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Access to Justice Commission
Hosted by Lucca Bar



Report about access to Justice for Minors

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Structure of the report

- ☀ Access to Justice for minors in civil matters under parental authority;
- ☀ Access to Justice for minors in civil matters under guardianship of a guardian;
- ☀ Access to Justice for minors in civil matters in conflict with parents or guardian;
- ☀ Role of minor children in matrimonial disputes between parents.
- ☀ The protection of Children during the adoption trail;
- ☀ Criminal justice for minors;
- ☀ Special criminal consequences for minors and measures of protection and aid;
- ☀ The position of minors of incarcerated parents.

ENGLAND AND WALES

Children and young people's access to Justice - Education law

(Sarah Inchley, 21.8.2)

Overview

As a headline summary, in the field of education law, children and young people are most likely to require access to justice when encountering the following problems:

- exclusion from school and an interference with their right to education;
- discrimination at school (most typically disability discrimination);
- challenging the support they receive from the Government in respect of their special educational needs and challenging public body decisions more widely such as challenging exam results.

There are rights of appeal/challenge for children and young people for all of the above but these are complex legal processes for a child or young person to navigate alone and all will benefit from the information sharing, advice and representation from a lawyer.

A child or young person is also heavily dependent on a pro-active and responsible parent to advocate on their behalf.

Many of the problems above disproportionately affect vulnerable and disadvantaged children and young people, who do not necessarily have an adult with parental responsibility championing for their rights to be upheld.

A child or young person does have recourse to public funding to access justice to seek remedy for some educational problems. This is limited in scope and means which does prevent a barrier to accessing justice in the field of education law.

Barriers to access to justice for young people are therefore are:

- i. A child /young person reliant on a parent or person with parental responsibility championing their rights;
- ii. Complex legal processes for a young person and their parents to navigate without the benefit of legal representation;

iii. Public funding for legal representation limited in scope.

The following reports¹ contain a wealth of information on access to justice for young people on the issue of school exclusions which may be helpful.

Key legislation.

- Equality Act 2010
- Children Act 1989
- Children and Families Act 2014
- LASPO
- Human Rights Act 1998.

More details expanding on the overview above is below

1. Key issue: Exclusion from School

Permanent exclusions can have serious detrimental consequences for a child's future. The effects of exclusion disproportionately affect disadvantage and vulnerable children and in particular those with special education needs and disability and minority groups. There is a strong correlation between exclusion and youth crime. There are growing concerns around the prevalence of 'off rolling' or informal exclusions.

Children have a right to ensure that exclusion decisions are lawful, reasonable and fair.

1.1 Ways to challenge wrong decisions /seek justice?

Two possible routes for a child/young person's parent to challenge:

- i. Independent Review Panel (IRP) whereby the Governing Body of the School reviews the Headteacher's decision;
- ii. Appeal to the First Tier Tribunal (Education & Social Care) who have the power to order reinstatement of a child

1.2. Funding

There is no available public funding for representation/advice at IRP and a young person/parent has to navigate this process on their own which can be emotionally charged and intimidating.

Limited public funding for appeal to First Tier Tribunal.

¹ *JUSTICE: Challenging School Exclusions 11h November 2019*
Timpson report on School exclusions 7th May 2019

Charity advice available such as the School Exclusion Project offering free legal representation.

1.3. Commentary

There is no right for a child to challenge an exclusion themselves and the appeal process via an IRP centres around the parents rather than the child. Concerns that children/young people's views are not taken into account. A barrier to justice is that a successful challenge via an Independent Review Panel is very difficult to achieve and this route is largely ineffective. The majority of IRPs simply 'rubber stamp' a headteacher's decision. In any event, the IRP lacks any power to order a child is re-instated.

An appeal to the First Tier Tribunal is more effective with wider independent case management powers and the power to order a school re-instates a child. This appeal route however is underutilised by parents due to 'appeal fatigue' often having already bought a IRP claim or lack of knowledge understanding of this route. A claim can be brought by a young person themselves if over 16 or parents on their behalf.

2. Key issue: disability discrimination in schools

Typically disability discrimination is in connection with admissions, the provision of education and access to learning and exclusions. Discrimination takes the form of unfavourable treatment or failure to make reasonable adjustments.

2.1. Ways to challenge wrong decisions /seek justice?

Claim under the Equality Act 2010 of disability discrimination brought to the First Tier Tribunal (Education & Social Care) or County Court.

The child cannot make a claim even if they are 18 or older. The claim must therefore be brought by a parent or another with parental responsibility which can be a local authority if a Care Order has been made for a child. It can also be a foster carer a child or young person lives with.

2.2. Funding

For those on low income or certain welfare benefits, legal aid funding on a means basis is available to a child/young person or their parents.

Charity advice also available.

2.3. Commentary

Discrimination claims are often backward looking and unlikely to result in better support being put in place for a child. Important however when a child seeks reinstatement to a school following exclusion or to hold a school to account to prevent discriminatory for other pupils.

The Tribunal cannot award financial compensation in claims or order that a staff member is dismissed and remedies are typically an apology, staff training, change in policies etc.

3. Key issue: Support for educational special needs secured via an Education Health and Care Plan EHCP

3.1. Funding

For those on low income or certain welfare benefits, legal aid funding on a means basis is available to a child/young person for 'legal help' only. That is to say for the preparation of an appeal. There is no legal aid for representation at the hearing itself. It can be secured in exceptional circumstances.

Charity advice also available.

3.2. Commentary

For a child under 16, an appeal is made by a parent or person with parental responsibility on a child's behalf. For a child over 16, an appeal can be made in their own right. The SEND Tribunal is a relatively child friendly Tribunal and children are encouraged to attend to give evidence if appropriate. A child's views have to be considered by law. The whole appeal process is designed to be navigated without representation of a lawyer and many parents appeal without legal representation. The majority of cases settle before a hearing (75%). The evidence is that 89% of cases are decided in a young person/parents' favour over a local authority and so chances of success are high.

The SEND Tribunal therefore provides good access to justice for a child/young person.

The barriers to accessing the justice above for a young person is understanding their right of appeal in the first place and they navigating though this process.

Many local authorities base decisions on a support for a young person's special education needs on their budget rather than what is required meaning that to secure effective support, a young person/parent may have to appeal several times.

This is also a lengthy process and prejudicial to a young person in the meantime whose educational needs are not being met.

4. Key issue: challenging decisions of public bodies through Judicial Review

A child/young person can challenge a public body decision through Judicial Review only if all other means of redress have been exhausted.

Typically used if a local authority is not providing the educational or social care support it should to a young person

Typically JR has been used by three young people to challenge the Quality Standard on the standardisation model of awarding A levels. Arguably, it was these legal challenges which formed part of the Government's 'U turn' to award teacher assessed grades rather than grades which had been subjected to an algorithm in an attempt to ensure fairness.

4.1. Funding

For a child limited public funding is available for a lawyer to draft a pre-action protocol letter and issue the application. Means assessment is on the child's income not the parents.

In the A level JRs, the young people were crowd funded to afford legal advice. Concerns that if unsuccessful a cost award may have been made against them to fund the cost of the Government's legal costs.

4.2. Commentary

Young people /children and their parents very much need the benefit of legal representation to bring a JR and will be hampered without legal advice. Changes brought by the Criminal Justice and Courts Act 2015 restrict JR for all parties and it is now more difficult for a child/young person to bring a challenge in this way or for charities and other organisations to do so on their behalf.

5. Access to justice for minors

5.1. Family - Public law – child protection²

Children are automatically parties to some applications, e.g. where there is an application to take them into care.

In some cases they get legal aid automatically and in others it is means and merits tested but most children would get legal aid due to their circumstances. There are slightly different rules for 16-17 year olds but again most would fall into the eligibility bracket.

There are some public law cases where the child would not be an automatic party but an application could be made to be joined to the case.

In public law cases, this would mean the child would have a solicitor and a guardian to represent their interests, unless the child is older and a guardian not needed. If the child is competent, the solicitor takes instructions direct from the child even if there is a guardian.

Children can approach their own solicitor who would have to decide if they are able to instruct directly, otherwise they would have to have a next friend or guardian ad litem to lead the litigation

A child would need leave of the court to make an application in their own right as an applicant

In public law cases, children are well represented and their voice heard in my view

5.2. Private law - children

The situation for children in private law cases e.g. disputes between parents, is very different. Children are not usually parties to the proceedings, although an application can be made to join the child but that is unusual. If the child is joined, they will usually be eligible for legal aid on a means basis and would have a solicitor and guardian to represent them

If a child is not a party, the only way the child “participates” is when the court decides that a welfare report is needed and the welfare officer (either from the local children’s service if the child is known to the Local Authority) or from CAFCASS (Children And Family Court Advisory and Support Service) interviews the children to ascertain their wishes and feelings and reports on their welfare. Otherwise it’s left to the parents to state the child’s views. Difficulties arise in these cases where the parents argue that the child is saying one thing to one, and one thing to another which is not surprising.

² Samantha Little.

This has long been a source of concern with some thinking that children should be parties to private law cases, so that children's views are heard neutrally, whilst others express concern that this involves them in the dispute too much which can be harmful.

It is suggested that in private law cases where children do not have a welfare report, that we are not compliant with article 12 of the UNCRC

UN Convention of the Rights of the Child, article 12 (respect for the views of the child): Every child has the right to express their views, feelings and wishes in all matters affecting them, and to have their views considered and taken seriously. This right applies at all times, for example during immigration proceedings, housing decisions or the child's day-to-day home life.

In both public and private cases, judges are usually willing to see children now if the child wants to see the judge, this is in private but the discussions are disclosed to the parties, and confidentiality is not possible. The meeting is not for the purpose of evidence gathering

Children would usually be represented by Children Panel Solicitors, approved by the Law Society to ensure the experience and ability of the solicitor

5.4. Private law – finance

Occasionally a child is joined to a family finance case e.g. where the child has some sort of financial interest in the outcome of the division of the assets on separation/divorce. This is unusual. The child would be represented by the Official Solicitor unless there is someone in the family/friends network who would be a suitable next friend/guardian

There are some cases where a child's legal costs would be paid by a parent in a private law case but that raises potential problems regarding neutrality

There are other applications, e.g. adoption, parental orders, abduction and in all these, the court can join a child to those proceedings if it meets the criteria and the child will then be represented, subject to means testing

Legal aid remains available therefore for children cases. Access for parents to legal aid for private law cases has reduced and a parent needs gateway evidence to be able to apply for legal aid. This has caused great concern about access to justice and protecting children's welfare in private law cases. The rates of remuneration have been heavily reduced over the years. This means that representation of vulnerable children is at risk due to the fact that it is not very profitable to undertake this work, particularly for more senior lawyers.

6. Public Funding for children related matters in the family arena

6.1. Overview

Since 1 April 2013, as a result of the [Legal Aid, Sentencing and Punishment of Offenders Act 2012](#) (LASPO 2012), public funding is available for the following areas³ of family law:

i. Public family law matters

- i. concerning the care, protection and supervision of children; and
- ii. any application for a Special Guardianship Order or Child Arrangements Order made in relation to care proceedings.

ii. Children matters falling under the inherent jurisdiction of the High Court

- i. ie wardship proceedings.

iii. Private family law matters

- i. where there is evidence that there has been or there is a risk of domestic violence;
- ii. where there is evidence of child abuse; and
- iii. where the child is the client.

iv. Cross-border child abduction matters

v. Mediation

- i. Legal advice (“Legal Help” which is the lowest level available from Legal Aid Agency) provided for mediation of family disputes.

vi. Domestic violence cases

vii. Forced marriage protection order cases

viii. EU and international agreements concerning children

³ Part 1, [Schedule 1](#), LASPO 2012

6.2. Means and merits test in proceedings

Means = assessment by the Legal Aid Agency (LAA) of financial eligibility based on income and capital.

Merits = LAA examines strengths and weaknesses of case: proportionality, chances of success, reasonableness.

6.3. Public proceedings

Type of proceedings	Means/merits criteria
Secure Accommodation Order under S 25 of Children Act 1989 (CA 1989)	Non means/merits tested for the child who is the subject of the order
Care Orders Supervision Orders Child Assessment Orders Emergency Protection Orders (including orders in relation to the duration of EPOs) all under Parts 4 and 5 CA 1989	Non means/merits for the child who is the subject of the order and parents of/ parties with parental responsibility for the subject child
Contact with/end contact with a child in care Discharge/Variation of a Care/Supervision Order Removal and accommodation of children by police in cases of emergency Appeals in public law cases (including appeals against final orders made in Special Children Act Proceedings All under Parts 4 and 5 CA 1989	Means and merit tested for <u>all parties</u>
Placement Orders Recovery Orders Adoption Chapter 3 of Part 1 of Adoption and Children Act 2002	Means and merit tested for <u>all parties</u>
Wardship	Means and merit tested for <u>all parties</u>

6.4. Other types of proceedings/ cases

Proceedings	Means/merits criteria
Where the child is the client in private law children proceedings for the following: Child arrangement orders, Prohibited steps order and Specific issue orders	No, child does not have to satisfy means test.
Other private family matters (ie the majority)	Those with parental responsibility must satisfy the eligibility test
International child abduction cases	Those with parental responsibility must satisfy the eligibility test

ITALIA

1. Access to Justice for minors in civil matters under parental authority

1.1. The capacity to act.

The general principle is that one becomes capable of performing acts with relevant legal effects relevant legal effects when you turn eighteen years of age.

Special laws which which establish a lower age for the capacity to work. to perform their work. In such case, the minor shall be qualified to the exercise of the rights and actions that depend on the contract of employment."

Therefore, complete maturity is acquired at the completion of the eighteenth year, which coincides with the age of majority.

From that moment the so-called capacity to act is acquired in general. It is, in simple words, the possibility to express one's own will with acts that can modify one's own juridical situation inasmuch as the law recognizes the effects. For example, opening a bank account

For example, opening a bank account, appealing against the decision of an authority, renting a room, etc. rent a room, etc.

1.2.The representative of the minor in the process.

In general, girls and boys up to the age of eighteen years may not claim their case alone in a trial, even through an attorney.

There must be a **parent or other adult who legally represents them**. This can be a parent or, if if not, a guardian.

This person acts on behalf of the minor and may appoint an attorney for them.

The law provides for the cases in which the parent must be authorized by the tutelary judge, who in extraordinary cases evaluates the interests of the child. The same thing happens when there are no parents, but a guardian is appointed.

1.3. Cases in which minors can act for themselves.

The law provides that a minor person may act for himself or herself and may stand in court. For example: the emancipated minor, i.e. the minor authorized by the

Court to marry under art. 84 of the Civil Code “can stand in court both as a plaintiff and as a defendant” pursuant to Article 394 of the Civil Code.

With regard to the issue raised about the possibility for the minor to challenge administrative acts, it will be necessary to assess whether the legislation applicable to the right of provides for the minor to be able to independently assert his right in court.. If the law does not provide for it, the minor may be represented in court only by a parent or guardian.

2. Access to Justice for minors in civil matters under guardianship of a guardian (Tutore)

2.1. What if there is no a parent or guardian?

You must ask the judge to appoint a guardian.

Before proceeding to the Before appointing the guardian, the judge must also hear the minor who has who has reached the age of sixteen years" (penultimate paragraph of art. 348 of the Civil Code, "Choice of guardian"). of the Civil Code, "Choice of guardian").

Or the judge may appoint a provisional representative for the trial (special curator).

2.2. Limits to the power of the child's representative (parents or guardian)

The minor cannot normally act autonomously.

The law considers him/her as a weak subject to be protected until the age of eighteen.

The adult who takes the place of the minor and represents him/her has special obligations and limits to protect the minor.

For first, the adult who represents the minor, even the parent, has the power to perform only acts of *ordinary administration*. These are all acts other than those specified by the law as acts of extraordinary administration. The latter can be carried out only with the prior authorization of the tutelary judge, if both parents request it (article 320 of the Civil Code).

The acts of extraordinary administration carried out without the authorization *acts of extraordinary administration* performed without authorization may be annulled and cannot be remedied even by means of subsequent authorization.

The prior authorization of the judge, since this represents a real and proper constitutive element of the legal act, rather than a mere condition of its condition of effectiveness of the same.

3. Access to Justice for minors in civil matters in conflict with parents or guardian

3.1. In case of conflict: the curator

In the case in which a conflict of interest arises between several children subject to the same parental authority, or between the child and the parent (or guardian), or even in all cases where the parent (or guardian) is unwilling or unable to carry out one or more acts in the interest of the child, the tutelary judge may appoint a curator also at the request of the minor, or of his or her close relatives or anyone else having an interest therein.

The curator may perform in the interest of the child a single determined legal act and has powers and functions identical to those.

The curator can carry out in the interest of the minor a single, determined legal act and has powers and functions identical to those due to parents, albeit limited to the transaction for which it is appointed. For this reason the special curator in this case is also called "curator ad acta".

For example, to accept an inheritance.

The question is whether the curator appointed to carry out a single act also has the power to represent the minor in the the judgement that may arise from the act for which he/she was appointed.

In the various hypotheses in which in the interest of the minor a case must be filed in the interest of the child, or if the child is sued in relation to acts exceeding the ordinary administration, or or if the child is summoned to court for acts exceeding the ordinary administration, or the promotion or management of a lawsuit, a special curator, also called "curator ad litem", shall be appointed.

Often and willingly there is coincidence between the lawyer and special curator ad processum, but this practice does not legitimize to identify the curator with the lawyer, as the former does not always have to be issued the power of attorney to the dispute (the mandate).

3.2. Disavowal of paternity

Other hypotheses of special curatorship concern actions of disavowal of paternity (art. 235 of the Civil Code), or in appeals against the recognition of the father by

the recognized child (art. 263, 264 of the Civil Code, where the appointment of a special curator is envisaged, at the request of the request of the Public Prosecutor, who acts as the minor's representative) or the child) or in the judgments of opposition to adoptability (articles 16 and 17 of Law 184/1983, as amended by Law 149/2001).

4. Role of minor children in matrimonial disputes between parents

4.1. The hearing of the minors.

The right to hear minors in proceedings in which measures concerning them are to be adopted is currently governed, in the Italian civil law system, by articles 315 bis, 336 bis and 337 octies of the Civil Code, introduced by Law 219/2012 and Legislative Decree 154/201: at international level, it is provided for by article 12 of the New York Convention and article 6 of the Strasbourg Convention.

Article 315bis(III) of the Civil Code recognises the right of the child - who has reached the age of ~~twelve~~, or even younger if capable of discernment - to be heard in all matters concerning him or her.

Article 336 bis of the Civil Code provides that the child shall be heard by the court in proceedings in which measures affecting him or her are to be adopted, unless such a hearing would be contrary to his or her interests or manifestly superfluous.

The hearing is conducted by the judge, also with the assistance of experts or other auxiliaries: the judge may authorize the parents to attend the hearing, even where they are parties to the proceedings, the parties' lawyers, the child's special guardian, if one has been appointed, and the public prosecutor. All these persons may propose to the judge arguments and topics for further study before the start of the hearing.

Prior to the hearing, the judge informs the child of the nature of the proceedings and the effects of the hearing: minutes are taken of the performance in which the conduct is described, or an audio/video recording is made.

Article 337 octies of the Civil Code confirms that, before issuing, even provisionally, measures concerning the children, the court shall order a hearing. If he considers it appropriate, having heard the parties and obtained their consent, the judge may postpone the adoption of measures to allow the parents, with the help of experts, to attempt mediation in order to reach an agreement, with particular reference to the protection of the moral and material interests of the children.

Article 12 of the New York Convention requires States to ensure that the child - who is capable of discernment - has the right to express his or her views freely on

any matter affecting him or her and that his or her views are taken seriously, taking into account his or her age and degree of maturity: to this end, the child is given the opportunity to be heard in any judicial or administrative proceedings affecting him or her, either directly or through an appropriate representative or body, in accordance with the rules of procedure of national law.

The Strasbourg Convention (Article 6) requires the judicial authority, before reaching any decision in proceedings concerning children, to assess whether it has sufficient information to make a decision in the best interests of the child and, if necessary, to obtain additional information, in particular from the holders of parental responsibility.

When the child has sufficient capacity of discernment, the court shall ensure that he or she has received all relevant information and, if the case so requires, shall consult him or her personally, if necessary in private, directly or through other persons or bodies, in a manner appropriate to his or her maturity, unless this is manifestly contrary to his or her best interests, in order to enable him or her to express his or her views and take them into due consideration.

In cases of irreconcilable conflict between the interests of the minor children and the claims of the parents, the Judge may appoint a special curator to represent the children and also an independent lawyer.

In practice, this is a hypothesis that is rarely practiced.

It is hoped that greater attention will be paid to the interests of minor children in matrimonial disputes, consistent with the decisions of the Courts and the Supreme Court focused to the interests and responsibility of minors.

5. The protection of Children during the adoption trail

The institution of adoption creates a relationship of legal filiation between persons not related by blood.

5.1. The types of adoption

Italian law currently provides for three types of adoption:

1. adoption of the child, which gives the adoptee the position of child of the adopters, creating a bond similar to that of biological filiation and places him/her in a new family;
2. adoption in special cases, which occurs when full adoption of the child is not possible, resulting in a legal filiation bond overlapping the filiation by blood. This type of adoption does not interrupt the relationship with the biological family, but parental responsibility falls to the adoptive parents;

3. adoption of an adult who acquires a legal filiation bond in addition to the filiation by blood.

5.2. Adopters and adoptee

The adopting party must meet certain requirements: (1) to be married; (2) to have the fitness to perform the parental function; (3) age.

Adopters must have been married for at least three years and must be suitable and capable of bringing up, educating and maintaining a child (emotional suitability). Finally, the age required of adopters must be at least eighteen years older than that of the adoptee and not more than forty-five years old.

The Italian Constitution recognises the right of the child to be brought up within his or her own family and it is therefore up to the judge to establish adoption only as a last choice when there are no other possible ways.

The State and local authorities have the tasks to ensure means of support to help a needy family to prevent the child from being removed from them.

With this in mind, the legislature initially envisaged the institution of child custody, whereby a child who is in a situation of temporary abandonment may be temporarily entrusted to another person until the family of origin overcomes the difficulties that prevent it from providing adequately for the child.

On the basis of these rules and principles, the judge may choose between different measures of increasing detachment from the family of origin, such as the adoption of family support measures, termination of parental responsibility, family fostering, non legitimate adoption and legitimate adoption, depending on the concrete situation, in order to safeguard, as far as possible, the child's right to grow up in the family of origin. Only legitimated adoption entails the total separation of the child from his or her family of origin.

Adoption shall be judicially pronounced when the following conditions are met with respect to the child: 1) the child is deprived of material and moral assistance by parents or relatives who are obliged to provide for him/her (situation of abandonment); 2) the child has been judicially declared in a state of adoptability.

As soon as the proceeding starts, the parents of the child shall be immediately informed and if the child does not have them, relatives up to the fourth degree of kinship who have significant relations with the child shall be notified.

The President of the Juvenile Court shall invite the parents and relatives (up to the fourth degree of kinship) to appoint a lawyer of their choice; if they do not have one, a lawyer shall be appointed by the Court.

Parents or relatives take part in the proceedings assisted by a defence counsel and can take part in all the investigations ordered by the court and submit requests in order to view and request copies of the documents in the court file.

It is necessary to ensure that the Public Prosecutor's Office and all interested parties in the proceedings, as well as the child who has reached the age of 12 years or younger, are heard by the Court in chambers, with the caveat that if he or she is not heard, the proceedings are null and void.

The child is represented by an autonomous person (a guardian or a special curator), who, if he or she is a lawyer, can take over the child's legal representation or appoint a lawyer.

Local Bars organize the right training course for that lawyers and ensure the necessary professional skills for the special kind of practitioners.

6. Criminal justice for minors

The criminal trial of juvenile offenders is ruled by the law 448/1988 and is inspired by a number of fundamental principles, also referred to in the relevant international conventions, and is therefore "child-friendly".

Among the inspiring principles are the following

6. 1. Principle of adequacy

Art. 1, par. 1, Law no. 448/1988 provides that the measures are: "applied in a manner appropriate to the personality and educational needs of the minor".

The judge's decision must take into account the minor's family situation, personal problems and educational background.

6.2. Principle of minimum offensiveness

The process must avoid that the contact of the juvenile with the penal system may compromise the harmonious development of his/her personality and social image with consequent danger of marginalization.

The judge's decision should not interrupt the ongoing educational processes and should avoid as much as possible the entry of the child into the criminal circuit allowing him/her to use alternative means.

Juvenile proceedings must concern serious facts, otherwise they should be avoided.

6.3. Principle of non-stigmatisation

This principle is an extension of the principle of minimum offence as it concerns the individual and social identity of the minor, which it is intended to protect as far as possible.

For these there are various institutions such as :

- judgement not to proceed due to irrelevance of the fact (Article 27 of Presidential Decree 448/1988)
- judicial pardon (Article 169 of the Criminal Code)
- extinction of the offense due to the positive outcome of the trial (Article 29 of Presidential Decree 448/1988)
- the prohibition to disseminate images and information on the identity of the child (Art. 13 Presidential Decree 448/1988)
- the conduct of the trial in camera (Art. 33 Presidential Decree 448/1998).

6.4. Principle of residual detention

Prison must be avoided as much as possible for minors.

The penalties are the same as for adults: pecuniary or custodial.

In the event of conviction, the penalty is reduced by up to a third compared to the penalty provided in general for the specific offense (Art. 98 of the Criminal Code).

The whole system is inspired by the so-called educational finality, whereby the trial must not interfere with educational continuity.

7. Special criminal consequences for minors and measures of protection and aid

For the realization of these principles juvenile justice is organized as follows:

There is a District Juvenile Court (one per region) and its Prosecutor's Office.

In each Juvenile Public Prosecutor's Office there is a Judicial Police Section with specific training.

In each court there is a Court of Appeal and a Supervisory Magistrate.

At every stage and level of the juvenile proceedings, the Judicial Authority avails itself of social and psychological assistance services also at territorial level.

The judging body, pursuant to Article 50 RD 12/1941, provides that the Ordinary Juvenile Court is composed of two judges and two experts, a man and a woman, experts in psycho-social matters, with the task of supporting the decision-making phase, which is the exclusive competence of the magistrate, with advice and technical opinions. .

7.1. Legal Aid

Minors who do not have their own lawyers are assisted by public defenders registered in a special list with a specific preparation.

The minor is admitted ex officio to the Patrocinio a spese dello Stato.

Art. 118 of Presidential Decree no. 115/2002 grants favorable treatment to minors: the minor's public defender is exempted from the need to initiate the procedure for admission to legal aid at the State's expense, and from the need to prove that he/she has unsuccessfully exhausted the procedures for the recovery of professional credits, provided for by art. 116 for the public defender of a person of age. The rationale of the discipline has been identified by case-law as the special protection due to the minor's patrimonial capacity, which is presumed by law to be non-existent or in any case lower than that of the defendant who is of age (Criminal Court of Cassation, section IV, 3 April 2008, no. 34985).

8. The position of minors of incarcerated parents

The Italian Ministry of Justice and the The National Ombudsman for Childhood and Adolescence signed a Memorandum of Understanding regarding the position of minors of incarcerated parents.

Those are the inspiring principles.

- Favoring the maintenance of contacts between imprisoned parents and their children, always safeguarding the minor's superior interest;
- Highlighting the peculiarity of imprisoned parents' children, so that regulatory interventions and measures are promoted, which allow for this social group's need for parental and emotional relationships without, however, producing further stigma and discrimination against them;
- Protecting children's right to an emotional and continuing bond with their imprisoned parent, who has a duty and a right to play his/her parental role;
- Supporting family and parental relationship during and beyond detention, assisting the family and, in particular, supporting the minors who are emotionally, socially and economically damaged, with frequent negative repercussions on their health and effects also on their dropping out of school;
- Overcoming barriers connected to prejudice and discrimination with a view to a process of social integration and deep cultural change, which is necessary for the project of a supportive and inclusive society.

- Considering the articles, undersigned in this Memorandum of Understanding, as reference in making decisions and in establishing the modus operandi as to what concerns all parents, even minor ones, who are subject to measures entailing restrictions of liberty;
- Ensuring that is offered to mothers and fathers in prison the support along assisted paths to parenthood.

Basically, The Ministry of Justice, with the collaboration of the Guarantor Authority for Childhood and Adolescence and the Association Bambinisenzasbarre ONLUS, commits to implementing all necessary actions so that:

1. the choice of the detention place for a parent with minor children takes into account the need to guarantee the possibility of direct contact between child and parent during his/her stay in prison;
2. a minor can visit the imprisoned parent within a week from the arrest and, on a regular basis, from then on;
3. in all waiting rooms a children's space is equipped, where minors can feel welcome and recognized. In these spaces, operators will welcome and supply family members with what is needed for a decent wait (like a bottle warmer or a changing table) and young children with resources such as toys or drawing tables, in order to prepare them to the meeting with their imprisoned parent;
4. every visiting room, even small ones, provides a "children's space" that is reserved to playing. Where the building allows it, to equip a separate space intended as a playroom. This plan will be gradually implemented, becoming fully at least in Institutions for the execution of prison sentences (establishments where longer sentences are served);
5. buildings are accessible to disabled minors or to those with special access needs;
6. visits are organized over six days a week, allowing at least for two afternoons so as not to prevent minors from attending school. Visits are to be scheduled also on Sundays and public holidays;
7. minors are given information appropriate for their age about visiting procedures and rules, as well as information on what can be taken to visits and on how security checking procedures are handled on their arrival in the prison. This information must be provided in various languages and various formats (for example through large size posters, video and audio versions that are easily understood even by smaller children);

8. security checks are adequate and in proportion to minors' rights and conditions, considering, in particular, their right to privacy, to physical and psychological integrity, to safety;
9. children are offered the possibility to visit their parents also with special attention to privacy, when it is necessary and in particular circumstances;
10. minors are allowed to acquire knowledge of their parents' life under detention and, where the facilities allow it and if it is seen as appropriate in the minors' superior interest, to visit some of the spaces which their imprisoned parents frequent (for example, the canteen or recreation rooms or workshops or places of worship);
11. alternative accompaniment for minors from 0 to 12 years of age is provided, in case the other parent or a reference adult is not available. This aim can be achieved with the help of qualified social workers, or permission can also be given to members of non-governmental organizations (NGO) or associations that are active in this field ;
12. in detention centers, wherever possible, "groups of experts in support of minors" are organized, with special attention to younger children, in order to assess regularly how they experience prison visits, in order to favor contact with parents also through different means and in order to provide advice about possible improvements to facilities and procedures.

POLAND

1. Introduction

Access to justice is synonymous with the right to an effective remedy before a court, i.e. the right to a fair trial.

According to the Charter of Fundamental Rights of the European Union, “Everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone has the opportunity to obtain legal advice, use the help of a defense lawyer and representative”.

2. Legal conditions for access to justice

2.1. Access to court

The right of access to a court (based on the right to a fair hearing) should be effective for all people, irrespective of their financial resources. This requires the state to take steps to ensure equal access to proceedings, for example by establishing appropriate legal aid systems. Legal aid can also contribute to the administration of justice as unrepresented parties to proceedings are often unaware of the procedural rules and require significant assistance from the courts, which may delay proceedings.

Court costs can help the effective administration of justice (for example, by discouraging abusive litigation or reducing administrative costs), but they can also limit access to justice. Excessive court costs can deprive individuals of their right of access to a court.

The right of access to court means access to competent courts, interpretation, access to information and the availability of court judgments. It may also relate to geographic remoteness from court if its location prevents applicants from effectively participating in the proceedings.

To qualify as a court, an authority must:

- i. be constituted by law;
- ii. be permanent;
- iii. be independent and impartial;
- iv. include an adversarial procedure;
- v. have compulsory jurisdiction;
- vi. comply with the law.

2.2. Process guarantees

2.2.1. Independent and impartial court

The requirement of independence obliges the court to act as a decision-making body, independent of the administrative bodies and the parties to the dispute.

Impartiality has two components:

- i. a subjective element of the judge's personal bias or bias;
- ii. an objective element relating to issues such as the impression of bias.

2.2.2. Fair and public hearing of the case

One of the basic requirements of the right to a fair hearing is the principle of "equality of arms" between the parties. Equality of arms involves ensuring that each party is given a reasonable opportunity to present its case under conditions which are not less favorable to either party to the opposing party.

Another essential element of the right to a fair hearing is the right to adversarial proceedings. In practice, the right to an adversarial procedure covers:

- i. the right to know all evidence submitted to a court in order to influence its decision and to comment on it;
- ii. the right to sufficient time to examine the evidence before the court;
- iii. the right to present evidence.

It is for the courts to consider whether the applied procedure as a whole complies with the requirements relating to the right to an adversarial procedure.

The right to reason a judgment is another key aspect of the right to a fair hearing. The grounds of the judgment indicate that the case has been examined properly and enables the parties to bring an appropriate and effective appeal. Courts are not required to provide detailed answers to each argument, and the duty to state reasons varies according to the nature of the decision and the circumstances of the case. In civil proceedings, courts are required to justify their judgments sufficiently to enable individuals to lodge an effective appeal (right to appeal).

Access to justice also includes the right to a public hearing. This helps promote trust in the courts through visible and transparent justice. The right to a public hearing of the case implicitly includes the right to an oral hearing.

Professional confidentiality may also justify restrictions. Children are clearly protected and a whole category of proceedings can be excluded because of the need to guarantee their protection.

2.2.3. Reasonable timing

The requirement to terminate the proceedings within a reasonable time applies to all parties to the court proceedings and its purpose is to protect the parties concerned against excessive procedural delays. Excessive delays can violate the rule of law and deprive you of access to a court. Delays in obtaining and executing judgments can constitute a procedural barrier to access to justice. States must organize the legal order in such a way that the courts comply with their obligation to deal with cases within a reasonable time.

States should guarantee access to special legal paths to pursue claims arising from unreasonably long proceedings.

Four criteria are used to assess the reasonable duration in proceedings:

- i. the complexity of the case;
- ii. the behavior of the applicant;
- iii. the behavior of the competent authorities;
- iv. the importance of the case for the complainant

However, a balance must be struck between the swift procedure and the proper administration of justice. For example, the urgency of resolving a case may not result in the defendant being deprived of his rights to defense.

States must organize the legal order in such a way that the courts can respect the guarantees of obtaining a final judgment within a reasonable time. However, the responsibility for the preparation of the case and the speedy conduct of the trial rests with the court.

2.3. Access to legal / procedural representation

2.3.1. Obtaining legal advice

The right to obtain legal advice, to use the assistance of a defense lawyer and attorney-in-fact is to ensure that individuals have the right to a fair trial and to exercise their rights. The right to a fair trial includes the right of access to a court. Individuals may require - and therefore the state may be required to provide - services of representation or legal aid to ensure they have access to a court and a fair trial.

2.3.2 Assistance by a defense attorney and representative

Legal aid may, for example, include free legal representation or representation by a solicitor or exemption from legal costs, including court costs. These types of arrangements can run alongside other complementary support systems, such as

pro bono defense, legal aid centers and legal protection insurance - which may be state-funded, organized by the private sector or managed by an NGO.

2.4. Legal remedies (appeals)

Legal remedies are sufficient to guarantee effective judicial protection of rights. This commitment is based on the principles of effectiveness and equivalence. The principle of effectiveness requires that national regulations neither prevent nor excessively hinder the exercise of rights. The principle of equivalence requires that the conditions relating to claims arising from EU law should not be less favorable than those relating to similar domestic cases.

3. Application of the law to minors (children)

3.1. Introduction

The principles of applying the law to children are based on the guarantees of procedural rights generally applicable in the legal system, which are enjoyed by every person facing the administration of justice.

The child should be empowered to participate in procedures and decisions by: [...] being able to express his views in any judicial and administrative proceedings relating to the child, either directly or through a representative or appropriate body, in accordance with the procedural rules of domestic law (Article 12 of the "Convention on the rights of the child").

In the Polish legal system, it has been assumed that a minor, i.e. a child, is anyone who is under 18 years of age, and anyone who has entered into marriage before the age of 18 obtains the age of majority (Article 10 of the Civil Code).

3.2. Liability

Civil liability depends on the concept of legal capacity and the age of the child. A minor who is under the age of 13, as a rule, is not responsible for the damage caused as a legally incapacitated person (Article 426). The legislator assumed that persons under 13 years of age cannot be blamed due to the insufficient level of intellectual development (maturity). However, someone should compensate and repair the damage. In such cases, the "Civil Code" introduces the principle of liability for other people's acts, adopting the principle of presuming the supervising person's guilt.

A minor who has reached the age of 13 and under the age of 18, due to limited legal capacity, may or may not be liable for the damage caused. This is determined

each time by the court's assessment whether, due to the minor's age, he or she has reached sufficient maturity to be fully guilty - the condition is that the minor recognizes his own action and its consequences, and is aware of the reprehensibility of his behavior.

3.3. Responsibility in supervision

The person most frequently supervising a child is the parent (legal guardian). In the case of a child entrusted with supervision (care) in a kindergarten, school, sports club, hospital or other institution, it may also be: a teacher, tutor, trainer, instructor, doctor, etc. improperly exercised. The supervisor can discharge himself from responsibility when he proves that the supervision was properly exercised. The responsibility for the child entrusted to supervision is connected with representing the child during the day-to-day care of it, for the time of the care entrusted to it. In emergency situations, when it is not possible to notify the parent, requiring the child to provide direct help or calling the appropriate assistance services (e.g. emergency room) or intervention (e.g. the police), such actions are taken by the person who has direct supervision over the child or their superior.

3.4. Criminal responsibility

Any minor who commits a prohibited act after the age of 13 but not older than 17 shall be liable under the provisions of the "Act on Proceedings in Juvenile Matters". In the case of minors, punishable acts are prohibited acts defined by law as: crimes, fiscal offenses or petty offenses (defined in the Code of Petty Offenses). These include: disturbing public order, bullying animals, damaging signs or devices to prevent danger, theft or misappropriation of property, fencing, destroying or damaging property, obstructing the use of devices intended for public use, and many others. Persons under the age of 18, as minors, are subject to the provisions of the "Act on Proceedings in Juvenile Matters" in matters relating to the prevention and combating of demoralization. The situations where minors are at risk of demoralization are: alcoholism, intoxication, prostitution, avoidance of compulsory education, compulsory education, vagrancy (truancy), participation in criminal groups, violation of the rules of social coexistence (prohibited acts).

3.5. Process guarantees

The guarantees of the child's procedural rights reflect well the principles of respecting the rights and dignity of the child in court proceedings, as set out in the Convention on the Rights of the Child. These are:

- i. Presumption of innocence until proved guilty according to law;
- ii. informing about the charges against him;

- iii. providing legal and other assistance in preparing and presenting your defense;
- iv. the case is dealt with without undue delay by a judicial authority in a fair and lawful process;
- v. ensuring the presence of parents or a legal guardian;
- vi. not to use coercion when giving evidence and in admitting guilt;
- vii. having the right to appeal the decision and other related remedies to a superior, competent, independent and impartial authority or judicial body;
- viii. respect for matters related to personal life at all procedural stages.

The above guarantees are manifested in additional, special treatment of children, according to which:

- ix. children in criminal proceedings have the right to be treated fairly and in a friendly manner;
- x. court proceedings should be appropriate to the needs of children to ensure their effective participation;
- xi. children have the right of access to a lawyer from the early stages of criminal proceedings and from the first questioning by the police;
- xii. children may only be deprived of liberty as a last resort and for the shortest possible time;
- xiii. children deprived of their liberty must be treated according to their age and with respect for their dignity;
- xiv. children should not be kept together with adults;
- xv. Child victims and witnesses have the right to protection from further victimization, to rehabilitation and reintegration, and to effective participation in criminal and alternative proceedings.

3.6. Legal representation of a child

A child cannot defend his rights on his own. Before the court, she is represented by a legal representative, who may be the mother, father or legal guardian. Representing the best interests of the child, they may apply for the status of: aggrieved party, auxiliary prosecutor or civil plaintiff. These are very important rights of the people representing the child. The knowledge and use of these institutions allows you to take advantage of a number of rights that are favorable to the child in court proceedings. A parent may not, acting as a legal representative, exercise the rights of a minor as an aggrieved party in criminal proceedings, if the accused is the other parent.

In such a situation, a guardian is appointed at the beginning of the proceedings, who will represent the interests of the child in the proceedings.

3.7. Child - A witness in court proceedings

Polish law, both in the civil and criminal procedure, does not impose any formal restrictions on the age of a person who may be called as a witness. The provisions of the "Code of Civil Procedure" are an exception, stipulating that in matrimonial matters (for divorce, annulment of marriage, establishing the existence or non-existence of a marriage), minors under the age of 13 and descendants of the parties (children) may not be examined as witnesses, who are under the age of 17 (Art. 430). Another, but obvious limitation to the use of children's testimonies in proceedings is the material condition of the ability to perceive and communicate one's observations provided for in the Code of Civil Procedure (Art. 290). People who do not have this ability (e.g. small children) cannot be witnesses.

The second issue is the minor's personal participation in matters relating to him. A provision was introduced in the "Family and Guardianship Code", imposing an obligation on the court to hear a child under 13 years of age, if he or she can understand the meaning of adoption - a 13-year-old child is obligatorily heard (Art. 118 § 2). , younger children, e.g. 5-year-olds, may be asked for consent or opinion. The child may also comment on the change of surname and first name. in the part concerning the current birth certificate (Articles 48 and 49).

The final decision as to the minor's participation in the proceedings is made by the court, taking into account educational considerations.

3.8. Child - victim of violence

Child - the victim of the victim may take part in the criminal trial. It acquires the status of an aggrieved party. The rights of his legal representative or the person under whose care the victim remains (Art. 51 § 2).

Helping children - victims of violence also protection of the interests of the judicial initiator through, among others:

- i. requesting the setting aside of the hearing in public, when the case concerns an offense related to the environment, morality, family and care;
- ii. arranging for the victim to be interviewed before the second stage;
- iii. an allowance to the interviewing of an injured person in the procedural services, if for evidence that the allowance may be an embarrassing act;
- iv. A court to resolve issues that have problems with the personal case or to strive for the victim's common sense, and not to resolve the merits of the case.

3.9. Right to remain silent

A child has the right to refuse to testify. The child may also refuse to answer certain questions. Under Art. 185 of the Code of Criminal Procedure, a child may exercise the right to refuse to testify if they concern a person closest to him. The body conducting the interview must be sure that the child has understood the instruction given to him and made a conscious decision based on it. This issue should also be solved with the participation and assistance of an expert.

3.10. Hearing "one time"

According to the solution adopted in Art. 185a of the "Code of Criminal Procedure" in cases of offenses against sexual freedom and decency of the aggrieved, who at the time of the act was under 15 years of age, should be interviewed only once, unless important circumstances come to light, the clarification of which requires re-examination, or the accused requests it who did not have a defense attorney during the first questioning of the aggrieved party. The hearing is conducted by the court at a session with the participation of an expert psychologist. The following persons have the right to participate in the hearing: the prosecutor, the defense attorney and the representative of the accused. The accused may also be present at the questioning, as it does not limit the freedom of expression of the questioned person. The report of such a hearing shall be read at the main hearing. It can also be an audio recording of the interview. The above procedure is also applied in the case of the hearing of a witness who, at the time of the hearing, is under 15 years of age, and the case concerns a violent crime, an unlawful threat or a sexual offense. The hearing takes place if the testimony of such a person may be of importance for the conducted proceedings.

Evidence in the form of the child's testimony is full-fledged evidence. The child's testimony, even if it concerns only the description of events, without analyzing their significance, may significantly affect the course of the proceedings. These statements must, however, be accompanied by an expert opinion - a psychologist, who should answer the question whether the child was able to perceive the situation correctly and recreate it correctly, whether he is prone to lie or confabulation. Evidence from the child questioning carried out in this way meets the procedural requirements. It also solves the issue of educating the child about criminal liability for making false statements; such instruction is received by an expert (and to a much greater extent) - he is the one who authenticates these testimonies with his professional knowledge. The credibility of the testimony is confirmed by the expert in the opinion issued on the order of the court.

3.11. Effective participation in the procedure

Examples of requirements for effective participation in proceedings include: presence of a child at hearings, holding hearings in closed doors, limited publicity, ensuring that the child understands what is going on and reducing the formality of court hearings.

3.12. Access to legal aid

Where a child is deprived of liberty, the person with parental responsibility shall be informed of the deprivation of liberty and the reasons for the deprivation of liberty, unless this would be contrary to the best interests of the child, in which case another appropriate adult shall be notified. In addition, the right of suspects / accused to access a lawyer includes the right to meet in private and communicate with the lawyer representing them, including prior to the first questioning, the right to have a lawyer present and participate effectively during questioning, and the right to have a lawyer present during investigations or evidence.

3.13. Establish specialized courts or judges for children

There are "specialized" courts in the form of family and juvenile divisions

3.14. Use of child-friendly facilities for questioning

There are specially designed or adapted rooms for interviewing children, the so-called "Blue rooms" equipped with venetian mirrors and enabling judges and other people to observe the course of the interrogations.

4. Barriers to access to justice

4.1. Court costs

Excessive court costs can deprive individuals of their right of access to a court.

4.2. Excessive formalism

Excessive formalism (restrictive interpretation of procedural rules) could deprive applicants of their right of access to a court. This may be manifested in a restrictive interpretation of limitation periods, procedural rules and evidence proceedings.

4.3. Evidence thresholds

In order for individuals to obtain adequate compensation in court, they must submit sufficient evidence in the case. If the evidence thresholds are too high, actions brought to the courts may be doomed to failure and individual rights may be unenforceable.

4.4. Limitation periods

Limitation periods define the time limits for a party to the proceedings to submit a claim or notify the other party of the claim. The imposition of reasonable time limits and procedural conditions on the lodging of claims can contribute to the promotion of sound administration of justice by providing legal certainty and finality, and protecting potential defendants / accused persons from past claims that would be difficult to oppose due to the passage of time.

4.5. Immunities

Immunities are a very special kind of procedural obstacle. States may also introduce immunities as a safeguard against claims. Substantive immunity is an exemption, in whole or in part, from a legal process - for example, a legal obligation, sanction or prosecution. Some immunities serve to fulfill obligations under public international law - for example, state or diplomatic immunity; others, in turn, may be awarded at national level - for example to protect public officials from accountability for decisions made in the performance of their duties or to protect the freedom of expression of members of parliament.

4.6. Failure to execute judgments

Failure to execute court judgments limits access to justice. This can undermine the protection of fundamental rights and deprive the individual of effective judicial protection. Thus, non-execution of court judgments is also tantamount to a breach of the rule of law.

4.7. Resources

The allocated human and financial resources are insufficient. Judges and social workers are overloaded with work and the staff shortage is acutely felt. Given the workload and the needs of children involved in the procedures, insufficient resources are available.

ROMANIA

According to art. 38 of the Romanian Civil Code the minor is the person who has not reached the age of 18 and who does not have the capacity to conclude single civil legal acts. The minor can acquire this capacity before adulthood only through marriage (art. 39 of the Civil Code) or when this capacity is recognized by the court of guardianship provided that he reaches the age of 16. The minor who has reached the age of 14 has a restricted capacity to exercise (art. 41 paragraph (1) of the Civil Code).

1. Access to Justice for minors in civil matters under parental authority

The access to justice of minors is regulated by art. 57 of the Civil Procedure Code and is allowed only if it is represented, assisted or authorized under the terms of the Civil Code.

1.1. The minor who has not reached the age of 14

For minors who have not reached the age of 14, the legal documents are concluded, on their behalf, by their legal representatives, respectively by parents or guardians (art. 43 paragraph (2) of the Civil Code).

1.2. The minor who has reached the age of 14

The legal acts of the minor who has reached the age of 14 are concluded by him, with the consent of the parents or, as the case may be, of the guardian, and in the cases provided by law, and with the authorization of the guardianship court. The approval or authorization can be given, at the latest, at the moment of concluding the act (art. 41 paragraph (2) of the Civil Code).

Acts made only by minors are annulable, even without proving a prejudice (art. 44 par. (1) of the Civil Code).

2. Access to Justice for minors in civil matters under guardianship of a guardian

The guardian will conclude on behalf of the minor who has not reached the age of 14 all legal acts.

The minor who has reached the age of 14 concludes the legal documents with the written consent of the guardian or, as the case may be, of the curator. If the act that the minor who has reached the age of 14 is to conclude is one of those that the

guardian can do only with the authorization of the guardianship court and with the approval of the family council, both its authorization and the approval will be necessary of the family council (art. 146 par. (1) and par. (2) of the Civil Code).

3. Access to Justice for minors in civil matters in conflict with parents or guardian

Whenever contrary interests arise between the guardian and the minor, which are not among those that must lead to the replacement of the guardian, the guardianship court will appoint a special curator (art. 150 para. (1) of the Civil Code).

4. Role of minor children in matrimonial disputes between parents

During the divorce process, the child can be placed with one of the parents temporarily or permanently, as the case may be (art. 919 and art. 920 of the Civil Procedure Code).

In certain exceptional cases, the following special protection measures may be taken: placement and emergency placement (art. 59 and art. 60 of Law no. 272/2004 on the protection and promotion of the rights of the child).

The placement of the child constitutes a special protection measure, having a temporary character, which may be ordered, under the conditions of this law, as the case may be, to a person or family, a foster carer or a residential service (art. 62 of Law no. 272 / 2004 on the protection and promotion of the rights of the child)

Emergency placement is a special, temporary protection measure that is established for the child who has been abused, neglected or subjected to any form of violence or for the child.

found or abandoned in health facilities (art. 68 of Law no. 272/2004 on the protection and promotion of children's rights).

5. The protection of Children during the adoption trail

The following principles must be observed throughout the adoption procedure:

- the principle of the best interests of the child
- the principle of raising and educating the child in a family environment;
- the principle of continuity in the education of the child, taking into account his ethnic, cultural and linguistic origin

- the principle of informing the child and taking into account his / her opinion in relation to his / her age and degree of maturity (matching between the child and the adopter / adoptive family)
- the principle of speed in carrying out any acts relating to the adoption procedure;
- the principle of guaranteeing confidentiality with regard to the identification data of the adopter or, as the case may be, of the adoptive family, as well as with regard to the identity of the natural parents (art. 1 of Law no. 273/2004 on the adoption procedure).

Adoption cannot be approved by the court until the child has been entrusted for a period of 90 days to the person or family wishing to adopt him or her, so that the court can reasonably assess the family relations would determine whether the adoption would be approved.

The child's ability to adapt, physically and mentally, to the new family environment will be analyzed in relation to the socio-professional, economic, cultural, language, religious conditions and any other such elements characteristic of the place where the child lives during foster care and which could be relevant in assessing its further evolution in the case of approval of adoption (art. 43 of Law no. 273/2004 on the adoption procedure)

The right to represent the child in legal acts or, as the case may be, to approve the acts he concludes, as well as the right to administer the child's property is exercised by the president of the county council or the mayor of the Bucharest municipality in whose territorial area the person resides or the family to which the child has been entrusted for adoption. The right of administration may be delegated, exceptionally, to the person or family to whom the child has been entrusted for the performance of special acts, in the interest of the child, which will be expressly mentioned in the document granting the delegation.

6. Criminal justice for minors

A minor who has not reached the age of 14 is not criminally liable.

A minor between the ages of 14 and 16 is criminally liable only if it is proven that he committed the act with discernment.

A minor who has reached the age of 16 is criminally liable according to the law (art. 113 of the Penal Code)

Detention and pre-trial detention may be ordered against a minor, exceptionally, only if the effects that deprivation of liberty would have on his personality and development are not disproportionate to the purpose pursued by the measure (art. 243 para.) 2) of the Criminal Procedure Code.)

The special detention regime for minors, in relation to the particularities of age, so that preventive measures taken against them do not harm their physical, mental or

moral development, will be established by the law on the execution of sentences and measures ordered by the judiciary during the trial. criminal law (art. 244 of the Criminal Procedure Code)

The prosecution and trial of crimes committed by minors, as well as the execution of judgments concerning them are done according to the usual procedure, with additions and derogations, such as summoning and hearing in the presence of parents or legal representatives (guardian, curator) or separate trial of minors of adults (art. 504 of the Criminal Procedure Code)

In cases with juvenile defendants, the criminal investigation bodies may request, when they deem it necessary, the assessment report to be carried out by the probation service attached to the court in whose territorial district the minor resides, according to the law. Through the evaluation report, the requested probation service can make motivated proposals regarding the educational measures that can be taken against the minor (art. 506 of the Criminal Procedure Code).

7. Special criminal consequences for minors and measures of protection and aid

A non-custodial educational measure is taken against a minor who, at the time of the crime, was between 14 and 18 years old.

As an exception to this minor, an educational measure of deprivation of liberty may be taken in the following cases:

- A. if he has committed another crime, for which an educational measure has been applied to him which has been executed or whose execution began before the commission of the crime for which he is tried;
- B. when the punishment provided by law for the crime committed is imprisonment of 7 years or more or life imprisonment (art. 114 of the Penal Code).

The educational measures are non-custodial or deprivation of liberty (art. 115 of the Penal Code)

Non-custodial educational measures are:

- A. the civic training internship;
- B. supervision;
- C. lockdown at the weekend;
- D. daily assistance.

The educational measures depriving of liberty are:

- A. hospitalization in an educational center;
- B. hospitalization in a detention center.

8. The position of minors of incarcerated parents

The minor whose parents have been incarcerated enjoys special protection until adulthood, upon request or ex officio, based on an individualized protection plan (art. 54 and art. 57 of Law no. 272/2004 on the protection and promotion of children's rights).

These measures are placement and emergency placement and have been explained in point 4 of this document (art. 59 and art. 60 of Law no. 272/2004 on the protection and promotion).

TURKEY

CHILDREN'S ACCESS TO JUSTICE IN THE TURKISH CRIMINAL LAW SYSTEM

1. Overview

In legal systems, which are usually regulated for adults, some problems can lead to more desperate situations for children. Especially in the criminal law system, where the intervention of the state on rights and freedoms can be observed concretely on the individual, even if there are exceptional regulations regarding children, problems arising from the system and some procedural habits of the judicial subjects may lead to disappearance of children within the system. This article is written to shed light on the current problems experienced by children in the Turkish criminal law system.

2. Definition of the "CHILDREN" in the Turkish Criminal Law System

According to the Turkish Criminal Code, a child defines an individual who has not turn the age of 18. In this system, every individual who has not turn the age of 18 yet, is considered a child and all the exceptional regulations regarding the children are valid for them. Children who are prosecuted with the allegation of the act of a crime, are referred to as "children driven to crime".

Within the Turkish criminal justice system, the term of children driven to crime is used to emphasize the idea that the main purpose is to improve the child, not to punish and the factors affecting children to the act of crime are mostly external factors. This term is used instead of the term "juvenile delinquent" because the concept of juvenile delinquency will remove children rather than reintegrate children to the society.

According to the Turkish Criminal Code:

- Children who are under the age of 12 at the time of committing the act of crime do not have any criminal liability. Only security measures which are regulated specifically for children can be applied to them.
- Children who are under the age of 15 at the time of committing the act of crime do not have any criminal liability if they cannot perceive the legal meaning and consequences of the act or if their ability to direct their behavior is not sufficiently developed. However, if they have those abilities, a reduced prison sentence is applicable.
- For individuals who are under the age of 18 at the time of committing the act of crime, a reduced prison sentence is applicable.

- No life sentence or aggravated life sentence can be applied for any children who has driven to crime.

3. Some specifically regulations for children and current problems

3.1. ARREST

In order to implement the arresting process, regulations have been made in accordance with the age of the children basis which is mentioned above. In that basis, children under the age of 12 can only be arrested with the intentions of obtaining information to arrest other suspects or taking necessary precautions. It is a clause designed to ensure that children of this age do not have any interact with the law enforcement authorities under no circumstances.

Children who are at the age of 12 to 18 can be arrested. This clause, which regulates that children of this age can be arrested under the same circumstances with adults, may lead to the aggrievement of children within the adult-regulated system.

From the moment of arresting, a defence lawyer is appointed from the relevant bar association to the child. The child's consent or request is not required in this regard. When the child is arrested, his/her family, relatives or the person responsible for the child is informed about the reasons for this arrest and where the child is being held. Until a relative of this child arrives, the detention process cannot be continued. However the relatives who are suspected of inciting the child to commit a crime or abusing the child should not be informed.

During the investigation, the only action the law enforcement authorities can take on children driven to crime is the arresting process, they are not authorized to take any action other than that. After informing the defence lawyer and the relatives, the child should be immediately directed to the office of the chief public prosecutor. The investigation regarding the children should be carried out by the prosecutors. Thus, it could be said that it is a system that aims to minimize the communication and interaction of the child with the law enforcement authorities. However, in practice, we see that the prosecutors refuse to carry out all the investigations regarding the children driven to crime for various reasons, and they leave other procedures to the law enforcement authorities, such as interrogating the children.

3.2. CUSTODY

Considering the difference between children driven to crime and adults in terms of custody procedures, it is seen that there are no exceptional regulations. The fact

that they are subject to the same maximum detention periods as adults, especially in terms of duration, reveals that children are unfortunately ignored within the system.

Since children under the age of 12 cannot be arrested, custody cannot be applied to them either.

As the investigation procedures regarding children are carried out by the prosecutor himself, the arrested child will be immediately directed to the prosecutor's office. Until then, the child will be held in the unit which is specifically arranged for the children. Although it is stated in the provisions of the relevant legislation that the places where children are held must be separate from adults, it is observed that this rule is occasionally violated due to the carelessness of the officers, insufficient resources and impossibilities of the unit. Indeed, keeping the child in the same place with adults comes to the fore with the excuses such as the fact that the place reserved for custody is not very large. However, this situation completely contradicts the purpose of the regulation and the benefit of the child.

3.3 DETENTION

Detention is not applicable for children under the age of 12. For children under the age of 15, detention will not be applied if an investigation is being carried out for a crime which has an upper limit of 5 years of prison. There is no exceptional regulation for other children under the age of 18, and the detention provisions for adults will also be applied to children of this age. However, this situation is against the principle of restricting people from their freedom is the last resort, especially for children. As a matter of fact, the aim of this principle is to ensure the continuation of education for the children under the age of 18, to protect them from the negative effects of the prison and to prevent the deterioration of their communication with the society.

In terms of the maximum duration of detention, children under the age of 15 will be applied half the time stipulated for adults, and three-quarters to children under the age of 18. However, the lack of a regulation in the same direction regarding maximum custody periods is rightly criticized. Protection measures, which are a practice that violates the right to personal freedom and security, should be developed considering the characteristics of children.

If the sentence stated for the crime requires a prison time of less than 1 year, allegedly committed by a child who is under the age of 18, detention will not be issued for this child.

It has been regulated that the children taken to the detention center will not be allowed to contact with adults, except for the cases listed in the law. Unfortunately, in places where there is no detention center for children, it is not possible to prevent children from contracting with adults, and this causes them to be abused,

to acquire bad habits and to learn new ways of committing crimes. As long as detention centers and prisons specifically designed for children are not established, even if they are, their conditions are not improved; these institutions continue to have the opposite effect instead of improving children. While applying for detention measures for them, it is necessary to think about the conditions of these institutions and the bad habits that children will acquire.

3.4. JUDICIAL CONTROL

Judicial control is used as a middle way between completely restricting the freedom and the complete release of the suspect, which is brought as an alternative to detention by law. In cases where it is not possible to detain children, judicial control decision may be made.

Detention may be applied for suspects who do not voluntarily fulfill the provisions of judicial control. However, in this case, priority should be given to the regulation that no detention can be applied for children who are not the age of 15 due to a crime which upper limit does not exceed 5 years. This is the way that complies with the principle of the best interests of the child.

The maximum periods regulated by law regarding the implementation of judicial control are applied at half rate for children.

3.5. PROTECTIVE AND SUPPORTIVE MEASURES

With the Code of Child Protection, some measures to be taken in the fields of counseling, education, care, health and shelter are included in order to ensure that the child is protected primarily in his own family environment. These measures are implemented only when it is determined that the child driven to crime needs protection while the trial is still ongoing. These measures are not considered as a sanction. However, it was left to the discretion of the judge to hold a hearing in the court and the child was not obliged to be heard. Although a non-sanctional decision is made here, the child's statements and opinions regarding the decision to be taken as an individual should be taken.

3.6. INTERROGATION

In accordance with the principle of the best interests of the child, judicial meeting rooms have been established with the aim of operating child-friendly procedures, interviewing children who involved in the judicial process in an appropriate environment and methods, determining their protection needs and directing them to the necessary services. Currently, as of June 2021, there are 105 judicial meeting rooms in 100 courthouses in 78 cities. However, only 293 of the 32,111 interviews held in judicial interview rooms since April 2017 were with children

driven to crime. The use of judicial interview rooms for children driven to crime being low shows that these rooms are not used in the process of interrogating children.

Children under the age of 12 cannot be interrogated due to the alleged crime; only identification of the suspect can be made. The prosecutor will personally carry out the interrogation of the children driven to crime, the law enforcement authorities will not be able to do it. The child who is arrested by the law enforcement officers, is immediately directed to the prosecutor's office after notifying his relatives and requesting a lawyer from the bar association. It is not necessary to obtain the opinion or consent of the child for the presence of a lawyer during the interrogation. Parents or guardians may be present in the interrogation process, unless it is found to be contrary to child's best interests or there is no legal obstacle.

Although the system of appointing mandatory lawyers for children driven to crime in the judicial process is a very positive method, it is observed that children cannot benefit from adequate legal assistance in the judicial process due to the lack of adequate training of these lawyers. Despite the fact that it is against the legislation, problems such as interrogating the children by the law enforcement authorities upon the order of the prosecutor have not been overcome. While the duty falls to the defense lawyers in such cases, we see that in most cases the defendants remain silent or do not oppose due to lack of knowledge.

3.7. JUVENILE COURTS

Juvenile courts are not just trying children driven to crime, they are also try to identify the reasons that push children to commit crime and take the necessary measures for their recovery in the next process. It is organized as juvenile courts and juvenile high criminal courts, making a distinction according to the type of crime which is prosecuted.

As of 2021, there are a total of 101 juvenile courts in Turkiye, 85 of which are juvenile courts and 16 of which are juvenile high criminal courts. Unfortunately, juvenile courts have not yet been established in every jurisdiction. For this reason, in jurisdictions where there are no juvenile courts, the competent courts for the trial of children driven to crime are criminal courts which are also authorized to try adults.

Considering the scarcity of specialized courts, many children have limited access to specialized judicial subjects and judicial units. Especially since there are no juvenile courts in many provinces in the countryside, the facilities provided by these courts cannot reach all children. In such cases, when it is necessary to combine the cases regarding children with adults and when it is considered that this combination is made in the general courts, it is understood that the children are often tried in the general criminal courts.

According to the latest judicial statistics published, 50.1% of the cases brought against children driven to crime are heard in criminal courts with general jurisdiction. This situation results in moving away from courts and subjects who are experts on measures specifically for children and all arrangements made in line with the protection of the best interests of the child. In addition, it causes children to be subject to judicial processes that are completely contrary to their age and mood.