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Barriers children with mental disabilities face in accessing justice in Spain



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This factsheet is based on research conducted between 2013 and 2015 within a European project on access to justice for children with mental disabilities, which took place in ten EU Member States. Full information can be found on the project website: www.mdac.org/accessing-justice-children.

April 2015

Population:	46,464,053 ¹
Children under the age of 18:	8,348,349 ²
Children and young people with disabilities:	213,800 ³
Of which children with mental disabilities:	No data available.
Children in institutions:	No data available.
Date of CRC ratification:	30 November 1990
Date of CRPD ratification:	3 December 2007

Child abuse

In Spain, having a disability is a factor that significantly increases the risk of abuse and ill treatment of children not only in institutions and special education centres,⁴ but also in the family environment. In 2011, 23.08% of children with disabilities between the age of 8 and 15 were affected by domestic abuse, while among their peers without disability the equivalent figure was 3.87%.⁵

In its concluding observations of 2011, the Committee on the Rights of Persons with Disabilities also expressed its concerns about the reportedly higher rates of abuse of children with disabilities in comparison with other children and recommended that Spain:

“(a) Increase efforts to promote and protect the rights of children with disabilities, and to undertake research on violence against children with disabilities, adopting measures to eradicate this violation of their rights,

(b) Establish policies and programmes that will ensure the right of children with disabilities to express their own views;

(c) Develop coordinated public policies with sufficient resources to ensure inclusive access to support services that include informed therapeutic, rehabilitation and habilitation services, and care which covers the health, psychosocial and education needs of children with disabilities, in particular during early childhood.”⁶

Research conducted within the framework of this project – and in accordance with the results of the 2011 macro-survey of gender violence in Spain – revealed that girls with disabilities, especially those with intellectual disabilities, are extremely vulnerable, as they are exposed to particular forms of violence, such as forced sterilisation and abortion.⁷ As stated in the report of the Open Society Foundations on violence against women

- 1 In July 2014. Data available in the online database of the National Statistics Institute of Spain at http://www.ine.es/en/inebaseDYN/cp30321/cp_inicio_en.htm (last accessed 27 April 2015).
- 2 On 1 January 2014. Data available on the webpage of the EU's European Platform for Investing in Children at http://europa.eu/epic/countries/spain/index_en.htm (last accessed 27 April 2015).
- 3 In 2008. Data available online in the database of the National Statistics Institution at <http://www.ine.es/jaxi/tabla.do?path=/t15/p418/a2008/hogares/p01/modulo1/11/&file=01001.px&type=pcaxis&t=1> (last accessed 27 April 2015).
- 4 Asociación SOLCOM, Informe SOLCOM 2011. Derechos Humanos en España. *Violaciones en España de la Convención sobre los derechos humanos de las personas con discapacidad (diversidad funcional) de la ONU [SOLCOM Association, SOLCOM Report 2011. Human Rights in Spain. Violations of the UN Convention on the Rights of Persons with Disabilities (functional diversity) in Spain]* (Asociación SOLCOM, December 2011), available at http://www.asociacionsolcom.org/files/documentos/informe_solcom_2011.pdf (last accessed 27 April 2015), p. 13-14.
- 5 Centro Reina Sofía, *Maltrato infantil en la familia en España. Informe del Centro Reina Sofía [Queen Sofía Centre, Child Abuse in families in Spain. Report of the Queen Sofía Centre]* (Madrid: Ministry of Health, Social and Equality Policy, Madrid, 2011), available at http://www.observatoriodelainfancia.mssi.gob.es/productos/pdf/mali2011v4_total_100_acces.pdf (last accessed 27 April 2015), p. 48-49.
- 6 Committee on the Rights of Persons with Disabilities, Concluding Observations of the Committee: Spain, CRPD/C/ESP/CO/1, 19 October 2011, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2FC%2FESP%2FCO%2F1&lang=en (last accessed 27 April 2015), para. 24.
- 7 Ministerio de Sanidad, Servicios Sociales e Igualdad, *Macroencuesta de violencia de género 2011. Principales resultados. [Ministry of Health, Social and Equality Policy, Gender Violence Macro-survey 2011. Main results.]* (Madrid: Ministerio de Sanidad, Servicios Sociales e Igualdad, 8 February 2012), available at http://www.observatorioviolencia.org/upload_images/File/DOC1329745747_macroencuesta2011_principales_resultados-1.pdf (last accessed 27 April 2015).
- 8 See Open Society Foundations, *Against Her Will: Forced and Coerced Sterilization of Women Worldwide* (OSF, 2011), available at <http://www.opensocietyfoundations.org/sites/default/files/against-her-will-2011003.pdf> (last accessed 27 April 2015), p. 6; UN General Assembly Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan É Mendez, 1 February 2013, A/HRC/22/53*, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf (last accessed 27 April 2015), para. 80.

and also in the report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Spanish national legislation “allows for sterilisation of minors who are found to have severe intellectual disabilities”.⁸

Article 156 of the Spanish Penal Code of 1995 decriminalised the sterilisation of people with disabilities by stating that sterilisation of an incapacitated person suffering from serious mental deficiency shall not be punishable “when this is carried out pursuant to the overriding criterion of the best interest of the incapacitated person and it has been authorised by a judge, either in the actual procedure of incapacitation, or through voluntary jurisdiction proceedings, processed thereafter at the request of the legal representative of the incapacitated person, having heard the opinion of two specialists, the Public Prosecutor and having examined the incapacitated person”.

This provision clearly contradicts Article 23(1)(c) of the CRPD that ensures the rights of persons with disabilities to retain their fertility on an equal basis with others. The Spanish Committee of Representatives of Persons with Disabilities (CERMI) therefore has demanded several times that “the Penal Code be amended to remove the decriminalisation of sterilisation without the express consent of the interested party when that person has a disability”.⁹

Partly owing to these efforts, Organic Law 1/2015 of 30 March has amended, inter alia, Article 156.2 of the Penal Code. The second paragraph of the article 156, currently considers not punishable “Sterilisation authorised by a judge in case of people who are permanently unable to give the consent that is referred in the former paragraph in any way, provided that is an exceptional case in which there is a serious conflict of protected legal assets, in order to safeguard the major interest of the affected, all in accordance with the provisions of the civil law “. The first additional provision of the Act provides that sterilisation (referring to the second paragraph of Article 156 of the Criminal Code) “must be authorized by a judge in the process of modification of legal capacity or in a later adversarial proceeding, at the request of the legal representative of the person on whose sterilisation is resolved, after hearing the opinion of two specialists and the public prosecutor, and after examination by the judge of the person concerned who lacks the capacity to consent”. The Spanish legislator considers that this article is an improvement, because it limits sterilisation to exceptional cases in which there is an absolute inability to give consent and a serious conflict of interest; and refers to the civil procedural law and establishes some safeguards. However, the current policy continues to tolerate the forced sterilisation of people with mental disabilities, albeit as an exceptional measure, carried out in their “major interest”, thus not fully complying with the requirements of CRPD.



⁹ Spanish Committee of Representatives of Persons with Disabilities (CERMI), *Submission to the study on “State Responsibility for Eliminating Violence against Women” to be drawn up by the Special Rapporteur on violence against women – Violence against girls and women with disabilities in Spain* (Madrid: CERMI, 25 September 2012), available at: <http://www.cermi.es/en-US/Biblioteca/Pages/Inicio.aspx?TSMElPub=13> last accessed 27 April 2015), p. 10. CERMI indicated specifically that “coerced sterilization and abortion must be deemed forms of violence against women, which must be eradicated and energetically condemned by the competent authorities of the European Union and its member states. Such acts may even go so far as to be equated to torture or inhuman or humiliating treatment for which they must be prosecuted and punished”, *ibid.* p. 12.

Juvenile Police Services

Spanish police forces have special divisions for cases dealing with children and other vulnerable persons at national, regional and local levels. The two most important units are the Group for Minors (“GRUME”) and the Team for Women and Minors of the Civil Guard (“EMUME”). GRUME is mandated to protect children from any form of violence and protect juvenile offenders. It also “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.”¹⁰ EMUME is specialised mainly

in crimes involving women and children, but it also acts in cases involving people who are in situations of vulnerability for other reasons, such as persons, adults and children, with mental disabilities.

Although the intervention of these units has been extended in recent years due to the greater awareness of the need for support of these specialised groups to interview children, particularly children with mental disabilities, intervention of these specialised units is not compulsory.



Child participation in proceedings

Organic Law 1/1996 of 15 January on the Legal Protection of Minors ensured that all children have the right to participate, be informed, express their views and opinions, and be heard in matters affecting them.¹¹ The new wording of Article 9 of the *Organic Law 1/1996*, as it has been modified by the *Organic Law 8/2015, of July 22, modifying the system of protection of children and adolescents*, significantly improves the regulation of the right to be heard and listened to, which also explicitly deal with its exercise by children with disabilities, who cannot be subject to discrimination on the basis of disability in any proceedings, but who shall enjoy and exercise it on an equal basis with others. However, it is still considered, in accordance with the existing procedural norms, that while there is an obligation to hear the child in judicial or administrative proceedings that significantly affect their lives, according to their situation and evolutionary development, the child is in any case mature enough to exercise this right by himself or through a person designated to represent him only when he has already reached 12 years of age. However, with regard to administrative and civil judicial proceedings affecting children,

the Spanish legal system does not satisfactorily comply with these provisions. In practice, the child’s right to be heard has been subject to the determination of a judge who conducts an assessment of the minor’s discernment and ability to understand the situation. According with that, the judge may consider that the child’s participation is not appropriate and even reject the request for the child’s participation.

Findings of empirical research conducted in the course of this project revealed that although judges and prosecutors try to engage in dialogue with the child, they do not really “hear” the child’s opinion, views and wishes. Decisions on the placement of children are more likely to be based on other factors, such as a medical diagnosis and reports of psychologists and social workers.¹²

In addition, Spanish courts and administrative organisation are not adapted to the particular needs and stages of development of children, thus it is not child-friendly and not easily accessible to children.¹³

10 Save the Children Italia Onlus, *Minor Rights. Access to Justice for children at risk of social exclusion* (Roma: Save the Children Italia Onlus, s.a.), available at http://images.savethechildren.it/IT/it/img_publicazioni/img182_b.pdf (last accessed 27 April 2015), p. 111.

11 Marta Ballesteros, *Report on Spain for the Study on Member States’ Policies for Children with Disabilities* (Brussels: Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, European Parliament, 2013), available at [http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2013/474432/IPOL-LIBE_ET\(2013\)474432_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2013/474432/IPOL-LIBE_ET(2013)474432_EN.pdf) (last accessed 27 April 2015).

12 Information gathered through a focus group with the participation of staff members of the Tutelar Foundation for Persons with Mental and Intellectual Disabilities, two mothers of children with mental/intellectual disability living in the institutions maintained by the Foundation and a representative of the Spanish Ombudsman’s Office, Madrid: 4 April 2014.

13 Virginia Rodríguez, Yolanda Román and Almudena Escorial, *Infancia y Justicia. Una cuestión de Derechos. Los Niños y las Niñas ante la Administración* (Save the Children, November 2012), available at http://www.savethechildren.es/ver_doc.php?id=153 last accessed 27 April 2015).

Child victims and witnesses with mental disabilities

With regard to child victims with mental disabilities, there are no specific legal regulations or compulsory protocols, guidelines or standards on making adaptation to reflect their special needs. Child alleged offenders enjoy a more comprehensive and specialised legal and institutional framework than child victims and witnesses, even though it is not specifically referred to children with mental disabilities. Child alleged offenders are dealt with by judges and prosecutors specialised for minors who are trained to work with and for children, although the specialization not always means a sufficient compulsory formation. Child victims and witnesses are dealt with by regular courts and prosecutors who are not required to undergo specific training.¹⁴

Since 1999 the *Criminal Procedure Code* has been amended several times to include some minimum measures to protect children from secondary victimisation and the additional harm that implies¹⁵ both at investigative and at trial stage.¹⁶ Nevertheless, the majority of these measures are voluntary, so its effective implementation depends on the sensibility of the judges. Particularly in cases of sexual abuse, maltreatment and secondary victimisation suffered by children during court proceedings is an ongoing and regular concern.¹⁷

The *Law 4/2015, of April 27, on Crime Victims Statute* establishes some measures that will help improve some of the weaknesses of the current system, both in regard to children and victims with disabilities in need of special protection, among which can be included victims with mental disabilities.

Regarding the interview of children, there is a lack of material resources, such as adequate locations and audio-visual materials.¹⁸ There are some protocols and guidelines, such as the *Protocol on Police Action with Children*,¹⁹ which regulates how police should deal with children; however these do not focus on methods of communication and do not establish specific measures or procedures to ensure that interviews are respectful and appropriate. The *Circular 3/2009, of November 10th, from State Prosecutor General Office on protection of child victims and witness*, includes some recommendations and good practices relating children's interviews, but it does not mention explicitly children with mental disabilities.

According to information obtained through empirical research, the right for children with disabilities to be informed directly about their rights, the nature of the proceedings, their possible outcomes, and the decisions about their placement are not implemented properly.²⁰



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- 14 Information gathered through telephone interviews with the Child Prosecutor of the Provincial Court of Alicante on 26 March 2014, the Prosecutor of the Provincial Court of Ourense on 19 March 2014 and a disability law specialist and Legal Advisor of the Spanish Confederation of Organisations for Persons with Intellectual Disability (FEAPS) on 5 April 2014, and through a face interview with a lawyer of the Legal Aid Service for Minors of the Bar association of Madrid on 15 April 2014.
- 15 Organic Law 14/1999 of 14 July; Law 27/2003 of 31 July ; and Law 8/2006 of 4 December.
- 16 See Carolina Villacampa Estiarte, "Víctima menor de edad y proceso penal: especialidades en las declaraciones testificales de menores víctimas", *Revista de Derecho Penal y Criminología*, 2^a Época, 16 (2005), p. 265-299; Jaime Tapia Parreño, "Recientes reformas en materia de protección de menores víctimas en los procesos penales", *Diario La Ley* 6655 (2007), p. 1770-1779.
- 17 Save the Children, Italia ONIUS, *Minor Rights Access to Justice for children at risk of social exclusion*, page 98. Blanca Gómez Bengoechea, "Infancia y violencia", *Infancia en España: nuevos desafíos sociales, nuevas respuestas jurídicas* (Madrid: Comillas, 2009), p. 6.
- 18 Virginia Rodríguez, Yolanda Román and Almudena Escorial, *Infancia y Justicia. Una cuestión de Derechos. Los Niños y las Niñas ante la Administración*.
- 19 Approved by Instruction 11/2007 of 12 September from State Security Secretary.
- 20 Information gathered through a focus group with the participation of staff members of the Tutelar Foundation for Persons with Mental and Intellectual Disabilities, two mothers of children with mental/intellectual disability living in the institutions maintained by the Foundation and a representative of the Spanish Ombudsman's Office, Madrid: 4 April 2014.

Alleged child offenders and the juvenile justice system

The general legal framework of the Spanish juvenile justice system is established by *Organic Law 5/2000 of 12 January on the criminal responsibility of minors*,²¹ which has been supplemented by *Royal Decree 1774/2004 of 30 July*,²² and several circulars of the Public Prosecutor's Office.²³ The law requires specialisation of judges, prosecutors and lawyers working in the juvenile justice system, the establishment of bodies responsible for the organisation of training programmes, and the intervention of an interdisciplinary Social Team, including a psychologist, a social educator and a social worker, which is mandated to determine the juvenile's psycho-social situation and also has an important role in mediation processes.²⁴ With regard to alleged child offenders with mental disabilities, however, there are no specific trainings for legal professionals, and the existing general trainings do not refer to disability either. Professionals

of forensic clinics and also professionals of Social Teams lack sufficient knowledge on children with disabilities, which often results in the inadequate assessment of the needs and situation of alleged child offenders, especially in respect of the adoption of precautionary measures.²⁵

There is a lack of alternatives to punishment for alleged child offenders. Also in cases in which social support would be more adequate, penalties than implied deprivation of liberty are often applied.²⁶ The major problems are detected before the entry of the child in the criminal justice system and after leaving it, because of the absence of sufficient services to prevent the commission of crimes by children with behavioural problems and in social risk and recidivism, mainly due to financial constraints of public authorities²⁷.



21 This Act has undergone four amendments in 2000 (two), 2003 and 2006.

22 See Fundación Diagrama (ed.), *Comentarios al Reglamento de la Ley Orgánica 5/2000 de 12 de enero reguladora de la responsabilidad penal de los menores* (Magenta, 2008).

23 The most important of these is Circular 9/2011 on the criteria for the special prosecution unit for children.

24 Fourth additional provision of the Organic Law on the criminal responsibility of minors.

25 Information gathered through a face to face interview with a lawyer from the Legal Service for Minors of the Bar association of Madrid on 15 April 2014, through telephone interviews with the Child Prosecutor of the Provincial Court of Alicante on 26 March 2014, and through a focus group on alleged child offenders with mental disability with professionals of the Diagrama Foundation on 25 March 2014.

26 Manuel Jesús Dolz Lago, "La ley penal del menor española una década después (2001-2011)", *Anuario de justicia de menores*, 11 (2011), p. 25.

27 Information gathered through a telephone interview with the Judge for Minors of Granada on 26 March 2014 and through a face to face interview with the Technical Head of the Health and Social Policy Department of the Ombudsman's Office on 28 March 2014.

Training of professionals

In order to increase the effectiveness of the work of Psychosocial Teams of family courts, the Ombudsman made two recommendations to the Ministry of Justice in 2009 on the need for specialised team members.²⁸ In 2014 they published a study on the importance of provide specific training skills for dealing with minors for the professionals with responsibility in family proceedings and judicial review of protective measures²⁹.

The *Organic Law 8/2015, of July 22, modifying the system of protection of children and adolescents* establishing the obligation, through the amendment of Article 2 of the *Organic Law 1/1996 of 15 January on the Legal Protection of Minors*, to guarantee in all proceedings affecting children the intervention of qualified professionals or experts; if necessary these professionals must have sufficient training to determine the specific needs of children with disabilities.

The *Law 4/2015, of April 27 on Crime Victims Statute* establishes, in Article 30.1, the obligation to ensure general and specific training of all professionals in the justice system in the protection of victims in criminal proceedings, and notes this training will pay particular attention to victims in need of special protection, victims with special vulnerability factors, child victims

and victims with disabilities. In a study published in 2015, the Ombudsman recommended conducting training programs on this particular legislative provision with a specific focus on child victims.

The need for training of professionals working in the justice system on disability has been highlighted in the concluding observations of the Committee on the Rights of Persons with Disabilities,³⁰ and also by CERMI, which in its 2012 report insisted on the establishment of an office specialised in protecting the rights of people with disabilities and vulnerable adults.³¹ CERMI's 2011 report also stated that access to justice for these people "is affected by the high degree of stigma, which translates into little credibility due to their particular type of disability; this discourages them from making complaints and makes it less likely for situations of abuse to be detected. People with this type of disability tend to self-stigmatise due to their fear of retaliation. Therefore flagrant violations of rights go unnoticed and are not even reflected in statistics. In order to ensure access to justice beyond formal channels, in addition to measures for the prevention and detection of abuse, legal practitioners involved in the justice system need to receive training, as do the law enforcement agencies."³²



28 Recommendation of the Ombudsman No. 60/2009 of 19 May on Psychosocial Teams of courts with expertise in family law and No. 131/2009 of 24 November on the selection of the members of the Psychosocial Teams of courts in family law matters.

29 Study of the Ombudsman on *the hearing and best interest of minors*. Judicial review of protective measures and processes on family, Madrid, May 2014, available at <https://www.defensordelpueblo.es/wp-content/uploads/2015/05/2014-05-Estudio-sobre-la-escucha-y-el-interes-superior-del-menor.pdf>.

30 Committee on the Rights of Persons with Disabilities, Concluding Observations of the Committee: Spain, CRPD/C/ESP/CO/1, 19 October 2011, para. 20.

31 Spanish Committee of Representatives of Persons with Disabilities, *Human Rights and Disability. Spain Report 2012* (CERMI, 2013), available at <http://www.cermi.es/en-US/Biblioteca/Pages/Inicio.aspx?TSMElidPub=18> (last accessed 27 April 2015).

32 Spanish Committee of Representatives of Persons with Disabilities, *Human Rights and Disability. Spain Report 2011* (CERMI, 2011), available at <http://www.cermi.es/en-US/Biblioteca/Lists/Publicaciones/Attachments/14/Human%20Rights%20and%20Disability%202011.pdf> (last accessed 27 April 2015), p. 25.

Legal aid

The Spanish Bar Associations have a free specialised legal advice service for children, but this service only intervenes in criminal cases involving alleged child offenders. Minor victims of crime, may also receive free legal aid, but from the general service of the Bar Associations.

Law 1/96 of 10 January on legal aid has been modified recently,³³ and states, in Article 2 g), that “regardless of the existence of means to litigate, the right to legal aid is recognised, which shall be provided immediately, to victims of gender violence, terrorism and human trafficking in those processes that are linked to, arise or are a result of their status

as victims, as well as minors and persons with mental disabilities when they are victims of situations of abuse or maltreatment”. The weakness of this provision, as noted by the Spanish Committee of Representatives of Persons with Disabilities,³⁴ is that it only ensures legal aid for children with mental disabilities in cases of abuse and maltreatment, instead of ensuring legal aid for all children with disabilities in all situations in which their rights and interests have been violated. Similarly, the report “Children and Justice: A Matter of Rights”, developed by Save the Children, highlights that legal aid provided under such schemes to children remain insufficient.



Statistical data

There is a significant lack of statistical data on children with mental disabilities in general, because available data on children are rarely disaggregated by impairment-type. The lack of data is striking in the areas below:

- children with mental or intellectual disabilities living in institutions;
- child victims with mental disabilities;
- cases in which violence against children generally, children with disabilities and children with mental disabilities in particular is perpetrated by people in their circle of trust; and

- unreported crimes against children with mental disabilities.³⁵

The National Statistics Institute publishes an annual statistical report on juvenile offenders. Systematic collection of data is disaggregated by sex, age and nationality, criminal offence and measures adopted, but not by impairment.³⁶



33 By Royal Decree-Law 3/2013 of 22 February.

34 See Note on Disability contents of the Royal Decree-Law 3/2013 of 22 February amending the rules on fees in the field of administration of justice and the legal aid system.

35 According to the opinion of most of the participants in interviews and focus groups the “hidden number” is very high, higher than unreported cases of violence of children and persons with disabilities in general.

36 Data is available in the database of the National Statistical Institute, at <http://www.ine.es/jaxi/menu.do?type=pcaxis&path=/i18/p467&file=inebase> (last accessed 27 April 2015).

