the principles of the effective exercise of children's rights, including the right to access justice mechanisms, as set out at European level by the Council of Europe. Special attention was devoted to the Convention on the Exercise of Children's Rights (1996, Strasbourg) that focuses on the role of children's legal assistants, participation and implementation, and which has been signed by the majority of EU Member States involved in the action.

The workshops were held in Italy, Spain and Greece and involved children at risk of social exclusion with the aim of enabling them to participate in activities designed to help them familiarise themselves with the methods and ways of exercising their rights. In addition, a video was produced, using the child-friendly material delivered to the children.

This project built on these achievements by enhancing knowledge of the current situation with regard to children's rights within the justice system and with the aim of promoting a child-friendly justice system at national, European and international level.

The activities were designed on the basis of certain technical and artistic criteria in order to focus on issues relating to the exercise of children's rights. ■

Specific objectives of the workshop within the local context

The specific objective was to investigate the general knowledge of children at risk of social exclusion about their rights and the way/extent to which the justice system affects their lives, in order to enhance that respective knowledge and facilitate the children's access to justice. To this end, children from two different institutions (one public, one NGO) were selected, with main the criteria being their personal experience, their personal involvement in the justice system, their age (between 13.5 and 17.5) and, finally, their willingness to participate in the activities.

During the first stage, the emphasis was paced on the exercise of their rights, on their obligations, and on their basic needs, in addition to the role of the justice system in general. After reviewing their personal experiences, the aim was to explain how accessing the judicial mechanisms may constitute the preferred option and the most practical tool for supporting their rights when other practices would have no effect.

In the next stage, the aim was to help children approach the justice system on their own, through several artistic and creative activities. The children had the chance to become familiar with legal proceedings in the justice system and to understand how such proceedings can be a tool for promoting their interests. ■

Human and technical resources provided for the workshop

The human resources allocated on behalf of the European Public Law Organization (EPLO) were Sofia Kostantellia (social worker) and Fani Stathoulopoulou (project coordinator). In addition, Stamatina Poulou (lawyer) participated in one of the workshop sessions.

Ms Kostantellia and Ms Stathoulopoulou were also responsible for the transfer of the children from the institutions to the EPLO premises where the workshop was to be held.

A room of 40m^2 on the first floor of the EPLO headquarters in Athens was provided for the activities. The space was reserved for the workshop sessions and it could be adapted to suit the needs of different activities.

The technical resources included a computer, a video camera, a photo camera, a projector, fabrics, paint, paper, masks, etc. In addition, drinks and finger food were provided by EPLO.

The work of Mrs. Kostantellia and Ms. Stathoulopoulou was supervised by Francesca Sangermano, workshop coordinator for Save the Children (Italy). ■

The group of children participating in the workshop

The group consisted of: a) unaccompanied boys, children from Asian and African countries at war or subject to political instability, and b) girls in social care in a public institution, following a court decision issued for family problems (abuse, neglect, unemployment, high poverty, parents with psychological problems or involved in drug dealing, etc.)

The teenagers selected had never lived under normal family life conditions, all of them coming from an environment in which not all their needs were met and all of them had been deprived of basic rights such as the right of access to food, good health and education.

The group consisted of five boys, 2 from Afghanistan, 1 from Pakistan and 2 from Eritrea, living in a house / hostel in the centre of Athens and attending a multi-cultural school.

The girls were all Greek (one of Roma origin), except for one from Poland. They all live in a public institution for girls in Athens.

The age of the teenagers ranged from 13.5 to 17.5 years.

All of them met each other for the first time during the first session that took place on the 23rd of September, 2011 at the EPLO premises. ■

The activities engaged in

The workshop sessions included a wide range of educational, artistic and creative activities. The ground rules for proper communication were established, written down and used from the start, with frequent reminders from the EPLO coordinator of the project mission. During the first meetings, the focus was on communication activities designed to bring the group closer together, involving games to promote communication and to help the young people get acquainted with each other. Special attention was paid to introducing children's rights and the justice system in the national context and the children were given a brief description of the European bodies and the Convention on the Exercise of Children's Rights (1996, Strasbourg) in order for them to gain a better understanding of international standards. Stories relating to the rights in question

were read and discussed as were the main points of a video on the justice system. During the third meeting, the children told their personal life stories, to the extent that each child wanted to reveal, giving them the opportunity to bond together more closely.

Games were used extensively during the sessions, allowing the children to express themselves freely and practice some creative brainstorming. These included a card game depicting children's rights, making videos, selecting photographs, writing audio stories, free animation and games involving self-expression through body movement. The children enjoyed the creative activities and worked as a part of a group or individually while painting, collecting images or creating a collage.

From the life stories that were told at the third meeting, the children created a descriptive narrative of two life stories they had chosen, transcribing these for dramatisation.

In order to dramatise the two narratives, masks were designed to match the roles in the plays and the children cast the various roles themselves. The children then added the roles of the judge, the journalist and the psychologist to their plays. This activity enabled the children to put the knowledge they had gained on the justice system into practice, strengthening their understanding of the role of the judge, the social worker, the advocate, the child etc. The youngsters learned how to exercise their rights while having a lot of fun at the same time.

In addition, a DVD was created with the input of all members of the group which was sent to the Italian workshop. The Italian workshop coordinator, Francesca Sangermano, in her visit to Athens, showed a video of the greetings of the Italian team to the Greek team and the Greek team made a similar video for the Italian team. The children had the chance to meet others who had had similar experiences and they had a discussion with the lawyer, Mrs Poulou (lawyer), who answered the children's questions on the justice system and on the role of the Attorney General for Children. Last but not least, the lyrics and music for the team song were written and the team brochure was designed and created by the children. ■

Methodology

In order to maintain the teenager's constant interest, the workshop employed some innovative tactics. Active participation was the driving force behind every workshop activity. Free expression was also a motivating tool since these children had been deprived of such basic rights as playing and taking part in normal life events. The children had the opportunity to express themselves and interact with children from other institutions who had similar experiences and memories of the justice system. Giving the children responsibility for their role in individual activities and the project as a whole was an important methodological tool which made a remarkable contribution to completing each activity successfully. The children were motivated to deliver a good team result and encouraged to take on more responsibility. The presence at the Greek workshop of the Italian evaluator, Francesca Sangermano, helped significantly since the children established communications with the Italian team, in addition to the relationships they established among their own team.

The methodology involved education on the subject of learning rights, in addition to strengthening knowledge about how the justice system operates and on the role of the Attorney General for Children. The children enriched their knowledge of many aspects of the justice system and issues relating to the exercise of their rights. Moreover, the methodology included techniques such as play, focus groups,

education on legal affairs, acting, painting and creating a video all of which enabled the children to enjoy the learning process.
The team working as a whole or in groups, according to the needs of each activity. ■

Respecting the standards for participation

The rules governing an ethical approach were of major importance at all stages of the workshop: transparency, honesty, accountability and respect were the means of a constructing a relationship of trust between the children. These rules motivated the children to contribute actively to the aims of the project and demonstrate its usefulness, enabling the children to identify their rights and start believing in them.
Active and voluntary participation was sought and agreed before the start-up of the workshop. For the participants, children with difficult personal experiences and at risk of social exclusion, voluntary participation related to many of their personal needs, i.e. the need to have fun, to spend time with other young people who they did not know before, to communicate, to do something important and, finally, to feel proud of themselves. Moreover, this participation made the children feel proud to be part of a wider European project.
They were all given equal opportunities, regardless of their background, gender, abilities, etc. One example that illustrates this perfectly is the boy with intellectual disabilities who was given the opportunity to participate in the team on equal terms, with the result that he made a remarkable contribution to all the activities.
The staff members were all well trained and highly experienced. The social worker (Sofia Kostantellia) has many years' experience with children and has extensive knowledge of both the child protection system and justice system in Greece. The EPLO coordinator Fani Stathoulopoulou organised the activities according to the rules and guidelines laid down for all the project partners.
The protection and safety of the children during the workshop were guaranteed.
Finally, each activity was evaluated according to the criteria laid down for the the project. ■

Difficulties faced and strategies for overcoming them

The political situation in Greece and the demonstrations often affected the organisation of the activities, mainly during the first meetings. The transport strikes and the streets overloaded with traffic did not help the coordinators to organise the children's transportation in the standard way. The social workers in the institutions were also reluctant to allow children to leave the institutions during the general strikes, especially during the days of riots in the centre of Athens. As a result, the co-ordinators were forced to change the day of one of the meetings and move to the girls' institution to hold one of the sessions. Another difficulty was that events/developments in children's lives, such as court decisions ordering foster care/guardianship or interrupting the relationship with the parents, or being punished and not allowed to leave the institution, affected their participation in the workshop. Three of the children had difficulty using the Greek language and almost all the children had a lack of self-confidence and concentration problems that, to some extent, affected their ability to express themselves. As a result, when they refused to try to work on something new, a lot of encouragement and real acceptance was needed.
Seeking the cooperation of the social workers at the institutions was the main strategy for overcoming the above difficulties. ■

Strong points/success factors

One strong point was the fact that the project social worker met and cooperated with the social workers at both institutions during the workshop preparation stage, discussing in depth the main aims of participating in such a project. Moreover, the project social worker held a number of meetings with the children before the workshop activities began.

The workshop location on the EPLO premises provided all the practical facilities and it could be adapted to meet the needs of each meeting;

Another strong point was the voluntary basis of the children's participation in the workshop and acceptance of any children not feeling "ready" to get involved in an activity. However, the constant interest shown in the workshop can be considered a success factor with the focus on the children's positive points, abilities and skills. Moreover, the fact that the children's difficult personal experiences were met with an atmosphere of respect enabled trust to develop steadily with the help of the people organising the activity and this helped the children understand and respect each other and feel solidarity.

The different ethnic, family and cultural backgrounds helped the children to understand the idea of universality and to overcome prejudices, creating successful bonding and intimacy. The creative, artistic activities helped the children to express themselves freely, generating the joyful atmosphere that was necessary for the children to have fun while participating and thus motivate them to make their best efforts. ■

Weak points/critical factors

One weak point was that the majority of the children were not open to changes in their lives. The girls, in particular, were very sensitive to any kind of change. The group gender balance was therefore very sensitive and with the constant risk of their participation slipping toward marginalisation.

Children expressed their own life problems requesting the input of the social worker in order to do something to solve them. The professionals had to be constantly on their guard to avoid making promises on these requests and also to transfer these requests to the social workers at both institutions.

In addition, the time available for processing and consolidating the new skills and concepts was insufficient for this group of children, given their need for a multifaceted approach to cope with different levels of understanding of the language, resistance to participation in activities of a spiritual nature, etc.

Another weakness associated with lack of time was that sometimes two people were not sufficient to handle the sensitive needs and the behaviour of the children. Fortunately, the artistic activities were undoubtedly the best choice for encouraging common understanding, action and communication. Last but not least, more emphasis could have been given to spreading the experience of the participants to children not attending the workshop. Even though the social worker often urged the children to share their experience and knowledge with their friends, classmates and relatives outside the circle of the workshop, the impact of the workshop would have been more widespread if other initiatives had been planned. ■

Impact of the activities on the life of the children, their families and communities

All the children became aware of the role of the justice system and the judge in their lives and approached the issue in a new friendlier way. Since the project worker emphasised the children's rights by teaching them to exercise them on their own, this too had considerable impact. The children were given the opportunity to identify their rights, to discuss their personal experiences and come up with the necessary explanations themselves.

The children were able to enrich their knowledge on the broad subject of justice through different means, stories, movie clips, leaflets, discussions, acting out situations and the presence of the lawyer, becoming familiar with such legal terminology as court decision, judge, convenience, support, representative, etc.

They are now quite clear about the changes in their attitude and their increased activeness and energy, also helping to increase their self-confidence and communication skills. Some of the children recognised their own abilities for the first time and learned to put their trust in them. One of the girls who had played a leading role in one of the dramatised stories was encouraged to audition for the leading role in the Christmas play at her institution.

The staff of both institutions were affected by the project, having great interest in and respect for it as the activities progressed. Both institutions asked for approval to mention it in the annual report on their own activities. They are very interested in hearing the results of this project and they are willing to participate in future European projects.

In addition, the workshop activities were a good reason for two of the girls' families (one foster, one biological) to show them more interest. They accepted their participation as something important and special for the girls.

Last but not least, the Ombudsman, the Ministry of Employment and Social Security, governmental and non governmental organisations, institutions and professionals were informed and all showed an interest in the results. ■

Relevant aspects to have emerged on the theme of access to justice

The relationship and links between the judicial service and other services, particularly with the police and social services, is an important issue that emerged mainly from the perceptions and attitudes expressed by the children throughout the workshop.

Example 1: "The juvenile prosecutors take children away from their families". This prejudice relates to the way in which children are removed from their family. The child does not meet the prosecutor who makes a decision about his/her removal. The removal process is almost always painful, and is sometimes recognised as traumatic, because the professionals involved do not give the child a sufficient explanation, nor do they arrange for a "psychological shift" into the new environment, protection, etc.

Example 2: "The prosecutor does not allow children to leave the institution, he/she is bad". In this case too, the judge assumes a strict, unbending role rather than the role of someone who provides assistance. The concept of protection, which is crucial for the entire judicial system and in particular its application to children, is lost in these circumstances and the unfortunate or incomplete operations of the agencies involved weaken the beneficial role of the judiciary.

The lack of appropriate infrastructure and institutions to protect children often in-

validates court decisions that support the implementation of children's rights. In Greece the extremely limited application of the Fostering system and the lack of small family-type institutions have negative effects on children if the court decides to move them away from home. The two most common outcomes are as follows: 1. They stay in hospitals for months until a place is found for them at an institution. 2. Siblings are separated if they are of a different sex or if there is a large difference in age.
Several comments and claims were made directly by the children: children want to know what happens in their lives, how and why decisions are made concerning them. They do not want to be kept in hospitals in the transitional period after their removal from their families. They do not want to be separated from their siblings, and when this is needed, frequent contact and communication should be arranged. The children want to follow the court procedure with the attendant their choice (e.g. the social worker who they respect and trust). ■

Atelier in Rome

Workshop duration: September 2011 – January 2011

Short description of the context

For many years Save The Children Italy has been organising activities with the participation of children at risk of social exclusion on themes linked to children's and teenagers' rights.
For this project, we started by acknowledging that children's inability to demand their rights and to receive legal assistance in legal proceedings represents a specific risk factor in their failure to fulfil their opportunities putting them at risk of social exclusion and deviance.
This project aims to reinforce the protection of the rights of children at risk of social exclusion by reinvigorating the implementation of the Strasbourg Convention of 1996 on the exercise of the rights of children, with particular reference to role of the Children's Advocate.
A consultative project was carried out with a group of children, both Italian and foreign children, in order to let the boys and girls define the content, identify critical areas/issues and put forward proposals, including through the production of two child-friendly videos designed to provide a source of information and to raise awareness of the rights of young peoples. ■

Specific objectives of the workshop within the local context

The main objective of the workshop was to identify the young people's existing knowledge of their rights, to increase this and to give them the opportunity to receive appropriate legal assistance.
We also investigated those factors that obstruct the exercise of children's rights, trying to give voice to their stories and to the difficulties encountered in their lives.
The principle instrument used to reach these objectives was the active participation of the boys and girls. The main purpose of this participation was to give them a sense of responsibility as individuals and as members of the community in which

they live. Participation offers them the opportunity to influence the actions and the decisions that affect their lives and to become active citizens.
Another important goal was to encourage the children to get involved with the other members of the group, sharing their life stories, and their experiences which would then become a stimulus for discussion with the whole group. ■

Human and technical resources provided for the workshop

The workshop was conducted by Francisco Calderon and Francesca Sangermano, experts in projects involving child participation. Their work was supported by staff members of the Civico Zero day centre and by the legal contribution of Antonella Inverno, manager of the Save the Children Italy (SCI) Policy and Law Unit policy and by Susanna Matonti, SCI's legal consultant.
The workshop took place mainly on the Save the Children premises which has a room spacious enough to contain the group, and equipped with the essential technical support for carrying out the workshop's activities.
The technical resources used were: computers, video cameras used by the children themselves, digital cameras, projector, musical instruments, materials for the production of masks, paper, posters, markers. ■

The group of children participating in the workshop

The boys and girls taking part in the workshop were selected by invitations sent to such local entities as day centres, youth centres and family housing for immigrant children.
The group consisted of 8 teenagers from 14 to 19 years old, who took part in the meetings on a regular basis, plus others who attended more sporadically.
They were mostly boys, with only 2 girls among the regular participants, one from Morocco and the other of Roma ethnicity.
The boys were from Italy, Bangladesh, Romania, Gambia and Ecuador.
The children belonged to the following categories:

- Children subject to alternative measures
- Refugees
- Unaccompanied children
- Roma children

Some of them had been resident in Italy from birth, others had been here for a few years or for just a few months. They all live in Rome and in its surrounding province in family houses, host communities, or with their own family in houses or in Roma camps with facilities.
Once shown the direction the workshop would be taking, each child was asked to give her/his consent to participation, together with that of their parents or legal guardian (in the absence of parents).
The social situation of the children, except for one boy, is characterised by poverty, lack of regular employment opportunities, with some of them involved in illegal activities and others in the process of sorting out their legal residence status in Italy. ■

The activities engaged in

The aim of all the activities carried out in the workshop was to encourage the participation and the direct involvement of the teenagers. The activities were structured

to address issues relating to the principles and rights enshrined in the Convention on the Rights of the Child (CRC), such as the participation principle, the non-discrimination principle, the right to freedom of expression and, in particular, the right to be heard, the basis for the entire workshop.
The activities proposed to the children were:

- In-depth study of relevant issues
- creative activities and manuals
- awareness raising

The first meetings were devoted to explaining the project and its objectives to the children.
One of the first activities was a discussion held to draft the ground rules for the group. The children then moved on to their own life stories, relating examples of their experiences as foreign teenagers in our country, the target being to understand the difficulties they encountered and to fire their imagination, using newspapers and magazines to create a collage representing the stories told.
Almost all the initial meetings included in-depth analysis of some of the main articles from the Convention on the Rights of the Child, the European Convention on the Rights of Children and the guidelines from the Committee of the Council of Europe on child-friendly justice.
These analytical studies alternated with creative activities, like making masks out of plaster and bandages to put on each teenager's face while they related their life stories and which were also used for shooting the rap video clip. Creating these handmade masks, each of which was made by two people, was highly significant for encouraging cooperation among the teenagers, uniting the group and reinforcing its solidarity.
Following a discussion of their thoughts on rights, each teenager wrote down on a piece of paper one right that was not respected and together these formed the "rights tree".
Once the group had gained strength and the teenagers were more confident with each other, some of them told the others their personal stories, which were then written as a screen play and performed by the teenagers themselves.
A central issue was listening to the young people. After the group had delved deeply into the various meanings of listening in all its forms, they decided to interview people on the street on this theme. Before starting the interviews, we formulated the questions to ask the people being interviewed.
The last activity was to write the lyrics of a rap with respect for the rights of the children as its central theme.
The lyrics were written in the teenagers' mother tongues, starting with their own their life story and with contributions from each group of teenagers from the workshops held in Athens and Madrid
Once the music had been chosen we recorded the song in the different languages
The last meetings were dedicated to shooting the video for the rap, with locations in some iconic places in the city. The end product of the workshop was the two videos, conceived and developed by the group of youngsters in Rome with the essential contribution of the Greek and Spanish teenagers.
The first video is the rap on the theme of children' rights, written and performed by the children and intended to be a source of information for other children. The second video records that main activities of all three workshops. ■

Methodology

The methodology adopted was active-participatory, with the boys and girls playing

the leading role in all activities. The young people were also sensitive to the complexity of the group, with an awareness that, in any relationship, it is the diversity of each person involved that creates collective wealth.
The young people were free to express themselves on issues put forward from time to time, creating a relaxed, prejudice-free atmosphere.
Starting with reading and sharing the teenagers' life stories and context in which they live those lives, we set out to work on their knowledge of their rights and on the obstacles to their exercising those rights. Through participatory activities, the young people were able to think about these themes in a group setting, increasing their awareness and skills.
The first step in the meetings was dedicated to listening, bringing problems to light through creative play activities, such as role plays and brainstorming, watching videos and group work.
We then proceeded to analyse the problems associated with exercising their rights, acknowledging the teenagers as active carriers of knowledge which, through group work, can be enhanced and further activated. ■

Respecting the standards for participation

Standard 1: ethical approach, transparency, honesty and responsibility

From the very first moment the girls and the boys were informed about their role and the journey they would be taking.

Standard 2: relevant and voluntary participation

During the workshop, the activities were programmed in ways, at levels and timings appropriate to the teenagers' level of language fluency and literacy with no restrictions on participation. The teenagers were supported and fully involved in sharing opinions and making proposals, thus reinforcing their capacity to relate directly to the thematic content of the activities and to increase their sense of empowerment. All the themes explored were related to the real living environment of the teenagers.

Standard 3: stimulating environment, suitable for children

The methods used let the boys and girls express their opinions on matters of interest to them in complete freedom. Even though the environment was stimulating, the locations were not always suitable for the teenagers to give full rein to their own creativity and self-expression.

Standard 4: equal opportunities

All the girls and boys participated in the activities without discrimination on grounds of age, gender, social status, ethnicity, language or religion.

Standard 5: efficient and skilled staff

The boys and girls involved in the workshop were guided by expert staff, trained in the methodologies favoured by Save the Children.

Standard 6: participation ensuring the safety and protection of the children

The workshop activities took place in safe protected locations. The boys and girls were assured that no videos or photos would be taken during the workshop and published without their explicit and written consent. The consent form specified the intended use of the images.

Standard 7: Follow-up and evaluation
At the end of the workshop, an external evaluator made an assessment of the activities engaged in. ■

Difficulties faced and strategies for overcoming them

The first difficulty was creating a group that was as diverse as possible.
The strategy employed was to contact many local centres that work with children, presenting the project and interviewing each child.
The main theme of the project, access to justice, was not easy to explain and make clear to the children and therefore it was important to call upon the support of the experts from the legal unit for clarification, when needed, of the issues in question.
The headquarters for the group work was not always adequate and therefore we often varied the location, organising meetings off the premises.
The children also had some difficulties seeing this type of consultation as a tool for evaluation and planning, as in real life no one had ever asked their opinion such matters. ■

Strong points / success factors

The group was extremely diverse, consisting of both girls and boys with very different life stories and situations. At first, this feature tended to slow the work down somewhat, but it also made the group seem grounded in reality and the life stories proved a positive challenge to the whole workshop.
The children participated voluntarily, no child being forced to participate, and indeed some of the children were present at the first meetings but then left the workshop, while others joined after the first few meetings. The children who made the spontaneous decision to stay, attended nearly all the meetings and the majority of the young people showed considerable interest and involvement in the activities suggested to them.
The workshop had a wide range of different activities and, very often, group discussions on the principal themes at issue were followed by more experience-based, practical activities in which the children and their life stories played the central role, making the meetings less boring and strengthening the solidarity of the group.
The children were also the real protagonists in the material shot for the final films. Once a professional cameraman had taught them how to use the professional video camera, the most significant and exciting moments of the workshop were captured on film by the children themselves. ■

Weak points/ critical factors

The themes dealt with were sometimes rather complicated for the children, often because a few of them did not understand the language very well and sometimes because we felt that the theoretical concepts were too distant from the reality experienced by the children in their day to day lives and, while they possessed those concepts at an experiential level, they were often unable to define them.
This meant that the children did not always fully comprehend the aims and objectives of the workshop.
The group was not always cohesive, especially at the beginning when it was difficult to define common ground. While the diversity of the children proved a positive factor in the end, this lack of cohesion initially caused some problems.

Sometimes the locations for the workshop activities were not entirely suitable, particularly those for the more active tasks that needed much bigger spaces. ■

Impact of the activities on the life of the children, their families and communities

The girls and boys have acquired some useful skills that will reinforce their capacity to have a positive effect on the decision-making processes that involve them, gaining important information about the fundamental rights that local, national and international legislation guarantees them.
They felt engaged and involved with the project and felt that they received the support they needed to learn about their rights, giving then access to some useful information. Their commitment to and perseverance with the project has enabled them to import the results achieved into the communities in which they live and their families and the family houses that host such children are now aware of increased educational opportunities and the opportunity to collaborate with other organisations.
Some of the young people who showed a particularly strong interest in the workshop activities have demonstrated their willingness to involve other children in their own community, informing them of their rights and how to defend them. ■

Relevant aspects to have emerged on the theme of access to justice

During the workshop, some very interesting issues regarding access to justice emerged, arising from the young people's personal experiences.
For example, children from Bangladesh emphasised the importance for foreign children to be accompanied and represented in all the bureaucratic procedures involved in legalising their residence.
Linguistic mediation is also fundamental for children to understand what is happening in the various steps of this process.
Other young people highlighted the need to respect the dignity of any child who commits illegal acts.
The importance of listening to the child was a recurrent theme in all the workshop activities and deeply felt by the whole group.
Something that emerged strongly was that, in order to promote a culture of children's rights, it is necessary to engage in further research and to produce and share more material, documents and information. ■

Atelier in Madrid

Workshop duration: October 2011 - January 2012

Short description of the context

Pueblos Unidos was founded in 1990, as a response to the changes in the Ventillas neighbourhood in Madrid, in order to service and attend to the needs of new

residents from immigrant backgrounds. Apart from providing personal attention and community socialisation, Pueblos Unidos was eager to provide such services job-seeking support and support for children in school, together with legal advice, psychological care and social intervention.
The Pueblos Unidos premises chosen for the workshop are located in the Ventillas (Almenara) neighbourhood in the district of Tetuán. This neighbourhood was originally formed by migrants from the Spanish provinces attracted by the major commercial and industrial development taking place in and around the capital (Madrid). More recently, foreign immigrants started populating the neighbourhood, coming firstly from Morocco, followed by Latin-Americans initially mainly from Ecuador then also from Bolivia and Paraguay. Most of the inhabitants of the area are low-skilled workers and most of them have been affected by the economic crisis and unemployment. Despite a certain amount of refurbishment with the construction of new public housing, the neighbourhood still has dilapidated buildings and it lacks such public facilities as parks, squares, etc. ■

Specific objectives of the workshop within the local context

Several goals have been achieved during the workshops, all of them interconnected and always based on the issues associated with children' rights. One of the main objectives was to promote genuine knowledge of the of the rights and responsibilities of children as individuals and the importance of social inclusion.
In order to achieve these objectives, the workshop activities were developed along participatory lines in a cooperative context, focusing mainly on subjects considered important both for and by the young people who also engaged in decision-making activities and practised how to share responsibilities.
Two of the objectives of the workshops were to increase knowledge about children' rights and the opportunity to receive appropriate legal assistance and the workshop focused on how teamwork and small contributions from others can help to achieve a positive, pleasing and original result. In this context, it was important for the group to learn how to claim their rights and how to exercise those rights with a strong sense of responsibility. There was a necessary focus on the concept of justice, particularly justice when applied to more vulnerable members of society. Finally, the workshop aimed to promote the concept of full human development. ■

Human and technical resources provided for the workshop

The Pueblos Unidos organisation provided a suitable space for the workshop, a space in which to engage in educational and leisure activities with immigrant children and to provide them with counselling .
An educator was present who has been continuously involved with the organisation, working with young people right from their enrolment from primary school.
The university provided the technical equipment for meetings, video camera, tape recorder, etc.
The teacher/monitor recruited to develop the workshop has been involved in youth mentoring programmes, support for unaccompanied children and providing technical and human relations training.
The work placement student who participated in the workshop showed an enormous capacity for empathy with adolescents in addition having the technical skills required for the recording sessions.

Finally, the workshop was supervised by a team member from IUEM trained in social work and education.
The whole team was involved in the preparation of this report. ■

The group of children participating in the workshop

All the girls in the group were born in Morocco but brought up in Spain. They all attended state schools, except for one who attended a private school in the same area.
All the girls lived in the La Ventilla neighbourhood. They all lived with their parents and siblings except for one girl who lived with her grandmother since her parents were still in Morocco.
The families consisted of parents and their children with some having 2 and others 4 children and the girls were neither the youngest nor the oldest in the household.
Their parents have spent several years in the neighbourhood, most of them working in very low status jobs such as construction, street vending, mechanics, cooking, domestic services, catering, etc. In approximately half of the families the father was unemployed and some mothers worked as housekeepers.
All the girls in the group were high school students at the time expecting to go on to University, and the fields they showed most interest in were design, anthropology, language and literature and education.
They had all been attending Pueblos Unidos for several years, taking part in many programmes, demonstration in itself of the effectiveness of the support provided by this organisation to the girls and their parents with the accompaniment programme.
Culturally they were Moroccan, all of them practising the Muslim religion.
They felt more conditioned by family traditions and paternal authority than by their religion.
They expected to overcome these limitations pursuing a life as self-sufficient independent adults. They aspired to be able to choose their lifetime partner and be free to bring up and educate their children. ■

The activities engaged in

Attendance at each workshop session varied from 4 to 7 young people and each meeting lasted around three hours and included a group meal. The first subjects dealt with in these session had emerged through informal discussion. The main concerns included the use of the veil/headscarf, marriage, the ability to choose studies freely, their future independence from their parents and racism, all which was openly and collectively discussed.
After the meal we moved on to different activities, most of which were suggested by the team and chosen by the group, others were suggested by the young people involved in the workshops. The first activities were designed to capture and raise the interest of the girls and to initiate a process of learning through participation.
Several tools were used to generate interest in the important issues, such as videos related to human rights and their worldwide importance and how in many parts of the world these are neglected and disrespected. This knowledge was vital for involving the young people and showing them why rights are and always will be important.
In order to encourage the girls to interact as a group, a common narrative was constructed in which all of them were involved and contributed to, an activity

designed to demonstrate the importance and value of the synergy generated by the group. This allowed the girls to experience how cooperation can affect their actions and help to create a better world around them, at the same time illustrating the fact responsibility is always something shared.

After the main workshop discussions focusing on children' rights, with the emphasis on access to justice, the next activity relevant to this right involved making megaphones for the young people to use to proclaim their rights.

The final group activity was graffiti which enabled them to express all the things they had learned about their rights and access to them, with each member explaining what they had drawn and why. Each graffiti design was analysed with the word RIGHTS as its basis.

All the activities turned out to be highly motivating and the graffiti represented a unique artistic product created by the young people and inspired by the other activities, such as the stories told. ■

Methodology

The methodology used for the workshop was based on free participation and cooperation by the members of the group. The main methods applied were as follows.

- Reaction, in order to face up to a number of human rights issues, justice and events that occur in a child's life.
- Questions based on the girls' need to build shared knowledge, focusing on their interests and real life situation.
- Building a group activity in which the girls share their ideas and interests.
- Encouraging the integration and participation of all the girls.
- Engaging and motivating the girls to continue taking part in the workshop sessions.
- Correct scheduling to ensure the work was relevant for them.
- Activities involving all members of the group.
- Using their suggestions and interest to create and plan activities, and using all the material available to make those activities interactive and entertaining. ■

Respecting the standards for participation

- At all times with ethics, transparency, honesty and responsibility. The workshop allowed the young people to expose their ideas and opinions freely, thus stimulating the practice of active citizenship. The teenagers found a place in which they could speak to the teachers about their doubts and fears or just voice their opinion.

  The girls found a place in which they felt comfortable expressing their ideas, talking and resolving their doubts about particular issues without fear and with trust in the team.
- Voluntary participation guaranteed that all the workshop sessions were conducted with respect and in freedom, allowing the young people to choose and organise those activities they believed necessary. Universidad Pontificia Comillas can verify that participation was genuinely free, ethical and meaningful.

  Participation in the workshop sessions was free and voluntary, several activities were proposed to the group but it was the members of the group who selected, proposed and even organised some activities.
- All young people showing an interest were welcome to join the group.
- Qualified staff. The Universidad Pontificia Comillas supervised the workshops

ensuring they were planned and conducted in line with the principles of the University and the standards set for participation.

Members of the project leading team were highly qualified; the coordinator had a great deal of experience working with immigrants, particularly with women. The work placement student already had experience of educational work with children and demonstrated an excellent ability to relate to and interact with the group. Each session was monitored by one of the Universidad Pontificia Comillas research supervisors.

- The University guaranteed the safe participation and protection of the girls, ensuring that their images, videos, or photos would not be used without legal authorisation or their consent.
- Evaluation and self-evaluation. ■

Difficulties faced and strategies for overcoming them

All the children were attending high school, so they usually had homework therefore their time for extra-curricular activities was limited. Fridays seemed to be the best day to fit the workshop sessions into their schedule. It was very difficult to preserve the continuity of the sessions since the girls sometimes engaged in other social activities on Fridays.

Children under 18 years old were allowed to participate in the workshops but consent was not given for them to be recorded during their participation in any activities.

Another problem was managing to persuade the young people to concentrate on the specific workshop topics, the reason why all the sessions began with informal conversation after which their attention was directed towards their rights, access to justice, the importance of being heard and to be included in the community.

The strategy for solving this problem meant changing the schedule, so the sessions began just after the girls had finished school on Fridays. We offered them lunch together before the workshops sessions and they were reminded about the upcoming session during the week to enable them to organise their time. ■

Strong points/success factors

Pueblos Unidos provided a safe place to hold the meetings, making the girls feel comfortable on the premises. Since their families were practising Muslims practitioners, they usually limited the places their daughters could attend, although they respected and valued the work done by Pueblos Unidos for the community.

Communications were extremely successful with many interesting issues brought up by the girls relating to freedom, family relations, their way of life and the ability to make decisions about topics to be covered in future workshops.

The teenagers were highly communicative, expressing their expectations and interests very readily. They clearly demonstrated their interest in learning about their rights.

This group had worked together before so they cooperated, interacted and talked to each other with ease.

The girls were highly communicative, expressing their interest in knowing their rights. The narrative constructed reflected certain issues of great concern to them, such as their relationship with their parents and the opportunity to have their support before making certain decisions

These were teenagers from a strong culture but brought up in a different place with a different culture from that of their origin and sometimes, they did not know how to handle this situation. ■

Weak points/ critical factors

We identified the following weaknesses in the workshop sessions. Attendance was irregular and the girls sometimes had school activities that were not compatible with the workshop schedule.

The meetings were held on Friday afternoons but sometimes they had to take part in activities with their families or friends rather than attending the group.

They were young girls who had a very stable relationship with their families, although they had some criticisms of Muslim culture and of the authority their family wielded over them, in particular their father. Rather than blame the Islamic religion, which they respected very highly, they blamed paternal authority. For example, when they felt that their plans were being frustrated because they could not obtain their father's consent to travel or dance in public. The pressure from the father was evident in the way they referred to several subjects, such as when talking about their plans for independent living.

This situation turned out to be a weakness, since, from the comments made by the underage (-18) children it was noted that they had some uncertainty about the viability and reality of the rights in question because they felt things were different in the real world.

Another weakness was that, while the girls were preparing themselves to attend college, the educators found this might not be possible if the family did not consent. ■

Impact of the activities on the life of the children, their families and communities

They considered that the workshop helped them to think, talk about and analyse issues they had never considered before, and being at the centre of the activities made them feel important.

Something very important for them was being able to express what they would like to do in the future; they enjoyed talking about university and their own plans, such as becoming independent from their families and even from their friends.

One girl told us how easy she had found this study and how much she had enjoyed the activities. She was very happy since she had passed all her tests at school.

The impact on the families could only be gauged by a few actions, for example the contributions made to the meetings with homemade food showed some approval.

The impact on the community may become more obvious in the near future, particularly if the girls continue their involvement with Pueblos Unidos, even as volunteers. ■

Final Recommendations

To the European Commission

- To promote the use by Member States of the Council of Europe Guidelines of 17 November 2010 on child-friendly justice by fostering specific programs and projects which aim at improving children's participation in justice process
- Recognizing the efforts made by EU Commission to establish statistics and collect data on children's access to justice through the tender for a "Study to collect data on children's involvement in judicial proceedings in the EU", we recommend that as a follow up to the study, the Commission promote the use of specific data indicators for children at risk of social exclusion in the context of their access of justice
- Within the framework of the EU Agenda for the Rights of the Child, we recommend that the Commission takes into account that children are rights holders and entitled to exercise their own rights therefore the foreseen directive on victim's rights, the proposal for a directive on special safeguards for suspected or accused persons who are vulnerable and the revision of the EU legislation on parental responsibility should include provisions that facilitate children participation through the possibility to appoint a special or a separate representative* for both judicial and administrative process.
- To fund training activities for judges and other professionals involved in justice systems on specific child friendly techniques and methodologies on children's interview
- To fund the setting up at national level of information offices for children's rights, including legal services free of charge, and the elaboration and distribution of child friendly materials containing relevant legal information about the national legal system

To National Governments

- To ratify the 1996 Strasbourg European Convention on the Exercise of Children's Rights with a particular focus on creating an homogeneity of the child's treatment on access to justice with the improvement of the role of the child special representatives
- To guarantee the effective implementation of the right of children to have their best interests be a primary consideration in all matters involving or affecting them, as promoted in the Council of Europe Guidelines of 17 November 2010 on child-friendly justice
- To guarantee the extension of free legal aid for all children, including migrant children, under the same or more lenient conditions as for adult as is indicated in the Council of Europe Guidelines of 17 November 2010 on child-friendly justice
- To improve national data collection on children's access to justice. Special attention should be given to children at risk of social exclusion** as particular vulnerable children
- To guarantee sufficient resources in order to achieve and maintain an adequate

* As stated in art 9 and 10 of 1996 Strasbourg Convention on Exercise of Children's Rights

** The categories of children that according to the COM (2011) 60 are particularly vulnerable and at risk of social exclusion are: children at risk of poverty, children with disabilities, children victims of violence, sexual exploitation and trafficking, Roma children, children asylum seekers and children with no parental custody

level of social, educational and therapeutic services within the justice system for children at risk of social exclusion

- To implement the children's right to be heard by ensuring a suitable and neutral environment for hearing children and by promoting appropriate interview techniques; special attention should be given to avoid the repetition of interviews
- To guarantee to migrant children the right to be informed, to be heard and to participate in judicial and administrative proceedings by ensuring the presence of qualified cultural mediators and interpreters. In any cases children should not be involved in the proceedings as interpreters or mediators for other children
- To develop educational, psychological and social training programs for the personnel involved in the justice systems, such as judges, police officers, guardians, lawyers, social workers and administrative officers with the aim of promoting an appropriate communication with children at all ages and stages of development, as well as with children in situations of particular vulnerability
- To improve co-operation, communication and networking among the various actors involved in the protection of children rights and their access to justice

- To ensure that an adequate number of trained guardians is available to carry out their duties for socially excluded children in a responsible manner. Guardians should have proper expertise and appropriate mandates in order to give primary consideration to the best interest of the child and to exercise legal capacity where necessary. Guardians should be independent and have a permanent mandate rather than temporary
- To encourage recourse to alternative measures of non judicial protection of rights such as mediation and alternative dispute resolution taking in to account the best interests of the child

To Italian Institutions:

- To adopt appropriate measures to assure that children can initiate a civil action, even when the holder of parental responsibility doesn't do it, in order to guarantee proper access to the protection of their rights, across a range of areas and not only in the field of family
- To guarantee the functioning of the national ombudsman through the adoption of the necessary measures and resources to enforce the provisions foreseen in Law 112/2011
- To assure that an Ombudsman is appointed in every Region and to develop the role of Regional Ombudsman as champion of children rights by guaranteeing appropriate resources to promote educational, training and child participation programs
- To adopt the protocol on the determination of children' age "*Protocollo per l'accertamento dell'età dei minori secondo il modello dell' Approccio multidimensionale"* as drafted by the inter institutional and multidisciplinary technical group of the Ministry of Labour and Social Policies and Consiglio Superiore di Sanità

To Greek Institutions:

- To prevent the risk of social exclusion enforcing the Law 2447/1996 which introduced the provision of special units of social workers expected to make social investigations in the proceedings before the courts of first instance

- To guarantee to unaccompanied children the right to apply for international protection and to guarantee the respect of the obligation for the Greek Government to not make children's summary deportation according to international obligations
- To guarantee that the deprivation of liberty, including pre-trial detention or police arrest, of children should always be a measure of last resort
- To enforce the law 3860/2010 by providing the foreseen funding for the "Central Scientific Council for Prevention of and Combat against Child Victimization and Juvenile Delinquency"

To Spanish Institutions:

- To promote the employment of the *defensor judicial* by giving children the possibility to name directly a further representative in case of conflict of interest with the guardian
- To guarantee the protection of unaccompanied children developing the status of abandonment -*figura de desamparo*- in order to protect foreign children who have no guardians

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This comprehensive study shows there is still a long road to travel to obtain the principles of "child-friendly justice" are truly implemented.
Save the Children and its partners hope to give a useful contribution to that journey, ensuring that the justice system becomes truly child-friendly, thus preventing children who come into contact with the justice from feeling that "they shut us up and put us down".

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EPLO European Public Law Organization

ICAI ICADE COMILLAS

ROMA TRE UNIVERSITÀ DEGLI STUDI

ASGI Associazione per gli Studi Giuridici sull'Immigrazione

Save the Children Italia ONLUS