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MiRI Minor's Right to Information in EU civil actions

National Report

SPAIN

Children's right to information in civil proceedings in Spain

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1. The nature of the right to be heard in Spanish civil procedure[1]

1. In Spain, until 2005 the hearing of those minors involved in civil proceedings was considered compulsory on the basis of **article 9 of the Organic Act 1/1996 on the legal protection of children and young people, of January 15th, which partially modifies the Civil Code and the Civil Procedure Act**[2] in combination with article 12 of the **Convention on the Rights of the Child, of November 20th, 1989**[3] and articles 92(6) and 159 of the **Civil Code of July 24th, 1889**[4], as amended. This compulsory nature was endorsed by the **Spanish Constitutional Court** in its **Judgments 221/2005, of November 25th, 2002**[5], **152/2005, of June 2nd, 2002**[6] and **17/2006, of January 30th, 2006**[7] which considered the hearing an essential procedural step whose omission may negatively affect the fundamental right to effective judicial protection embodied in article 24(1) of the Spanish Constitution of 1978.

[1] BOE: Boletín Oficial del Estado (Spanish Official Journal); CE: Spanish Constitution; CPA: Civil Procedure Act; GM: Gaceta de Madrid (Former name of the Spanish Official Journal); LOPJ: Organic Act of the Judiciary Power; STS: Judgment of the Supreme Court.
[2] *BOE*, 01.17.1996.
[3] *BOE*, 12.31.1990.
[4] *GM*, 07.26.1889.
[5] ECLI:ES:TC:2002:221.
[6] ECLI:ES:TC:2005:152. As regards this Judgment, consider MARIN LOPEZ, M.J.: "Tutela judicial efectiva y audiencia del menor en los procesos judiciales que le afecten", *Derecho Privado y Constitución*, 2005 (enero-diciembre), no. 19, p. 167 ff.
[7] ECLI:ES:TC:2006:17.

2. However, this situation changed in 2005. The **Organic Act 15/2005, of July 8th, which modifies the Civil Code and the Civil Procedure Act as regards separation and divorce**[8] modified the wording of **article 92(6) of the Civil Code** and the hearing was no longer considered compulsory: "*In any event, before decreeing the care and custody system, the Judge shall ask the opinion of the Public Prosecutor and hear the minor who has sufficient maturity, if this is deemed necessary on his own motion or at the request of the Public Prosecutor, the parties or members of the Court Technical Team, or the minor himself, ...*" This provision must be approached in conjunction with **article 9 of the Organic Act 1/1996 on the legal protection of children and young people, of January 15th** which also supports this approach. The hearing of the minor is now approached more as a right of the minor –under 12- to be heard than as an obligation for the judge to hear him or her[9].

The change in the nature of the hearing was endorsed by the Spanish Constitutional Court in its **Judgment 163/2009, of June 29th, 2009**[10] which considers that the "*hearing of the minor is no longer conceived as having an essential nature, because the knowledge of the minor's opinion can be obtained through certain persons (art. 9 of the Organic Law 1/1996) and will only be compulsory when deemed necessary ex officio or at the request of the Public Prosecutor, parties to the proceeding or members of the judicial technical team, or the minor himself (art. 92.6 CC).*"[11] Taking into account, **as the Judgment of the Constitutional Court 22/2008, of January 31st, 2008**, the maturity of the minor, that is, the right of the minor to be heard depends directly on the fact of his or her ability to "*form his or her own mind*"[12], without providing elements to construct what this actually means[13].

However, as it will be seen in the following pages, the whole approach to the hearing is affected by the discussion existing in Spain as regards its specific nature in the framework of the Civil procedure.

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[8] *BOE*, 07.09.2005.

[9] Vid. ZAERA NAVARRETE, J.I.: "La audiencia al menor en los procesos de crisis matrimoniales. Comentario a la STS núm. 413/2014, de 20 de octubre (REC. 1229/2013)", *Actualidad Jurídica Iberoamericana*, núm. 3, agosto 2015, pp. 797 and 802-804; CALVO SANJOSÉ, M.J.: "La reforma del sistema de protección a la infancia y a la adolescencia (Ley Orgánica 8/2015, de 22 de junio y Ley 26/2015, de 28 de julio)", *Ars Iuris Salmanticensis*, 2016, vol. 4, p. 34; MARÍN LÓPEZ, M.J.: *cit*., pp. 188-190.

[10] ECLI:ES:TC:2009:163.

[11] Legal ground 5.

[12] Legal ground 7.

[13] See, PÉREZ GALÁN, M.: "La exploración/audiencia de los menores en los procesos de familia", *Diario La Ley*, no. 8866, Sección Tribuna, 11.18.2016, Ref. D-404.

2. The children's right to be informeds an essential component of the right to be heard and to participate

2.1. The current situation of the right to be heard in the Spanish legal system: national legislative provisions

3. **Article 39** of the **Spanish Constitution of 1978**[14] establishes the obligation for the public authorities in Spain to ensure social, economic and legal protection of the family, especially of minors, pursuant to the international agreements that safeguard their rights[15].

Standing on this mandate, the **Civil Code of July 24th, 1889**[16], as amended, and the **Legal Protection of Children and Young People Organic Act 1/1996, of January 15th, 1996**[17], as amended, are the two major regulatory bodies for the rights of minors in Spain. Both of them guarantee a uniform protection of minors throughout the country. They also constitute the two basic references for the legislation enacted by the several Autonomous Communities as regards minors, pursuant to their powers in such matters.

In the specific field of the right of the children to be heard in civil procedures, attention must be also paid to **Law 1/2000, of January 7th, 2000 on the Civil Procedure Act**[18], as amended, which sets forth specific standards and rules to implement this right in this area.

4. The right of the Children to be heard in civil procedures is fully supported by the Spanish legal system. This right is explicitly enshrined in:

A) The **Spanish Civil Code** envisages the hearing of the minor as regards different proceedings to be developed in the field of family law[19]. For instance:

a) Marital crisis' cases: **Article 92(6) of the Civil Code** as regards, solely, to care and custody proceedings states that, "*In any event, before decreeing the care and custody system, the*

[14] *BOE*, 12.29.1978.
[15] And it is considered part of the fundamental right to Access to justice embodied in article 24 of the Spanish Constitution. Note, SÁNCHEZ MARTÍN, P.: "El procedimiento contencioso de crisis matrimonial", in AA.VV.: *Las crisis matrimoniales*, Valencia, Tirant Lo Blanch, 2010, p. 444. Also, NUÑEZ RIVERO, C. & ALONSO CARVAJAL, A.: "La protección del menor desde un enfoque del Derecho Constitucional", *Revista Derecho UNED*, 2011, no. 9, p. 273 ff.
[16] *GM*, 07.26.1889.
[17] BOE, 01.17.1996.
[18] *BOE*, 08.01.2000.
[19] An analysis of this regulation may be found at: MARÍN LÓPEZ, M.J.: *cit*., pp. 173-178.

Judge shall ask the opinion of the Public Prosecutor and hear the minor who has sufficient maturity, if this is deemed necessary on his own motion or at the request of the Public Prosecutor, the parties or members of the Court Technical Team, or the minor himself, and evaluate the parties' allegations at the hearing and the evidence practised therein, and the relationship between the parents themselves and with the children thereof to determine the suitability of the custody system."

The obligation of the judge to hear the minor "*when deemed necessary*" refers only to the care and custody system and is subject to the ascertainment of the sufficient maturity of the minor[20].

b) As regards parental authority, article 154(III) of the Civil Code states that "*If the children should have sufficient judgment, they must always be heard before adopting decisions that affect them*".

Also **article 159** refers to the hearing of the minor when stating that, "*If the parties live separately and are unable to decide by common consent, the Judge shall decide, always for the benefit of the children, in the custody of which parent the underage children are to remain. The Judge, before taking this measure, shall hear the children who have sufficient judgment and, in any event, those older than twelve*".

c) In relation to the adoption, **article 177(3)(3) of the Civil Code** states that "*3. The following persons must simply be heard by the judge: ... 3. The adoptee who is younger than twelve, if he should have sufficient judgment*".

d) As regards guardianship article 231 of the Code sets forth that "*The Judge shall constitute the guardianship, after hearing the nearest relatives, any persons deemed convenient and, in any event, the ward, if he should have sufficient judgment, and always if he should be older than twelve*". This reference to the hearing of the ward is also embodied in articles 237(II), 280 of the Civil Code.

e) Reference to the hearing of the minor is also envisaged in the field of family's child fostership. Article 173 which states that the "*Foster care shall be executed in writing, with the consent of... the minor if he should be older than twelve years old*".

B) In addition to this provision, **article 777 of the Law 1/2000, of January 7th, 2000 on the Civil Procedure Act** sets forth special rules for those cases in which minor children are

[20] As regards this notion, see MARÍN LÓPEZ, M.J.: *cit.*, pp. 199-201.

involved in separation or divorce proceedings concluded by mutual agreement or by one of the spouses with the other's consent.

In accordance with **paragraph 5 of article 777**, "*Should there be any minor children or disabled persons be involved, the Court shall seek the Public Prosecution Service's report on the terms of the agreement with regard to the children and it shall hear the minors, should they have sufficient capacity, wherever the court may deem it necessary on an ex officio basis or at the request of the prosecutor, the parties, members of the court's technical team or the minor themselves. Such procedures shall be conducted within the time limit referred to in the preceding paragraph and, should such time limit have not begun, within five days*." Again, the hearing of minors in the framework of the proceedings is subject to the ascertainment of their sufficient maturity (although the provision, in this occasion, uses the term "capacity").

In any case, and in accordance to **article 770(I)(4) *in fine* of the Civil Procedure Act**, should the judge decide, on his/her own or at the request of third persons or the minor himself/herself, to hear him/her in the course of the proceeding, the judge "*shall ensure that any questioning of minors in civil proceedings is conducted under suitable conditions to safeguard their interests without interferences from other people, exceptionally making use of the help of specialists wherever necessary*." As we will see later, this reference to the "*exceptional*" intervention of specialists is also embodied in **Article 18(2)(4) of the Act 15/2015 of July 2nd, 2015**[21]**, on non-contentious proceedings** and **article 9(1) of the Legal Protection of Children and Young People Organic Act 1/1996**, as amended[22].

In comparison with the previously mentioned **article 92(6) of the Civil Code**, this provision refers to any civil proceedings in general, not only as regards care and custody proceedings. And requires that in case the "*questioning of minors*" is necessary, this will take place in a manner that fully safeguards "their interests" [23].

Traditionally, the hearing of the minor in civil cases does not constitute a means of proof, but a judicial activity to enable the minor to exercise a right granted on him/her[24]. However, this

[21] *BOE*, 07.03.2015.
[22] See HERNANDO VALLEJO, M.: "La audiencia del menor recabando el auxilio de especialistas", in ABEL LLUCH, X.: *Las audiencias del menor en los procesos de familia*, Madrid, Sepin, 2019, p. 63 ff.
[23] As regards these provisions, consider MARÍN LÓPEZ, M.J.: *cit*., pp. 179-182.
[24] CASO SEÑAL, M. & ATARES GARCIA, E.: "Naturaleza jurídica", in ABEL LLUCH, X.: *cit.*, 2019, pp. 27-28; CAMPO IZQUIERDO, A.L., "La audiencia de menores", *Diario de las Audiencias del El Derecho editores*, nº. 496, 06.09.2006, p. 1.

issue is growingly under dispute and a discussion between a "rights of the minor approach" and a much more procedural approach to the hearing of the minor is taking place in recent years[25].

Finally, **article 778 quinquies(8) of the Civil Procedure Act** sets forth a rule specifically as regards International Child Abduction. The provision states that, "*8. Prior to passing any decision in relation to the suitability or unsuitability of the reinstatement of the minor or their return to their place of origin, the Judge, at any time during the process and in the presence of the Public Prosecution Service, may hear the minor separately, unless this hearing is considered inappropriate given their age or level of maturity, which will be recorded in a grounded decision*

When cross examining the minor it will be ensured that they may be heard in ideal conditions which safeguard their interests, without interference from other people, and, exceptionally, calling on assistance from specialists where this should be necessary. This act may be carried out via video conferencing or another similar system."

C) This general principle is further developed and broadened in **the Legal Protection of Children and Young People Organic Act 1/1996, of January 15th, 1996**.

Article 2(2) of the Act embodies several criteria to be taken into consideration for the purposes of interpreting and applying the minor's best interest in each case, without prejudice to those criteria established in the applicable specific legislation, as well as any others that may be deemed appropriate, given the specific circumstances surrounding each case. The provision refers to, among some others, to "*b) Taking into consideration the minor's wishes, feelings and opinions, as well as their right to gradually participate -depending on their age, maturity, development and personal growth- in the process to determine their best interest*." In any case, paragraph 3 of this article states that all these criteria referred to shall be weighted taking some general elements into consideration. The first one of these elements is "*a) The minor's age and maturity*".

In addition to that, **article 9 of the Organic Act 1/1996, of January 15th, 1996** refers, for the first time, to both the right to be heard and the right to be informed not only in judicial proceedings but also in any administrative or mediation proceedings. This right depends on the age and maturity of the minor.

Thus, **article 9(1) of the Legal Protection of Children and Young People Organic Act 1/1996** explicitly recognizes that "*Minors have the right to be heard and listened to without any*

[25] See, GONZÁLEZ DEL POZO, J. P.: "Medios de prueba", in HIJAS FERNÁNDEZ, E. (Coord.): *Los procesos de familia: Una visión judicial*, Madrid, Colex, 2009, p. 493 ff.; LÓPEZ YAGÜES, V.: *La prueba del reconocimiento judicial en el proceso civil*, Madrid, La Ley, 2005, p. 195.

discriminations on grounds of age, disabilities or any other circumstance, both within their family environment and in any administrative proceeding, judicial procedure or mediation proceeding affecting them and leading to a decision impacting their personal, family or social environments, and their opinions will be duly taken into account, depending on their age and maturity." To that end, the provision states that "*minors must receive information allowing them to exercise this right in a comprehensible language and accessible formats adapted to their circumstances*."

In those cases, in which the hearing of minors directly or through the person representing them is denied in administrative or judicial channels, **article 9(3) of the Organic Act 1/1996** states that "*the decision shall be motivated by the minor's best interest and communicated to the prosecuting authority, the minor and, where appropriate, their custodian, explicitly detailing any existing appeals against the decision*."

In line with the mandate of the previously mentioned **article 770(I)(4) *in fine* of the Civil Procedure Act**, **article 9(1) of the Legal Protection of Children and Young People Organic Act 1/1996**, adds that in any judicial procedure and administrative proceedings, "*appearance or hearings of minors shall be preferential and shall be conducted in an appropriate manner given their situation and evolutionary development -with the assistance, where necessary, of qualified professionals and experts-, taking care to preserve their privacy and using a language comprehensible to them, in accessible formats adapted to their circumstances, whereby they are informed both of the question being posed and of the repercussions of their opinion, subject to full compliance with the guarantees of the procedure*."

The Spanish legislator states that this right must be guaranteed and, to this end, the assessment of the maturity of the minor becomes very relevant. In this sense, **article 9(2) of the Organic Act 1/1996** sets forth that "*Minors shall be guaranteed the ability to exercise this right by themselves or through the person they may appoint on their behalf provided they are mature enough*". The assessment of the maturity must be made by "*specialised personnel, taking into account both the minor's evolutionary development and their ability to understand and assess the specific issue at hand in each case. At any rate, they shall be deemed to be sufficiently mature at the age of twelve.*"

In order to ensure that minors are able to exercise this right by themselves, **article 9(2) of the Legal Protection of Children and Young People Organic Act 1/1996** states that the minor "*shall have the assistance, where appropriate, of interpreters*". And adds that "*Minors may express their opinion verbally or through non-verbal forms of communication*." Nevertheless, "*should this not be possible or in the minor's best interest, their opinion may be made known by*

their legal representatives, provided they have no interest that conflict with the minor's, or through other people that, due to their occupation or special relationship of trust with them, are able to deliver it objectively."

In any case, and as **article 9(3) of the Organic Act 1/1996** states, in "*decisions on background, the results of the hearing with the minor and their assessment must be mentioned, where appropriate*."

D) In addition to the previous pieces of legislation, this obligation to hear the minor is also stressed by the Spanish legislator as regard non-contentious proceedings. **Article 18(2)(4)(I) and (II) of the Act 15/2015 of July 2nd, 2015, on non-contentious proceedings** establishes, regarding the appearance in court, that *"(W)here the proceeding affects the interests of a minor or an individual whose capacity has been modified by a court, any formalities relating to those interests which are ordered ex officio or at the request of the public prosecution service shall also be carried out at the time or, where that is not possible, within then days*". To this respect, *"(T)he judge or the court clerk may decide to hear the minor or individual whose capacity has been modified by a court in a separate session, without the interference of other individuals, by with the public prosecution service being able to attend. In any event, guarantees are provided regarding their ability to be heard under ideal conditions, in terms which are accessible and comprehensive to them and suited to their age, maturity and circumstances, receiving help from specialists where necessary*".

Based on that examination, **article 18(2)(4)(III)** of the Act on non-contentious, states that "*a detailed report shall be issued and, wherever possible, an audio-visual recording shall be made. If the examination takes place after the appearance, the relevant report shall be passed to the parties to enable them to make statements within five days*".

The reference embodied in **article 18(2)(4)(III) of the Act** to the issuance of "*a detailed report… and wherever possible, an audio-visual recording shall be made" that "shall be passed to the parties to enable them to make statements*" is in contradiction with the reference to the request made by **article 9(1) of the Legal Protection of Children and Young People Organic Act 1/1996** to ensure that the appearance of the minor in any judicial procedure and administrative proceeding, "*shall be preferential and shall be conducted in an appropriate manner given their situation and evolutionary development … taking care to preserve their privacy*" and with the philosophy underlying **article 770(I)(4) *in fine* of the Civil Procedure Act** that oblige the judge

to ensure that during the hearing "*any questioning of minors in civil proceedings is conducted under suitable conditions to safeguard their interests without interferences from other people".* This difference has fuelled the debate as regards the nature of the hearing and has led to some procedurally orthodox solutions that, however, may be harmful for the minor, the exercise of her or his right to be heard and the preservation of his or her superior interests.

The outcome of the proceedings that affect the interests of the minor, according to **article 19(2)** of the Act, "*may be based on any of the facts contained in the statements by the parties or the evidence, or which came to the light at the court appearance*…", for example, by the minor.

5. All these provisions stand on two basic principles: minors must be heard but only when the judge considers that he or she has enough "maturity" (or age). This notion of "maturity" is vague and must be interpreted by the judge and assessed in every case in accordance with the circumstances surrounding the specific case. In Spain, the most explicit reference to the meaning of "maturity" can be found in **article 9(3)(c) of the Act 41/2002, of November 14th, 2002, on the fundamental regulation of patient's autonomy and rights and obligations regarding information and clinical documentation**[26]. The provision states that "3. *Consent by proxy will be granted in the following cases: … c) When the minor patient is not intellectually or emotionally capable of understanding the scope of the intervention. In this case, consent will be given by the minor's legal representative, after having heard his or her opinion, in accordance with the provisions of article 9 of Organic Law 1/1996, of January 15, on the Legal Protection of Minors*."

2.2. Relevant supranational provisions on minors for the Spanish legal system

6. Spanish authorities are also bound by several international agreements and instruments to which Spain is a party, that include different obligations, and levels of obligations, regarding minors. Reference can be made to[27]:

A) **Article 24** –"*The rights of the child*"- of the **Charter of Fundamental Rights of the European Union**[28]. The provision declares that: "*1. Children shall have the right to such*

[26] *BOE*, 11.15.2020.
[27] All italics in the provisions are by the authors.
[28] *DO* C 326, 10.26.2012.

protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. …"

B) **Convention on the Rights of the Child, of November 20th, 1989** whose article 12 makes an explicit reference to the right of the minor to be heard in any procedure that affects him / her: "*1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

2. ***For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law***."

C) Article 7 –"Children with disabilities"- of the **Convention on the Rights of Persons with Disabilities, of December 13th, 2006**[29] clearly states that[30]: "*1. States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.*

2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.

3. ***States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right***."

D) **The Hague Convention on Civil Aspects of International Child Abduction, of October 25th, 1980**[31] stresses in **article 13**, that "*The judicial or administrative authority may also*

[29] *BOE*, 04.21.2008.
[30] Also consider, art. 23.
[31] *BOE*, 10.24.1987.

refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views".

E) **The Hague Convention regarding Protection of Children and Co-operation in Respect of Intercountry Adoption, of May 29th, 1993**[32]. Article 4 states that "*An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin - ... d) have ensured, having regard to the age and degree of maturity of the child, that (1) he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required,*

(2) consideration has been given to the child's wishes and opinions, …".

F) **The European Convention on the Adoption of Children of November 27th, 2008**[33] states in its article 6 -"*Consultation of the child*"- that "*If the child's consent is not necessary according to Article 5, paragraphs 1 and 3, he or she shall, as far as possible, be consulted and his or her views and wishes shall be taken into account having regard to his or her degree of maturity. Such consultation may be dispensed with if it would be manifestly contrary to the child's best interests*."

G) Article 31 –"*General measures of Protection*"- of the **Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, October 25th, 2007**[34] mentions that, "*6. Each Party shall ensure that the information given to victims in conformity with the provisions of this article is provided in a manner adapted to their age and maturity and in a language that they can understand*."

H) Article 6 –"*Decision-making process*"- of the **European Convention on Exercise of the Rights of Children, January 25th, 1996**[35] stresses that "*In proceedings affecting a child, the judicial authority, before taking a decision, shall: ... b) in a case where the child is considered by internal law as having sufficient understanding:*

– ensure that the child has received all relevant information;

[32] *BOE*, 08.01.1995.
[33] *BOE*, 07.12.2011.
[34] *BOE*, 11.12.2010.
[35] *BOE*, 02.21.2015.

– consult the child in person in appropriate cases, if necessary privately, itself or through other persons or bodies, in a manner appropriate to his or her understanding, unless this would be manifestly contrary to the best interests of the child;

– allow the child to express his or her views;

c) give due weight to the views expressed by the child."

And, also to

I) **The Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, of November 23rd, 2007**[36] and its **Protocol**[37]

J) **The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of parental authority and measures to protect children, of May 28th, 2010**[38].

K) Reference must be also made to the **Council Regulation (EC) no. 2201/2003, of November 27th, 2003, concerning jurisdiction and the recognition of judgments in matrimonial matters and matters of parental authority, repealing Regulation (EC) no. 1347/2000**[39]. That will soon be replaced –1 August 2022- by **Council Regulation (EU) 2019/1111 of June 25th, 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction**[40].

As well as to the,

L) **European Charter of Rights of the Child - Resolution on a European Charter of Rights of the Child (A3-0 172/92)**[41] which states in no. 8.14 that: "*Any decision regarding a child taken by its family, the administrative authorities or the courts must have as its prime aim the protection and safeguarding of the child's interests. To this end, provided that it involves no risk or prejudice to him, the child must be heard as soon as he is old enough and reaches sufficient intellectual maturity, regarding all decisions affecting him. So as to assist the competent persons to reach a decision, the child must in particular be heard in all proceedings and decisions*

[36] *OJ* L 93, 04.07.2011.
[37] *BOE*, 12.16.2009.
[38] *BOE*, 12.02.2010.
[39] *OJ* L 299, 11.18.2003.
[40] *OJ* L 178, 07.02.2019.
[41] *OJ* C 241, 09.21.1992.

involving a change in the exercise of parental authority, the allocation of care or custody, the appointment of a legal guardian, his adoption or placing in a home, educational institution or reintegration into society. For this purpose the Attorney-General 's office shall be party to all proceedings and its chief role shall be to safeguard the child's rights and interests."

3. National case law

7. The Supreme Court has stressed in many occasions the need for the minor to be heard in cases regarding Family law in accordance with the Civil Code, the Civil Procedure Code and the Legal Protection of Children and Young People Organic Act 1/1996. This right is subject to the assessment of their maturity. In any case, this maturity is deemed to exist when they are of the age of twelve in accordance to article 9(2) of the Organic Act 1/1996.

8. Nevertheless, many authors consider that between 12 and 18 years-old there are many different levels of maturity and this should be taken into account by the judge. Because of that, the notion of "matured minor" is used to refer to those who are 16-18 years old[42].

9. Spanish case law has dealt with several issues relating to the hearing of the minor and provides for responses to them. Although many issues are still open. Specially as regards the specific way to actually implement it.

3.1. The need to hear the minor

10. The **Judgment of the Supreme Court (STS) 4032/2020, of November 30th, 2020**[43], reiterates once again the position maintained by the Court for long time –e.g. **STS 157/2017, of March 7th, 2017**[44] or **STS 18/2018 of January 15th, 2018**[45]- stressing that "*this Chamber has repeatedly ruled on the need to be heard by the minor in the procedures that directly affect them*[46]". However, as we will see in the following pages, the analysis of the existing Spanish case law fosters the

[42] See CARTIÉ JULIÀ, M., JOUNOU BARNAUS, T. & ORTÍ LLORET, M.: "La audiencia del menor y la audiencia del 'menor maduro', in ABEL LLUCH, X.: *cit*., p. 43.
[43] ECLI: ES:TS:2020:4032.
[44] https://supremo.vlex.es/vid/672187541, legal ground Second, no. 5.
[45] ECLI: ES:TS:2018:41, legal ground Second, no. 2.
[46] Legal ground Two.

understanding of the right for the minor to be heard in all proceedings affecting him or her to be still "under construction" and needs further interpretation and development of its exact meaning and scope[47].

3.2. But this "need" to hear the minor does not constitute a duty for the judge but a possibility for him / her to listen to the minor

11. The Spanish **Constitutional Court** in its **Judgment 163/2009, of June 29th, 2009** declares that the hearing of the minor has no longer an essential –in the sense of compulsory- character and that although it is very relevant, it is for the judge to decide, taking into account the situation, age and maturity of the minor and the circumstances of the case, to carry it out. The Court states that, taking into account the legislation in force in this area, "*the Courts deduce that the hearing of the minor is no longer conceived as having an essential nature, being thus that the knowledge of the minor's opinion can be substantiated through certain persons (art. 9 of Organic Law 1/1996) and will only be required when it is deemed necessary ex officio or at the request of the Prosecutor, parts or members of the judicial technical team, or the minor himself (art. 92.6 CC)*"[48].

12. In relation to this obligation, the **STS 413/2014 of October 20th, 2014**[49] declares, in line with other Judgments of the Supreme Court like **STS 157/2017, of March 7th, 2017**[50]; **STS 578/2017, of October 25th, 2017**[51]; **STS 18/2018 of January 15th, 2018**[52] or **STS 4032/2020, of November 30th, 2020**[53], that "*The apparent contradiction between the Civil Code and the Civil Procedure Act has been clarified by the Law of the Minor and by the Convention on the Rights of the Child, in the sense that when the minor's age and maturity presume that they have sufficient judgment and, in any case, those over 12 years of age, must be heard in the legal proceedings in which it is resolved on their custody and custody, without the party being able to renounce to the proposition of said test, having to agree on it, where appropriate, the judge ex officio*"[54].

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[47] To this respect, note, NUÑEZ RIVERO, C. & ALONSO CARVAJAL, A.: *cit*., pp. 275-275.
[48] Legal ground 5.
[49] https://supremo.vlex.es/vid/543432634. As regards this Judgment, note ZAERA NAVARRETE, J.I.: *cit*., p. 793.
[50] Legal ground Second, no. 5.
[51] https://supremo.vlex.es/vid/696139157, legal ground Second, no. 2.
[52] Legal ground Second, no. 2.
[53] Legal ground Second.
[54] Legal ground Five.

3.3. The rejection to hear the minor is for the judge to be decided, but his / her decision must be always grounded

13. **Article 9(1) of the Legal Protection of Children and Young People Organic Act 1/1996** sets forth that in any judicial procedure and administrative proceeding, "*appearance or hearings of minors shall be preferential and shall be conducted in an appropriate manner given their situation and evolutionary development…".* In line with that principle, number (2) of this provision states that "*Minors shall be guaranteed the ability to exercise this right by themselves or through the person they may appoint on their behalf provided they are mature enough… At any rate, they shall be deemed to be sufficiently mature at the age of twelve.*" And adds that "*Minors may express their opinion verbally or through non-verbal forms of communication*." Nevertheless, "*should this not be possible or in the minor's best interest, their opinion may be made known by their legal representatives, provided they have no interest that conflict with the minor's, or through other people that, due to their occupation or special relationship of trust with them, are able to deliver it objectively*."

This reference to the best interest of the minor constitutes a public policy principle binding for all Spanish Courts[55], and is interpreted by the **Provincial Court (Court of Appeal) of Valladolid in its Judgment 175/2006, of May 24th, 2006**[56]. According to the Court, article 9 of the Act must be interpreted in "*terms of great breadth and flexibility*" and taking into account all its numbers which are related among themselves and serve the essential goal of the "*protection of the interests of the minor that are satisfied, not only when he is heard but also when hearing is not granted in those cases in which the judge does not consider it necessary (…) or it is not in the interest of the minor (…). The interests of the minor that are protected in art. 9 contemplate the right to be heard, that can be exercised directly (section 2 first paragraph) or through its legal representatives when it is not possible or does not suit their interest (section 2 paragraph second), such as the possibility of not being it when the Judge denies such right in resolution motivated, which obviously must respond to a possible damage to the minor who could derive from the hearing and that must be resolved in each case according to the circumstances concurrent*."[57]

[55] In accordance to PARRA LUCÁN, M.A.: "El principio del interés del menor en la jurisprudencia", in PICO i JUNOY, J. & ABEL LLUCH, X. (dirs): Problemática actual de los procesos de familia. Especial atención a la prueba, Barcelona, JMBosch, 2018, pp. 34-44.
[56] ES:APVA:2006:568.
[57] Legal ground One.

3.4. The rejection of the hearing "*in the minor's best interest*"

14. The Supreme Court, following the **Judgment of the Spanish Constitutional Court of June 6th, 2005**[58], repeatedly manifests –**STS 18/2018 of January 15th, 2018**[59] or **STS 413/2014 of October 20th, 2014**[60]- that these kind of decisions need to be grounded in order to be valid: "*In order for the judge or court to decide not to implement the hearing, in the interest of the minor, it will be necessary to resolve it in a reasoned manner*". As previously stated, the best interest of the minor constitutes a public policy principle to be always taken into account by Spanish Courts[61].

The Supreme Court –e.g. **STS 18/2018, of January 15th, 2018**- admits the possibility for the judge to reject hearing the minor, with the obligation of rendering a grounded decision, "*due to the lack of maturity of the minor or because the interest of the minor is put at risk… The goal is to avoid that the direct hearing of the minor causes to him or her a worse damage than the one intended to conjure. But for this to be implemented, it will be necessary for the court to motivate it, or that, in response to that interest, it could be considered to be more appropriate for the examination to be carried out by an expert or to take into account the one already carried out*" [62].

3.5. The procedural stage to hear the minor

15. The special nature of the hearing makes more flexible the specific moment of its implementation, although it must always take place before any decision is taken by the judge. This is, for instance, stressed by the **Judgment of the High Court of Cataluña 39/2015 of May 25th, 2015**[63] when stating that it "*must be practiced prior to the decision-making*"[64].

16. In fact, the hearing can also take place when enforcing a judgment even *ex officio* as the **Order of the Provincial Court of La Rioja, 23/2018, of February 16th, 2018**[65] admits on the basis of

[58] ECLI:ES:TC:2005:153.
[59] Legal ground Second, no. 2.
[60] Legal Ground Five.
[61] PARRA LUCÁN, M.A.: *cit*., p. 34 ff.
[62] Legal ground Four, no. 1.
[63] ES:TSJCAT:2015:8099.
[64] Legal ground One, no. 3. Note GARCÍA GONZÁLEZ, J.A.: "La confidencialidad de la audiencia del menor", in ABEL LLUCH, X.: *cit*., pp. 86-87.
[65] ES:APLO:2018:125A.

article 560 of the Civil Procedure Act, which "*does not regulate the hearing as an imperative step of the proceeding to be followed in case of opposition to the enforcement for substantive reasons. The decision on its celebration corresponds to the judge, who may in any case not consider appropriate its celebration"*[66].

3.6. The legal nature of the "hearing of the minor"

3.6.1. Standpoint: traditionally the hearing of the minor has been approached as not –properly- constituting a procedural means of proof

17. The **Supreme Court in its Judgment 18/2018 of January 15th, 2018**, states "*that the purpose of the examination of the minor is to inquire about his or her interest, its due protection, and therefore it is not properly a means proof, so that his or her interest does not necessarily coincide with his or her will, it is for the judge to assess their maturity and if their wishes are consequence of his or her caprice or due to external influences*"[67]. In fact, as the **Judgments of the High Court of Catalonia 18/2012, of February 23rd, 2012**[68] or of **Provincial Court of Almería 5/2015, of January 7th, 2015**[69] declare, "*it can hardly* (be) *consider*(ed) *a means of proof on which to base a resolution but the instrument by which the minor affected by a procedure can make his or her opinion known to the judge*". In the hearing of the minor, adds the **Judgment of the Provincial Court of Barcelona 98/2013, of February 11th, 2013**[70], the "*minor is not the object but the subject who exercises a right*". The fact that the judicial examination of the minor cannot be considered as a means of evidence but as a diligence intended to satisfy and to fulfil the minor's right to be heard implies, as the **Judgment of the Provincial Court of Barcelona 516/2015, of July 7th, 2015**[71], "*why the procedural requirements of the evidence are not of application*"[72] to them.

18. Although this approach is broadly supported, some discussion has taken place in the lasts years. Thus, for instance, the **Judgment of the Provincial Court of Cádiz of October 22nd, 2012**[73]

[66] Legal ground Two.
[67] Legal ground Four, no. 1.
[68] Id Cendoj: 08019310012012100019, legal ground Five.
[69] TOL 5.186.374, legal ground Eleven.
[70] TOL 3.415.824.
[71] ES:APB:2015:6823
[72] Legal ground Two.
[73] TOL 3.020.058.

admits the existence of this debate: "*Certainly some sector has maintained the character of full proof of this hearing, embodying it in the framework of the recognition of persons provided for in articles 355 ff. of the Civil Procedure Act but we cannot agree with this approach because in the hearing of the minor, the right to be heard is materializing, while these recognitions are not considered as a right of the person to be appreciated, but as a means available to the judge to reach a conviction about certain points relevant to the rendering of the judgment*."[74]

19. This debate has led to the existence of some isolated judgments from lower instances which grant to this obligation to hear the minor the double nature of being a procedural means of proof *stricto sensu* and a way to assess the opinion of the minor. This discussion has increased since the enactment of the **Act 15/2015 of July 2nd, 2015, on non-contentious proceedings**, whose **article 18(2)(4)(III)** seems to stress the idea of means of proof[75]. The provision, which refers to all non-contentious proceedings in general, sets forth that once the hearing takes place "*a detailed report shall be issued and, wherever possible, an audio-visual recording shall be made. If the examination takes place after the appearance, the relevant report shall be passed to the parties to enable them to make statements within five days*".

20. Standing on this article, the **Judgment of the Provincial Court of Tenerife 153/2018 of March 19th, 2018**[76] stresses the idea that, although the hearing constitutes a way to assess the real will of the minor, it is also a means of proof aimed to protect the minor[77]. As we will see in the next pages, the consideration of the hearing in one or another way has relevant consequences in its practical implementation and may also affect its development and the achievement of its goals. Technically, it may not be included in article 299 of the Civil Procedure Act and lacks the specific condition of "means of proof" but it does have an evidential relevance[78].

3.6.2. The development of the hearing must be recorded

21. Setting aside the potential controversies that exist in relation to the nature of the hearing of the minor, it is accepted that it must be documented. Thus, the **Judgment of the Provincial Court of**

[74] Legal ground Two.
[75] See COSTA LAMENCA, M.J. & CARRETERO PEÑA, C.: *cit*., pp. 76-77.
[76] TOL 6.680.127.
[77] See HERNANDO VALLEJO, M.: *cit*., p. 64.
[78] Consider to this respect, ZAERA NAVARRETE, J.I.: *cit*., pp. 799.780.

Cádiz 554/2012 of October 22nd, 2012 "*it must be documented by the Court Clerk, although not literally, but by means of a document in which the allegations and statements that are relevant for the adoption of any measures that may affect the minor, however for reasons of privacy, dignity and in order to pressures and conflicts of fidelity to one or another parent, it should not be tape-recorded*"[79]. In this same direction, the **Judgment of the Provincial Court of Tenerife of March 19th, 2018** considers that although this has been controversial, "*this Chamber has been considering that the exploration of minors must be documented due to the mandatory nature of the Court Clerk, who attests to the fact of the hearing and the declarations*"[80].

3.6.3. Content of the record of the hearing

22. Controversies exist as regards the content of the record. In contrast with the silence of the **Civil Procedure Act** or the **Legal Protection of Children and Young People Organic Act 1/1996** as regards the content of the record, **article 18(2)(4)(III) of the Act 15/2015 of July 2nd, 2015, on non-contentious proceedings** states that "*a detailed report shall be issued and, wherever possible, an audio-visual recording shall be made".*

Certainly, this provision does not refers to contentious proceedings, which, in principle, will be governed by the Civil Procedure Act[81] but, in any case the plain reference to "*detailed*" does not fully fit with the narrow interpretation of this article provided by the **Spanish Constitutional Court in its Judgment of May 9th, 2019**[82].

The Court stresses that the "*content of the record shall only detail those manifestations of the minor that are essential as significant, and therefore strictly relevant, for the decision of the case*"[83]. This idea of including in the record the "minimum content of exploration" of the minor, fore the parties to be aware of it and being able to make any relevant assessments they may wish is stressed by the **Judgment of the Provincial Court of Barcelona 516/2015, of July 7th, 2015**[84].

3.6.4. The special nature of the hearing has not –traditionally- obliged the judge to forward the minutes of the hearing to the parties involved in the proceeding

[79] Legal ground Two.
[80] Legal ground Two.
[81] In favour to the extrapolation of the doctrine of the Constitutional Court also to contentious proceedings, see ABEL LLUCH, X.: "La confidencialidad de la audiencia del menor", in ABEL LLUCH, X.: *cit*., p. 85.
[82] ECLI:ES:TC:2019:64.
[83] Legal ground 8. Consider, ABEL LLUCH, X.: *cit*., pp. 84-85.
[84] Legal ground Two.

23. The fact that the hearing of the minor is broadly understood as not being a means of proof *stricto sensu* has a direct impact on its treatment in the procedure. A relevant one is that the judge has no obligation to forward to the parties the outcome of the hearing of the minor for them to have the opportunity to make allegations. The **Judgment of the Provincial Court of Alicante 369/2015, of October 14th, 2015**[85] or that of the **Provincial Court of Guipúzcoa 250/2016, of October 21th, 2016**[86] plainly declare that, "*there is no specific provision on the practice of this examination of the minor in the procedural text albeit in practice, to avoid the additional pressure that may be placed on the minor subject to exploration, it is usually carried out behind closed doors and with the exclusive intervention of the Judge and the Prosecutor, and it is debatable that its content can be transferred to the parties once it has been carried out*".

24. The absence of any obligation to forward the minutes of the hearing to the parties is also supported by the **Judgment of the Provincial Court of Barcelona 98/2013, of February 11th, 2013** in the sense that "*In any case, it should be noted that not being a means of proof, it is not necessary for it to be assess it by the litigating parties, and this leads to the conclusion that this they have not been produced any defencelessness by such action*"[87].

And this is not only due to the fact that the hearing does not constitute a procedural means of proof but also because of the content of the hearing and the impact that its outcome may have in the future relationship between the minor and his or her parents. As the **Judgments of the Provincial Court of Alicante 369/2015, of October 14th, 2015**[88] or that of the **Provincial Court of Guipúzcoa 250/2016, of October 21th, 2016**[89] recognize: "*we are in the realm of a family process where publicity remains limited by the need to protect the minor, as the basic criterion for the activity of the courts, and there is no doubt that the knowledge of what the minor has said by their parents may have a direct or indirect impact on his or her relationships with them, therefore it is an act of prudence and protection of the minor to deny the content of the examination*".

In fact, the **Judgment of the Provincial Court of La Coruña 295/2009, of July 3rd, 2009**[90] states as regards the aim of the hearing of the minor that: "*It should not be forgotten that*

[85] TOL 5.585.505, legal ground Two.
[86] TOL 5.911.450, legal ground Two.
[87] Legal ground One.
[88] Legal ground Two.
[89] Legal ground Two.
[90] ES:APC:2009:1788.

the purpose is to create an environment conducive to the minor to expand, to show his feelings, his ideas and sensitivities. If you are being asked about the ins and outs of your life and relationship with his parents, it is very dangerous to "betray" him later by giving a copy of the recording to the parties. Involuntarily, the risk may be generated that one of the parents, before comments that are not to his or her liking, reprimand the minor, or adopt positions contrary to him… Their interests are not guaranteed if what was restricted to the knowledge of the Judge and the Public Prosecutor only, is subsequently disclosed to the parties."[91]

25. However, this has been an issue under debate whose solution very much depends on the position adopted by the court as regards the legal nature of the hearing of the minor. The mentioned **Judgment of the Provincial Court of Tenerife 153/2018 of March 19th, 2018**, which accepts the special nature of the hearing –a way for the minor to exercise his or her right to be heard and, also, means of proof- refers to **article 18(2)(4)(III) of the Act 15/2015 of July 2nd, 2015, on non-contentious proceedings**[92] when stressing this last nature[93]. The provision, which covers all non-contentious proceedings in general sets forth that: "*a detailed report shall be issued and, wherever possible, an audio-visual recording shall be made. If the examination takes place after the appearance, the relevant report shall be passed to the parties to enable them to make statements within five days".*

Consequently, the Judgment stresses that, should the hearing of the minor be considered strictly as a means of proof, the judge can decide to implement it behind closed doors on the basis of **article 138(2) of the Civil Procedure Act** which states that the public oral proceedings "*may be heard in closed session when this is necessary for the protection of public order, or national security in a democratic society, or when the interests of minors, or the protection the private lives of the parties and other rights and liberties require this or, insofar as the court deems this to be strictly necessary when, due to the occurrence of special circumstances, being heard publicly might damage the interests of justice*"[94]. In line with this provision, **article 140(3)(II) of the Civil Procedure Act** says that "*Proceedings classified as restricted may only come to the knowledge of*

[91] Legal ground Two.
[92] Legal ground Three.
[93] See COSTA LAMENCA, M.J. & CARRETERO PEÑA, C.: *cit*., pp. 76-77.
[94] Art. 138.3 CPA: "*Before agreeing to holding proceedings in closed session, the court shall hear the parties who are present at the act. The decision shall take the form of a court order and no appeal shall be allowed against it, without prejudice to any protests and raising the question, if admissible, in the applicable appeal against the final judgment*".

the parties involved and their representatives and defenders, without prejudice to the provisions regarding events and data of a criminal or tax or other nature".

26. Therefore, according to the mentioned **Judgment of the Provincial Court of Tenerife 153/2018 of March 19th, 2018** denying the transfer of the record of the hearing to the parties would lead to "*an infringement of the procedural norm and generator of defencelessness to the parties when a decision on a minor (custody, visitation regime, etc.) is adopted bearing in mind the result of an examination that the parties are unaware of*"[95]. Something that is also stressed by the **Judgment of the Superior Court of Cataluña 39/2015 of May 25th, 2015** that states that one thing is to develop the hearing of the minor without the presence of the parents and their representatives, as a way to foster the freedom and independence of the minor and his or her right to intimacy and, "*a different issue is that the said hearing of minors developed behind closed doors and in a reserved manner and recorded, does not receive, regardless of its content, any publicity even for the parties, something that violates both the procedural regulations contained in articles. 138. 1, 140.3 CPA and 234 LOPJ as fundamental rights of effective judicial protection in accordance to article. 24. 2 CE*"[96].

27. Irrespective of this discussion, some authors consider, taking into account the special nature of the hearing, that in no case the record of the hearing –whatever the way it has actually been done- should be provided to the parents of the minor. Only to their representatives[97].

28. The debate goes a step further with the Judgment of the **Constitutional Court of May 9th, 2019**. The case specifically refers to the obligation to forward the minutes of the hearing to the parties in accordance to **article 18(2)(4)(III) of the Act 15/2015 of July 2nd, 2015, on non-contentious proceedings**. The Constitutional Court considers the impact that "*the impact that the minor's right to confidentiality may have in a non-contentious proceeding, that is, the protection of the information relating to his or her person or that of his family, as well as the limits of this by the concurrence of others fundamental rights and constitutionally protected legal principles, especially those mentioned that are specific to art. 24.1 CE*"[98] devoted to the access to justice.

[95] Legal ground Four.
[96] Legal ground One, no. 3. See GARCÍA GONZÁLEZ, J.A.: *cit*., p. 89.
[97] COSTA LAMENCA, M.J. & CARRETERO PEÑA, C.: "La confidencialidad de la audiencia del menor", in ABEL LLUCH, X.: *cit*., p. 77.
[98] Legal ground 3.

The Court states that "*The best interests of the minor is the primary consideration to which all measures concerning minors "taken by public or private social welfare institutions, courts, administrative authorities or legislative bodies*" must attend in accordance with article 3(1) of the Convention on the Rights of the Child, of November 20th, 1989[99]. The Court admits that article 18(2)(4) of the Act 15/2015 develops this principle and affirms that the "*record of the judicial examination of the minor constitutes the procedural, documented reflection of the minor's right to be "heard and heard", among other areas, in all the judicial procedures in which they are affected and that lead to a decision that affects their personal, family or social sphere*" [100].

29. However, the recognition and preservation of this right may affect another fundamental right granted to minors : his or her right to privacy, protected **by article 18.1 CE**, and embodied in articles 16(1) of the Convention on the Rights of the Child and 4(1) of the Organic Law 1/1996. The right to privacy, as the **Judgment of the Constitutional Court 58/2018, of June 4th, 2018**[101] affirms, "*is intended to 'guarantee the individual a reserved area of his life, linked to the respect of his dignity as a person (art. 10.1 CE), against the action and knowledge of others, irrespective of whether these powers are public or simple individuals. Thus, the right to privacy attributes to its owner the power to protect this reserved area, not only personal but also family …, against its disclosure by third parties and unwanted publicity…' The interrelationship between both rights is clearly seen in article 9.1.II of the Organic Law 1/1996, when establishing as a general rule, applicable to all appearance or hearing of minors in judicial proceedings, that it must be carried out taking care of the necessary preservation of their privacy*[102]".

The need to balance both rights must be always done taking into account the necessary preservation of the bests interest of the minor[103]. However, and despite standing on this principle, the Court adopts a solution that seems to favour the procedural approach to the record of the hearing[104]. The Court considers that it is not when the record is forward but in a previous moment to the implementation of the hearing when the right of privacy of the minor must be preserved. And this must be done by way of selecting the questions and limiting the areas of the interrogation to the minor: "*ensuring at all times that the statements of the minor are limited to those necessary*

[99] Legal ground 4.
[100] Legal ground 4.
[101] ECLI:ES:TC:2018:58.
[102] Legal ground 4.
[103] Legal ground 5.
[104] See, ABEL LLUCH, X.: *cit.*, p. 84.

for the investigation of the disputed facts and circumstances, so that the examination only deals with those issues that are strictly related to the object of the case"[105].

Should "*these rules and precautions*" be strictly observed "*as it is required in attention to the best interests of the minor, the impact on his or her privacy is reduced to a minimum: as a reflection of a judicial examination in which the appropriate measures have already been adopted to preserve the privacy of the minor, the content of the record should only detail those statements of the minor that are essential as significant, and therefore strictly relevant, for the decision of the case*."[106] And consequently, the record "*must be made forwarded to the parties so that they can make their allegations*" because it does not entail "*a disproportionate sacrifice of the minor's right to privacy*"[107].

30. Despite the limited scope of the Judgment, related to non-contentious proceedings that involve minors[108], the procedural approach to the hearing followed by the Spanish Constitutional court supports the understanding of the hearing as a truly means of proof. In addition to that, it rises new issues related to the need to specify which is the meaning of "*issues that are strictly related to the object of the case"* [109] and who is in charge of determining which is the information that must be documented and, consequently, forwarded to the parties[110]. Those authors who are willing to accommodate the necessary preservation of the intimacy of the minor and the confidentiality of the hearing with the right of the parties to have access to the minutes of the hearing support the possibility to forward general information about the hearing without reproducing the specific responses provided by the minor[111]. Specially in those cases in which the minor shows rejection towards one of the parents or clear preference for one of them as a way to avoid future controversies with the parents[112].

[105] Legal ground 8.
[106] Legal ground 8.
[107] Legal ground 8.
[108] Therefore, contentious proceedings would not be affected by this rule. See ABEL LLUCH, X.: "*cit*., p. 81. Also, consider, ZARRALUQUI SÁNCHEZ-EZNARRIAGA, L.: "La audiencia del menor en el Proyecto de Ley de la Jurisdicción voluntaria", Actualidad Jurídica Aranzadi, no. 895, 2014, p. 2.
[109] Legal ground 8.
[110] To this respect, consider, COSTA LAMENCA, M.J. & CARRETERO PEÑA, C.: *cit*., p. 78.
[111] See ABEL LLUCH, X.: *cit*., pp. 80-81.
[112] ABEL LLUCH, X.: *cit*., p. 86.

31. Perhaps a solution to this issue may be found in the **Judgment of the Provincial Court of Tenerife 523/2012, of December 4th, 2012**[113]**.** According to it, and due to the lack of information embodied in the CPA to this respect, it is enough for the judge to inform the parties about the hearing and the result arising out of it to prevent them from claiming defencelessness. This could be a way to solve the existing legal puzzle[114]. And, in any case, as the **Judgment of the Provincial Court of Badajoz (Mérida) 131/2018, of June 26th, 2018**[115], considers that for the defencelessness to exist, the absence of information by the judge must have been denounced by the parties in the proper procedural stage[116].

3.7. The meaning of "hearing of the minor" and the way it is implemented

3.7.1. The flexible –and variable- meaning provided to the "hearing of the minor"

32. No rules exist in Spain as regards the way the hearing must be actually implemented[117]. **Article 770(I)(4) *in fine* of the Civil Procedure Act** only states that should the judge decide, on his/her own or at the request of third persons or the minor himself/herself, to hear him/her in the course of the proceeding, the judge "*shall ensure that any questioning of minors in civil proceedings is conducted under suitable conditions to safeguard their interests without interferences from other people, exceptionally making use of the help of specialists wherever necessary*." And **article 9(1) of the Legal Protection of Children and Young People Organic Act 1/1996** recognizes that "*Minors have the right to be heard and listened to without any discriminations on grounds of age, disabilities or any other circumstance, both within their family environment and in any administrative proceeding, judicial procedure or mediation proceeding affecting them and leading to a decision impacting their personal, family or social environments, and their opinions will be duly taken into account, depending on their age and maturity*." To that end, the provision states that "*minors must receive information allowing them to exercise this right in a comprehensible language and accessible formats adapted to their circumstances*."

[113] TOL 3.961.206.
[114] Legal ground Four.
[115] ES:APBA:2018:552.
[116] Legal ground Three.
[117] See, COSTA LAMENCA, M.J. & CARRETERO PEÑA, C.: *cit*., p. 75.

Generally speaking, the hearing must be implemented, in a manner adequate to his or her situation and personal evolution, and preserving his or her right to intimacy[118]. However, the absence of clear rules as regards the content of the hearing has favoured differences in the way the hearing is actually implemented by the Courts in Spain[119]. In fact the Spanish Defensor del Pueblo –ombudsman- has stressed the existence of these differences and the quest for harmonization[120].

33. According to the Judgment of the **Provincial Court of Almería 5/2015, of January 7th, 2015**[121] the rules on the hearing of the minor are "*excessively evanescent or ethereal, without specifying the concrete way in which diligence is practiced*" or what it actually means. Different words are mentioned in the applicable legislation "audiencia" –hearing-, "exploración" –exploration- … all these terms lack clear "*legal contours rather, they suggest a direct and personal contact of the judge, the one who at the end is going to adopt the decision, with the minor. The laxity of the terms used by the legislation have led to some judgment to refer to this procedural act* (of hearing the minor) *as an "interview*"[122].

34. In any case, it is accepted, as the **Judgment of the Provincial Court of Granada 100/2017 of March 17th, 2017**[123] states, that this hearing "*is conducted exclusively for the formation of the criteria of the court, and of the Public Prosecutor's Office, the only addressees of the necessary immediacy required, about what is the most convenient for the interest of the minor based on the perceptions that comes out from his or her manifestations without the interference that may cause to him or her the presence of the parties involved in the process*"[124].

3.7.2. It does not exist a single way to implement the hearing of the minor

[118] See PÉREZ GALÁN, M.: *cit., supra*.
[119] ZAERA NAVARRETE, J.I.: *cit*., pp. 804-805.
[120] DEFENSOR DEL PUEBLO: *Estudio sobre la escucha y el interés superior del menor. Revisión judicial de medidas de protección y procesos de familia*, Madrid, 2014, p. 17 (available at: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjRw6fRw-TtAhU5QkEAHcFQDrYQFjAIegQICxAC&url=https%3A%2F%2Fwww.defensordelpueblo.es%2Fwp-content%2Fuploads%2F2015%2F05%2F2014-05-Estudio-sobre-la-escucha-y-el-interes-superior-del-menor.pdf&usg=AOvVaw3f01wDxQ8lNmZxElvfO0tH).
[121] Legal ground Eleven.
[122] Legal ground Five.
[123] TOL 6.189.923.
[124] Legal ground One.

35. No legal provision and no single way to implement the hearing of the minor exits in Spain. The fact that the hearing of the minor has not been traditionally considered a procedural means of proof *stricto sensu* permits to implement it without following the rules and principles about the means proof embodied in the Civil Procedure Act, that is, as the Judgment of the **Judgment of the Provincial Court of Palencia 30/2015, of April 4th, 2015** states, "*publicity and ... the contradictory intervention of the parties in its development*"[125].

36. The **Judgment of the Provincial Court of Tenerife 153/2018 of March 19th, 2018** – following the **Judgment of the Provincial Court of Cádiz 554/2012 of October 22nd, 2012**- plainly admits that because of that in Spain, "*in practice there are multiple and diverse forensic practices: a) with regard to the persons involved in the hearing, some judges implement it by way of intervening alone and the minor, others allow the intervention of the Court Clerk (acting as a notary), others also to the Public Prosecutor and exceptionally some of them perform it in the presence of the parties; b) regarding the documentation of the same, they are from those who record them in full, in some other cases, a simple summary of the allegations of the minor, collecting the essence and fundamental aspects of it is made, there are also those who perform a written record, where they literally collect the statements of the minor, and the minor must sign it*"[126].

37. **Article 778 quinquies(8) of the Civil Procedure Act**, which sets forth a rule specifically as regards International Child Abduction, admits *in fine* that the "*act may be carried out via video conferencing or another similar system.*"[127]

3.7.3. This lack of uniformity affects legal certainty and the bests interests of the minor

38. This lack of uniformity as regards this relevant issue is considered very negative for minors and for the system itself. The **judgment of the Provincial Court of Cádiz 554/2012 of October 22nd, 2012** admits that "*throughout the national territory a great disparity exists in terms of the*

[125] TOL 4.800.566, legal ground Five.
[126] Legal ground Two of the Judgment of the Provincial Court of Tenerife and of the Judgment of the Provincial Court of Cádiz.
[127] See ABEL LLUCH, X.: *cit*., p. 79.

form and persons who can intervene in this judicial proceeding, a situation that does not favour legal security and even less the interests of minors"[128].

3.7.4. Some ideas and principles for the implementation of the hearing of the minor are provided by Spanish case law

39. In order to overcome this very negative situation, Spanish courts have attempted to harmonize the situation and have provided some ideas and principles on which the implementation of the hearing of the minor should stand. Particularly, the **Judgment of the Provincial Court of Cádiz 554/2012 of October 22nd, 2012**[129] states that when implementing the hearing of the minor, several basic principles should be taken into account and honoured:

1) Before starting the hearing, the minor "*must be offered informed truthful, complete and according to the conditions of age and maturity of the minor about what is being decided in the process and the extent it may affect him or her*".

2) The hearing of the minor "*must be carried out respecting the necessary conditions of discretion, privacy, safety and absence of pressure, to safeguard the minor's dignity and personality as much as possible*" with the goal, as the **Judgment of the Superior Court of Cataluña 39/2015 of May 25th,** 2015 mentions, of allowing the minor to express himself "*with the highest degree of autonomy and without restricting their opinions, avoiding the dreaded 'conflict of loyalties'*"[130].

3) It is necessary to avoid "*as much as possible the feeling of betraying one or the other parent, or having to choose between one parent and another*".

4) The hearing must take place "*in a suitable place and comfortable, which usually will be the office of the Judge or the Courtroom itself.*" But also, as the **Judgment of the Provincial**

[128] Legal ground Two.
[129] Legal ground Two. Also, consider, Legal ground Two of the **Judgment of the Provincial Court of Tenerife 153/2018 of March 19th, 2018**.
[130] Legal ground One, no. 3.

Court of Madrid 24/2017, of January 13th, 2017[131] states, "*behind closed doors or outside the venue of the Court*"[132].

Some examples of "Good Practices" for the development of the hearing have been developed in Spain, either by the Central Government -for instance, by the Spanish Defensor del Pueblo –ombudsman-: "***Study on listening and the best interests of the minor. Judicial review of protection measures and family proceedings***"[133]- or by certain Regions of Spain -for instances, in the País Vasco, also by the Arateko –ombudsman- the document "***Good Practices in considering the rights of boys and girls in the judicial system***"[134]. Also from a doctrinal perspective, some authors also provide ideas about a kind of Protocol for the reception of the minor at the hearing[135].

5) The hearing must be carried out "*in a language and wording adapted to the*" minor and his or her ability to understand.

6) The hearing should be done, preferably, "*without the presence of parents, guardians or guardians, as provided for in article 770.4 of the Civil Procedure Act*". This idea is ratified by the **Judgment of the Superior Court of Cataluña 39/2015 of May 25th, 2015**[136] which plainly recognizes that this fact "*does not violate fundamental rights, but quite the opposite, since the presence of the parties … would imply an undesirable lack of freedom for minors, who can already be affected by the mere fact of appearing in court*"[137].

7) And, at the same time, it should be developed with "*the presence of the Public Prosecutor*" in so far it collaborates with the judge and promotes justice in defence of the interests and rights of minors and disabled.

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[131] ES:APM:2017:619.
[132] Legal ground Two.
[133] DEFENSOR DEL PUEBLO: *Estudio sobre la escucha y el interés superior del menor. Revisión judicial de medidas de protección y procesos de familia*, Madrid, 2014, *cit*.
[134] TAPIA, J.: *Buenas prácticas en la consideración de los derechos de niños y niñas en el sistema judicial*, Bilbo, 2014 (available at: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjRw6fRw-TtAhU5QkEAHcFQDrYQFjAHegQICBAC&url=http%3A%2F%2Fwww.ararteko.eus%2FRecursosWeb%2FDOCUMENTOS%2F1%2F0_3562_3.pdf&usg=AOvVaw3INkg4XJW3xEz79f9QPFLb).
[135] See, ARCH MARIN, M.: "Protocolo de acogida del menor en la audiencia", in ABEL LLUCH, X.: *cit*., p. 31-36.
[136] Legal ground One, no. 3.
[137] Legal ground One, no. 3.

This intervention is mandatory. The intervention of the Public Prosecutor in cases involving minors is stressed by the **Judgment of the Spanish Constitutional Court 17/2006 of January 30th, 2006**[138] which refers to the role granted by Spanish Law to the Public Prosecutor[139] to protect minors and their bests interests[140]. Such intervention is mandatory, impartial and aimed to defend the legality and rights of any minor affected. The Public prosecutor will ensure the primacy of his or her best interest. Its participation in the hearing will allow the Public Prosecutor to know, directly, the opinion of the minor and whether it is expressed freely, and with this information the Prosecutor can request the measures it deems appropriate in the interest of the minor.

Nevertheless, some judgments –e.g. **Judgment of the Provincial Court of Tenerife 153/2018 of March 19th, 2018**[141]- consider that more than the physical presence of the Public Prosecutor –"*as the maximum defender of the rights and interests of minors*"- in the hearing, the real relevant fact is that the Prosecutor has been duly summoned. In this case, his or her absence cannot be considered as breaching the law.

8) Also it is said that although the hearing does not constitute a means of proof *stricto sensu* "*it must be documented by the Court Clerk, although not literally, but by means of a documentation in which the allegations and statements that are relevant for the adoption of any measures that may affect the minor, …"* Among others, the appearance of the Court Clerk is based on, and must be developed in accordance to, articles 138, 141 bis, 145-146 and 754 CPA[142].

9) However, "*for reasons of privacy, dignity and in order to pressures and conflicts of fidelity to one or another parent, it should not be tape-recorded*". This is stressed by many authors who argue the negative effect that the knowledge by the minor that his or her declaration is recorded may have in his or her declaration[143].

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[138] ECLI:ES:TC:2006:17.
[139] See **Act 50/1981, of 12.30.1981, on the Organic Statute of the Prosecution Service**, *BOE* of 01.13.1982, **art. 3(7)**.
[140] Legal ground 4.
[141] Legal ground Four.
[142] Among others legal provisions. See, COSTA LAMENCA, M.J. & CARRETERO PEÑA, C.: *cit*., pp. 70-74.
[143] For instance, note CARTIÉ JULIÀ, M., JOUNOU BARNAUS, T. & ORTÍ LLORETL, M.: "La confidencialidad de la audiencia del menor", in ABEL LLUCH, X.: *cit*., p. 91.

This rejection of the tape-recording of the hearing would be in line with **article 9(1) of the Legal Protection of Children and Young People Organic Act 1/1996** that stresses the understanding of the hearing as a way for the minor to exercise his or her right to be heard. That means that in any judicial procedure and administrative proceeding, "*appearance or hearings of minors shall be preferential and shall be conducted in an appropriate manner … taking care to preserve their privacy"*[144]. And it is endorsed by Spanish case law. The **Judgment of the Provincial Court of Cádiz of October 22nd, 2012** plainly states that the hearing "for reasons of privacy, dignity and in order to avoid pressures and conflicts of fidelities to one or the other parent, should not be recorded"[145].

However, certain isolated courts that consider that the hearing of the minor is a means of proof support the possibility to record it. This is the case of the **Judgment of the Provincial Court of Tenerife 153/2018 of March 19th, 2018** that "*the examination should preferably be documented through its recording in audio-visual support, in which case the general rules on documentation of the hearings established by arts. 146, 147 and concordant of the Civil Procedure Act*" should be taken into account[146].

10) In addition to this, some other judgments support the immediacy of the hearing, in the sense of direct relation with the minor. The **Judgments of the Superior Court of Catalonia 18/2012, of February 23rd, 2012**[147] or of the **Provincial Court of Almería 5/2015, of January 7th, 2015**[148]**.** Both judgments stress that in the hearing of the minor, "*the principle of immediacy acquires its highest relevance because, regardless of what it is actually recorded in the minutes… it is very difficult to record the perception, impressions, etc. that the Court had during the interview with the minor*".

40. Also Spanish authors have added some additional principles on which the hearing of the minor should stand. Authors[149] speak of:

11) The hearing must stand on the principle of the protection of the minor.

12) It must be adapted and adequate to the circumstances of each minor.

[144] To this respect, COSTA LAMENCA, M.J. & CARRETERO PEÑA, C.: *cit.*, p. 74.
[145] Legal ground Two.
[146] Legal ground Four. Note, GARCÍA GONZÁLEZ, J.A.: *cit.*, p. 88.
[147] Legal ground Five.
[148] Legal ground Eleven.
[149] See COSTA LAMENCA, M.J. & CARRETERO PEÑAN, C.: *cit.*, p. 69.

13) It must take into account the principle of privacy of the minor and,

14) And also the exceptional participation of third persons.

15) And it must be confidential, taking into account in order to shape the meaning of this notion all the discussion that exists as regards the forwarding of the record of the hearing to the parties.

3.7.5. The exceptional intervention of a specialist in the hearing of the minor

41. The Spanish legislator envisages the intervention of a specialist in the hearing of the minor as "exceptional". This is stressed by **article 770(I)(4) *in fine* of the Civil Procedure Act**, that plainly sets forth that should the judge decide, on his/her own or at the request of third persons or the minor himself/herself, to hear him/her in the course of the proceeding affecting him or her, the judge "*shall ensure that any questioning of minors in civil proceedings is conducted under suitable conditions to safeguard their interests without interferences from other people, exceptionally making use of the help of specialists wherever necessary*." The "exceptional" intervention of specialists is also referred to in **Article 18(2)(4) of the Act 15/2015 of July 2nd, 2015, on non-contentious proceedings** and **article 9(1) of the Legal Protection of Children and Young People Organic Act 1/1996**, as amended.

42. According to the Spanish legal doctrine, this intervention may be necessary in those cases in which the minor suffer some kind of illness, disability or disorder, when the psych emotional situation of the minor is not clear, when the minor himself requests to be heard, when the minor suffers a situation of special vulnerability, when the judge does not want to expose the minor to an overvaluation or similar[150]. No specific rule as regards who will be the one who actually will be selected by the judge and on what grounds[151] or who actually will direct the conversation with the minor exists in Spanish law and opinions in favour of a case by case approach exist[152].

[150] To this respect, note HERNANDO VALLEJO, M., *cit*., p. 64.
[151] CARTIE JULIÀ, M., JOUNOU BARNAUS, T. & ORTÍ LLORET, M.: "La audiencia del menor recabando el auxilio de especialistas", in ABEL LLUCH, X.: *cit*., p. 66. Also CARTIÉ JULIÀ, M.: "El dictamen de especialistas en los procesos de familia", in PICO i JUNOY, J. & ABEL LLUCH, X. (dirs): *cit*., p. 289 ff.
[152] To this respect, note HERNANDO VALLEJO, M., *cit*., p. 64.

43. The "exceptional" nature of the intervention of a specialist in the hearing of the minor is supported by Spanish case law. Thus, the **Judgment of the Provincial Court of Asturias 325/2009, of October 19th, 2009**[153] -as many other, e.g. **Judgment of the Provincial Court of Madrid 24/2017, of January 13th, 2017**[154]- accepts that *"In the explorations of minors in civil proceedings the judge will guarantee that the minor can be heard in a suitable conditions in order to safeguard their interests, without interference from other people, and exceptionally seeking the support of specialists when necessary*"[155]. **Also the Judgment of the Provincial Court of Tenerife 153/2018 of March 19th, 2018** stresses that "*if the judge deems it appropriate, he or she can and should seek advice from specialists in the field to ensure that the examination is adapted to the circumstances of each minor*"[156].

3.8. The value given to the opinion of the minor by the court

44. The Court is compelled to evaluate the opinion of the minor in addition to the other elements and facts that have been accredited during the proceedings. And obviously, the more mature the minor is, the more relevant his/her opinion will be and a higher impact will have in the prospective judicial resolution. At the same time, this creates the need for the judge to balance the opinion of the minor with the need to ensure his/her best interest. This is a task for the judge to be done and in some cases this quest for the best interest of the minor may not coincide with his/her will, thus making the enforcement of the prospective resolution more difficult[157]. As the **Judgment of the Provincial Court of Badajoz (Mérida) 131/2018, of June 26th, 2018** states, "*This Court considers that the interest of the minor does not mean compliance with his will*"[158].

45. Spanish case law is rather clear to this respect. The **Judgment of the High Court of Justice of Cataluña of January 9th, 2014**[159] plainly states that the opinion of the minor is not decisive and that it is for the judge to actually decide: "*... However, the right of the minor to be heard before any decision that may affect him is taken, does not mean, that his opinion or will must be*

[153] TOL 1.649.327.
[154] Legal ground Two.
[155] Legal ground Two.
[156] Legal ground Three.
[157] See, CASO SEÑAL, M. & ATARES GARCIA, E.: "Naturaleza jurídica", *cit*., p. 29.
[158] Legal ground Three.
[159] ECLI:ES:TSJCAT:2014:5.

determinant in the resolution to be adopted. His criterion must be taken into account but cannot become a decision-making element. Otherwise we would incur in the risk of converting minors in subjects and objects of the dispute of the parents. … In this way, the Courts will assess the content of the minor's hearing together with other factors, since sometimes the will expressed by the minors does not coincide with the real will or with what is most beneficial to them.

Naturally, the wishes of minors cannot be ignored, without considering the other criteria contemplated in the rule, with the due justification or special motivation, when, as it is the case, they have enough judgment.

However, for the wish of the minor with sufficient judgment to be attended to, it will always be necessary: a) that his opinion is freely expressed and is will correctly formed not mediated or interfered with by the conduct or influence of either parent; b) that his reasons are understandable for not being inspired by short-term comfort or well-being criteria; c) that he is not discouraged due to the special incidence of other criteria with which, according to the norm, the opinion of minors must be weighed together."[160]

3.9. Transnational cases involving the issue of the hearing of the minor before Spanish courts

46. Practice as regards the hearing of the minor in transnational cases before Spanish courts is very seldom. Maybe, one of the most significant cases is the **Judgment of the Supreme Court 469/2018 of July 19th, 2018**[161]. The Judgment refers to the recognition and enforcement of a Hungarian Judgment on the basis of Regulation 2201/2003. The Supreme Court, in line with the decision of the Provincial Court of Palma[162], rejects the opposition to the recognition and enforcement of the Judgment on the basis of its contradiction with public policy. The Court supports the non-compulsory condition granted to the hearing of the minor in Spain since 2005 and states that, "*It is therefore not possible to invoke the public order clause of Article 23, as it affects the interest superior of the minor when the State that decided on the measure, standing on the criterion of proximity, has already evaluated that interest with all the guarantees and the law of the requested State has not been manifestly violated, for undermining fundamental principles in*

[160] Legal ground Five.
[161] ECLI: ES:TS:2018:2832. As regards this Judgment, note OTAEGUI AIZPURUA, I.: "La alegación de la falta de audiencia de una menor como causa de denegación del reconocimiento y ejecución de una orden de retorno: comentario a la STS 469/2018, Sala de los Civil, de 19 de julio de 2018", *Revista electrónica de estudios internacionales*, 2018, vol. 36, p. 31 ff.
[162] Judgment of the Provincial Court of Palma 266/2017, of July 17th, 2017, ECLI:ES:APIB:2017:1344

procedures on parental responsibility, such as the hearing of the minor, which is not considered essential in cases such as this one due to the age of the minor"[163].

4. International case law related to Spain.

47. International case law as regards Spain is not very broad. Some isolated cases are found both before the European Court of Human Rights and the Court of Justice of the European Union.

4.1. European Court of Human Rights.

48. The Judgment of the European Court of Human Rights of October 11th, 2016[164] on the case *Iglesias Casarrubios and Cantalapiedra Iglesias v. Spain* (no. 23298/12)[165]. The case refers to application lodged by Ms María Paz Iglesias Casarrubios and two of her children, Alba Sabine Cantalapiedra Iglesias and Sonia Cantalapiedra Iglesias, who are Spanish nationals (born in 1993, and 1996 respectively). All of them lived in Madrid. The case concerned the refusal of a judge to hear the children, who were minors at the relevant time, during the proceedings for their parents' divorce[166].

49. The European Court considered as regards the right of the minor to be heard in any procedure involving him or her that it is no need to hear the minor in any single case. This right must be in accordance with the situation of the minor and of the case. Thus, the Court states that: "*36.*

[163] Legal ground 4.
[164] Final 01.11.2017, http://hudoc.echr.coe.int/eng?i=001-167113.
[165] http://hudoc.echr.coe.int/eng?i=001-196867.
[166] The facts of the case are available at, EUROPEAN COURT OF HUMAN RIGHTS: Press Release issued by the Registrar of the Court, ECHR 322 (2016), 11.10.2016, Judgments of 11 October 2016, available at: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjphqbGk_HtAhXIMMAKHQfKDcUQFjAAegQIBRAC&url=http%3A%2F%2Fhudoc.echr.coe.int%2Fapp%2Fconversion%2Fpdf%3Flibrary%3DECHR%26id%3D003-5514573-6935022%26file-name%3DJudgments%2520of%252011.10.16.pdf.63&usg=AOvVaw1esPeorSrx-RAXqnnURX4n, last access, 12.28.2020. Subsequent to the decision, the Spanish Government adopted several decisions, consider to this respect, DH-DD(2019)332 26/03/2019 - 1348th meeting (June 2019) (DH) - Action report (20/03/2019) - Communication from Spain concerning the case of Iglesias Casarrubios and Cantalapiedra Iglesias v. Spain (Application No. 23298/12), available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168093ae67, last access, 12.28.2020.

Concernant notamment l'audition des enfants par un tribunal, la Cour a estimé que ce serait aller trop loin que de dire que les tribunaux internes sont toujours tenus d'entendre un enfant en audience lorsqu'est en jeu le droit de visite d'un parent n'exerçant pas la garde. En effet, cela dépend des circonstances particulières de chaque cause et compte dûment tenu de l'âge et de la maturité de l'enfant concerné (Sahin c. Allemagne [GC], no 30943/96, § 73, CEDH 2003 ‑VIII. Elle observe toutefois qu'en droit espagnol (paragraphes 18 et 19 ci-dessus) en cas de procédure contentieuse de divorce, et si cela est estimé nécessaire, les enfants mineurs doivent être entendus par le juge s'ils sont capables de discernement et, dans tous les cas, les mineurs âgés de 12 ans et plus. En tout cas, lorsque le mineur demande à être entendu, le refus d'audition sera motivé."

50. In this case, Ms. Casarrubios asked the Court to hear her daughters without success. The request was actually presented to the Court, and "*Elle n'aperçoit aucune raison justifiant que l'avis de la fille aînée de la requérante, une mineure alors âgée de plus de 12 ans, ne fût pas directement recueilli par le juge de première instance dans le cadre de la procédure de divorce, ainsi que la loi interne l'exigeait (paragraphe 18 ci-dessus). La Cour ne voit pas non plus de raison justifiant que le juge de première instance ne se prononçât pas, dans le cadre de la même procédure, de façon motivée sur la demande de la fille cadette de la requérante d'être entendue par lui, comme la loi le lui exigeait*"[167].

51. Therefore, it concludes that a violation of article 6.1 of the European Convention of Human Rights has taken place: "*Le refus d'entendre au moins l'aînée ainsi que l'absence de toute motivation pour rejeter les prétentions des mineures d'être entendues directement par le juge qui devait décider du régime de visites de leur père (paragraphe 13 ci-dessus) amène la Cour à conclure que Mme Iglesias Casarrubios s'est vue indûment priver de son droit à ce que ses enfants mineures soient entendues personnellement par le juge, nonobstant les dispositions légales applicables, sans qu'aucun remède à une telle privation n'eût été apporté par les juridictions supérieures ayant examiné les recours qu'elle avait formés*"[168].

4.2. Court of Justice of the European Union.

[167] Legal ground 42.
[168] Legal ground 42.

52. The issue of the hearing of the minor in relation to Spain has also been dealt before the European Court of Justice in its Judgment of December 22nd, 2010 in the case C-491/10 PPU, *Aguirre Zárraga*[169] involving expeditious return of a child. In the case, the issue of the recognition and enforcement of a Spanish Judgment in Germany on the grounds that the minor was not granted the opportunity to be heard by the Spanish Judge raised.

53. The European Court of Justice considers that article 42(2) of Regulation No 2201/2003, "*provides that the court of the Member State of origin is to issue the certificate referred to in paragraph 1 of that article only if the child was given the opportunity to be heard, unless a hearing has been considered inappropriate having regard to the child's age or degree of maturity (Article 42(2)(a)), if the parties were given the opportunity to be heard (Article 42(2)(b)) and if that court has in handing down its judgment taken into account the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention (Article 42(2)(c))*."[170]

The Court adds that "*It must be observed at the outset that the first subparagraph of Article 42(2) of that regulation has no purpose other than to inform the courts of the Member State of origin of the minimum content required in the judgment on the basis of which the certificate provided for in Article 42(1) is to be issued*."[171] And, adds, that having regard to the case-law of the court "*it must be held that the first subparagraph of Article 42(2) in no way empowers the court of the Member State of enforcement to review the conditions for the issue of that certificate as stated therein*.[172]" Such power could undermine the effectiveness of the whole system of the Regulation[173] and, consequently, "*It follows that, where a court of a Member State issues the certificate referred to in Article 42, the court of the Member State of enforcement is obliged to enforce the judgment which is so certified, and it has no power to oppose either the recognition or the enforceability of that judgment*"[174].

54. In this case, this means that "*in circumstances such as those of the main proceedings, the court with jurisdiction in the Member State of enforcement cannot oppose the enforcement of a certified judgment, ordering the return of a child who has been wrongfully removed, on the ground that the*

[169] ECLI:EU:C:2010:828.
[170] Legal ground 52.
[171] Legal ground 53.
[172] Legal ground 54.
[173] Legal ground 55.
[174] Legal ground 56.

court of the Member State of origin which handed down that judgment may have infringed Article 42 of Regulation No 2201/2003, interpreted in accordance with Article 24 of the Charter of Fundamental Rights, since the assessment of whether there is such an infringement falls exclusively within the jurisdiction of the courts of the Member State of origin"[175].

5. Questionnaires.

55. The questionnaire has been prepared under the supervision of the University of Genova's team and is very much in line with the other questionnaires used by the other members involved in the project.

56. The questionnaire has been broadly disseminated around Spain. The team of the University of Valencia has been in direct touch with several Colegios Oficiales (Ilustre Colegio de Abogados de Valencia, Ilustre Colegio de Procuradores de Valencia) and with the General Directorate for Justice of the Valencian Government and through the former, it has been sent to the President of the High Court of the Valencian Community, to the Dean of the First Instance Courts of Valencia, the Director of the Medical Legal Institute as well as the Chief of the Public Prosecutor of the Valencian Community. All of them have sent the questionnaire to their affiliates. The questionnaire has also been delivered to several National Associations (Asociación Española de Abogados de Familia (AEAFA), to the General Council of the Order of Advocates of Spain as well as to some national Law Firms (Broseta, Uria y Menéndez, Garrigues, Cuatrecasas, Gómez Acebo y Pombo…) and local Law Firms. Some lawyers, judges, psychologists and other members of the judiciary have also received the document.

57. We have got 12 questionnaires answered by different legal operators from several places of Spain:

-Judges: **6** (2 Catalonia, 2 Madrid, 1 Valencia, 1 Aragón)
-Court Clerk: **1** (1 Madrid)
-Lawyers: **5** (2 Valencia, 1 Galicia, 1 Balearic Islands, 1 Catalonia)

[175] Legal ground 75.

58. The right of the minor to be informed and its implementation, in general:

-Most questionnaires acknowledge the existence of a general obligation in Spain to provide information to the minor as regards disputes involving him or her. On the contrary, there are some of them denying the existence of such a right. Additionally, no unanimity exists as regards the dependence of the right on the age or the level of maturity of the minor. Also, some questionnaires consider that the existing right is to be heard during any procedure involving minors and not to be informed as regards any procedure involving them.

-Some questionnaires, mostly issued by judges, consider that minors are always informed about their right to be heard before and during any proceeding affecting them takes place. However, some others consider that minors are either very seldom or never informed before or after the procedure takes place. Other questionnaires extend this absence of information to the moment in which the procedure is pending.

-Almost all questionnaires consider that no specific legal operator is in charge of informing the minor about any proceeding. On the contrary, other questionnaires recognize that certain specialists may intervene as regards specific issues (e.g. exploration of the minor). Also it is usually accepted, with some exceptions, that parents or people in charge of minors do not receive any information as regards procedures affecting them.

-Usually, but not unanimously, it is said that no adapted and understandable documentation is provided to the minor as regards his/her right to be informed of any proceeding involving him/her, even in case the minor with special necessities. Also, the availability of translators for minors who do not speak Spanish or any other official Spanish language is questioned; some accept their availability whereas other questionnaires plainly deny it.

59. The right of the minor to be heard in parental responsibility proceedings.

-Most questionnaires support the existence of a right of the minor to be heard before the procedure starts.

-No unanimity exists as regards the person involved in the hearing of the minor. Some questionnaires state that the minor is considered to be heard, alone, by the judge. However, some questionnaires stress the possibility for other people to attend the hearing (psychologist or social servant).

-It is the judge, also, who provides the minor with information. And, sometimes, he or she is informed about the relevance that their information may be for the outcome of the procedure. Also, it is broadly accepted that before the procedure involving the minor actually starts, he/she is informed about the procedure. On the contrary, some questionnaires refer to the judge, as well as a social servant and a psychologist as attending the hearing and providing information to the minor.

-Again, no unanimity exists as regards the content of the information provided. References to the reasons for the hearing, the presence of other people, minor's substantive and procedural rights, the degree of confidentiality provided, the case or the potential outcomes of the hearing are also referred to.

-Once the judgment has been rendered, no unanimity exists –again- as regards the existence of a procedural stage for informing the minor about future activities, although the opinion most supported is its non-existence. In any case, it is broadly accepted that once the judgment has been rendered, it is for the representative of the minor, the lawyer, a psychologist or a social servant to inform him/her of the content and consequences of the judgment. Even reference to the parents is made. However, some questionnaires consider that the minor does not receive any information about the judgment, its content and consequences.

60. The right of the minor to be heard in International Child Abduction.

-Questionnaires accept that minors have the right to be (always, sometimes) heard in cases of international child abduction before the decision on the return is adopted. Some questionnaires stress the fact that the exercise of this right depends on the age of the minor.

-As a general rule, the minor is heard by the judge alone and no previous meeting with the minor is envisaged. Parents never attend the hearing.

-It is broadly accepted that minors are informed about the proceeding by the judge and no consensus on the content of the information provided exist: reasons for the hearing, degree of confidentiality, presence of other people in the hearing, steps to be taken, rights of the minor, prospective outcome of the hearing). It is also said that minors are informed of the relevance of the hearing but also that its outcome does not depend on them, although it is considered that this does not always happen.

-There is lack of unanimity as regards the existence of a procedural stage after the hearing in which the minor receives information on future steps to be taken by the judge and, it is also said, by the lawyer.

-Minors are said not to be informed about the resolution denying or granting the return of the minor to his/her country of origin. And the minor is not usually prepared for the return.

61. Right of the minor to have a special representative.

-Most questionnaires accept that minor has the right to be represented on her/his own in procedures affecting him/her. On the contrary, some other questionnaires deny this possibility.

-The possibility to appoint as curator ad litem is said to be available for the minor.

6. Overall comments.

The right of the minor to be heard in procedures involving him/her is well enshrined in Spanish legislation. The principle is fully accepted and the obligation for legal operators to be aware of it is perfectly drafted. However, the principle lacks a straightforward implementation in Spanish legal practice. The principle lacks a clear, uniform and unanimous understanding and several issues relating to its practice are growingly under controversy. This may directly limit the effectivity of the principle and affect the minor and the necessary preservation of his or her best interest.

The several questionnaires received fully support this convoluted situation. Differences on basic principles and ideas stress the need to develop a clear and easily understanding set of good practices to be offered to those involved in procedures affecting minors both with and without foreign elements.