

FAMILY COURTS IN CRISIS

NEWSLETTER

November 2013

Save the Children, Spain Report – The Spanish Justice System Confronted with Sexual Abuse Within the Family



***A perfection of means and confusion of aims,
seems to be our main problem***

Albert Einstein

The Spanish Justice System Confronted with Sexual Abuse Within the Family



“No judge in this world can make the damage an abused little girl has suffered disappear; but a sensitive, respectful and one who reacts, can prevent more suffering.”

Rozanski, C.A. Abuso sexual infantil. ¿Denunciar o Silenciar? Ediciones B. Buenos Aires, 2003.

Between the different types of violence against boys and girls, sexual abuse is one of the most extensive and, at the same time, covered-up forms. Sexual abuse covers a large number of human rights violations, such as physical and mental integrity, the right to the highest level of health and the liberty of the person and not to be discriminated against, amongst others. This form of violence against infant is particularly difficult to detect and deal with when it happens within the family and even more so when it involves toddlers.

International law obligates a State to respect, protect and effectively realize human rights of the people within its jurisdiction. In the application of the *UN Pact of Civil and Political Rights* this includes not only guaranteeing that implicated civil servants fulfill human rights norms, but that they also act with “due diligence” in responding to violation of human rights committed by individuals (non-state actors). The international standard of “due diligence” describes the level of efforts that a State must fulfill in order to assure that human rights are respected, which includes obligations in the prevention and the investigation of child sex abuse, the sanctioning of those responsible and the protection, justice and reparation to the children.

In the last years initiatives have multiplied in utilizing international norms in improving the response of States in front of this type of aggression, focusing on the rights of children as established in the *Convention on the Rights of the Child*. Within Europe, as well as by the Council of Europe and the European Union, definitions of guardianship, attention and protection of the rights of children, in particular their right to life, integrity, and full development, protects them from all forms of violence.

In 2007, the Council of Europe approved the Convention of Lanzarote in order to protect children against exploitation and sexual abuse, ratified by Spain. More recently, the European Union promulgated a Directive in relation to the fight against sexual abuse and sexual exploitation of minor children and child pornography, in 2011. Both instruments reinforce the promise of the State to act with “due diligence” in order to guarantee the effective protection of human rights of children faced with sexual abuse.

Save the Children works in a variety of ways and perspectives to prevent the sexual abuse of children and the promotion of the rights of victims of this type of aggression. One of the principle efforts in this area has been the evaluation of the political and administrative practices regarding the formation of recommendations of better protection of children. In relation to this work, it has identified the Judicial branch as an important institution in the realization of the rights of children facing this type of aggression.

In 2002 an investigation conducted by *Save the Children* in various European countries, Spain amongst them, alerted the potential that children victims of sexual abuse in judicial processes were being re-victimized by the system, and was mainly due to a lack of attention and diligence by judicial actors to the situations surrounding this type of aggression

The follow-up work to the afore mentioned investigation found that in Spain, even though there are several legislative advancements, the various implicated institutions lack an integrated perspective, focus, and objectives in their response to sexual child abuse. Additionally, in case studies of individuals *Save the Children* has detected obstacles and difficulties in assuring that rights of the children are protected and defended, especially when the abuse occurs in a family context and involves very young children. The preoccupation in relation to advancing norms, particularly in a European context, is that these norms are not translating into an elevated level of diligence within the administration of justice in Spain. In response, in this report *Save the Children* presents case studies which identify problem areas as well as evidence of victims inability to access protection and justice, and grave insufficiencies in judicial responses.

This report analyzes four cases of pre-school children who showed the first signs of sexual abuse at the hands of their fathers, and because of complexity in documenting the abuse, as well as the lack of diligence and an expeditious process, they were provisionally dismissed. In examining these experiences, complementing with an analysis of decisions of the Audiencias Provinciales in their dismissal of the cases of intra-family sexual child abuse, this investigation analyzes the origins and scope of the principle obstacles that make it difficult for victims of these crimes to receive adequate protection and effective judicial representation. According to the conclusion of the investigation, *Save the Children* has made several recommendations to policy-makers.

Case Studies

Case 1: ALICIA

Alicia is a girl of 6 years who was born with medical problems, that required her to receive assisted respiration and a special diet. In 2006, at 3 months old, her mother suffered aggression at the hands of her husband and the father of Alicia, and decided to initiate a separation. After the separation, she filed complaints against her husband for aggressions, many of which occurred in the presence of the child, but these aggressions were never condemned by the courts. During these years she was assisted by a domestic violence center from whom she received psychological treatment.

The divorce process of Alicia's father and mother was completed in the courts of violence against women. The judgment awarded custody of Alicia to her mother and regular visits with the father, when the criminal process for gender violence had not yet been completed. The gender abuse continued in meetings between the parents during exchange of the minor child in accordance with the custodial agreement.

At 17 months old, in June of 2007, after returning from a week with the father, Alicia's mother, while trying to bath her daughter, noticed she resisted being undressed. Once her daughter's clothes were removed she noticed two hematomas on each leg and redness in the vagina. She took her daughter to the Emergency Room of the hospital. Once there the doctors, alarmed by the suspected abuse of a minor, decided to contact the forensic doctor of the hospital. After having examined the girl the forensic doctor informed the mother of the gravity of the situation and that they would be initiating a criminal investigation. The mother became part of the process and requested a protection order for her daughter. After an initial court-hearing, the day after the complaint, the judge denied a precautionary restraining order, and the mother was not notified about anything regarding the case until several months later when her lawyer informed her that the case had been dismissed due to lack of evidence of a crime.

As Alicia's mother was unable to establish a protection order, the girl was obligated to continue with the visits established in the divorce decree, in spite of her growing rejection of her father. Also, because of the complaint Child Protection Services (CPS) became involved. This institution, instead of clarifying the possibility of sexual abuse, warned the mother that if she continued filing complaints against the father she would lose custody of her daughter. In spite of the complaints presented by the hospital, and by the mother, CPS claimed that the acts of the mother constituted "parental conflict" and considered that her activity in the criminal process inflamed the conflict, and were counter the interests of the minor child. For this reason that the mother of Alicia did not appeal the refusal of the protection order by the presiding judge.

The hospital, considers that there is clear indication of sexual abuse in the case of Alicia, evidence which is documented by the specialized program of the hospital designed to detect cases of sexually abused children. During three years, Alicia continued therapy in the hospital .

At the same time, even though she was increasingly rejecting her father, she was obligated to maintain contact and the custodial visits as provided for in the original divorce decree, which included over-night visits every two weeks.

In February of 2010, when Alicia was 4 years old, she came back from a visit with her father with extreme vaginal pain and difficulties in urinating, her mother subsequently took her to the Emergency Room and the hospital once again diagnosed “erythema and vaginal erosion” and it was noted that in the report that the *“girl, when asked, declared that her father had put his finger in her “pepe” (vagina)”*. Before such evidence the hospital called the forensic doctor who after examining the girl, informed the mother that they would be filing a complaint with the court of instruction, and requesting an investigation.

An investigation was initiated and the mother was called by the police who requested that she testify. However, even with the accumulated evidence, the presiding judge found in favor of the father and provisionally dismissed the charges. The mother of Alicia, was once again accused [of influencing her daughter] and did not appeal the decision for fear reprisal, due to the fact that CPS were more and more explicit in their assertions that the child was being manipulated by the mother.

In April of 2010, while an investigation was under way following the second complaint, CPS offered the mother and father a *“temporary improvement plan”* which consisted of declaring the child in situation of defenselessness, with them provisionally assuming guardianship of the child and authorizing temporary custody to the maternal grandparents. The mother accepted the agreement as she understood the situation was temporary, and as a last recourse to protect her daughter. As she declared *“I gave up custody because they promised me if I could not see her and I did not have her, he couldn’t either, and I thought it was the only way to protect her.”*

In spite of the expressed desire of the child to return to live with her mother and the reports of CPS that confirmed the mothers capacity to take care of her child, and in October of 2010 CPS decided to make the changed guardianship permanent. Since April 2010, Alicia’s parental visits with the father and mother were limited to brief visits in the Meeting Place. However, the father during this time was able to continue with ample contact with the child, since he lived with the paternal grand-parents, who at the beginning were accorded over-night visits. This situation of dis-protection lasted several months and was modified when a civil servant of CPS visited the domicile and noted that the child did not have her own bed and shared a bed with her father.

After more than two years without living together, and the refusal of CPS to reverse their decision of “defenselessness” of the child, Alicia’s mother appealed to the family court in order to recuperate custody and live with her child, who at six years old asked *“Why did they take away me away from my mother without asking me?”*. In addition to her requests, reports from psychologists and the school documented the suffering of the child due to the separation from her mother.

In May of 2012, the family court confirmed the declaration of “defenselessness”, arguing that *“between the father and mother their is such an elevated level of conflict that they cannot place the interests of the child in their litigation”*. Neither CPS, nor the family court took into consideration the evidence of domestic violence against the mother (the acquittal due to lack of evidence on record) and that two of the complaints of sexual abuse were not placed by the mother, but by a public hospital and a forensic doctor.

In the moment of the interview, Alicia’s mother affirms that she does not believe that she will file another complaint for sexual abuse because she is currently fighting to recuperate the custody of her daughter, who is requesting and needs to be with her mother. She considers that filing more complaints will be interpreted by CPS and the family court as nothing more than “maternal manipulation” and “parental conflict.”

Caso 2: RAQUEL

Raquel is a girl of 9 years old. Her mother has suffered from domestic violence from the father since the first months of her pregnancy. After the birth of her daughter, the threats of the father towards the mother included that if she left him, he would prevent her from seeing her daughter. In May of 2006, when Raquel was 3 years old, her mother decided to flee the family home with her daughter, seeking refuge in the home of her parents. Raquel later testified in interviews that she remembers the aggression of her father towards her mother and how on one occasion her father held her mother by her neck while she cried not knowing what to do. After the separation, Raquel’s mother denounced the domestic violence, but the judge qualified them as “mutual fights” and did not sanction the father. At present, Raquel’s mother is receiving treatment as a victim of domestic violence in a local specialized center.

After the separation, Raquel’s father disappeared during six months, during which time he did not contact the mother or the child. When he reappeared, he filed a complaint against Raquel’s mother for not letting him see his daughter. The complaint is archived. After November 2006 normal visits of alternate week-ends and two afternoons a week began.

According to the reports and testimony of the mother, since the first months, the child began to show signs of discontent with the visits and manifested that she was not happy with her father, in spite of the fact that her mother kept taking her to see her father. In March 2007, when the child had not yet reached 4 years old, she returned from a week-end visit with her father, with what appeared to be stains of blood on her underwear and was complaining of pain in her vagina, for which her mother took her to the hospital. Once there the girl was diagnosed with vulvovaginitis and told the attending personnel that it was “because her father had put something like a knife” in the vagina. The hospital informed the mother that they had not been able to analyze the liquid found because there had been an error in the sample with invalid results.

After the suspicion of sexual abuse, the hospital filed a complaint with the courts, which did not order a temporary protection order, and did not begin an investigation until six months later. The forensic examination of the girl took place one year later after the complaint was filed. During this year ordinary and overnight visits with father continued as did her rejection of her father. The girl was often ill (head-aches, stomach-aches), had nightmares and bed-wetting. The mother continued with the court ordered visitation and when the girl was not sick handed her over to the father. She complied with the court's decisions regarding visitation rights, because her lawyer advised her that the contrary would be interpreted a maternal manipulation in the filing of complaints against the father.

The expert examine, solicited by the courts in October 2007 and realized by the Forensic Medical Clinic in February of 2008, revealed that the veracity of the girl's testimony was very probable, and it was clear that the father presented at risk behavior with the girl (recognizing that he habitually bathed with the girl and on some occasions had touched his penis). Also, affirmed was that the father's behavior was meant to hurt the mother. He admitted to his abuse of the child, but did not confirm sexual abuse. The report alerted that the father on various occasion during the interview lacked veracity, and recommended the suspension of provisional visits of the father with the child, or at least supervised visits.

After having seen this expert examine en March of 2008, the presiding judge awarded a protection order with suspension of father-child visits. This suspension should have been awarded by the judge when the acts had originally occurred (in the domicile of the plaintiff). After the case had been transferred to another court, the defendant filed an appeal of the protection order, four months after it had been dictated. The protection order was revoked by the new courts without interviewing the girl or the mother. The judge accorded weekly visits (every Saturday of the year) supervised by the Family Meeting Place. According to the mother, the custodial visits had a great impact on the girl, besides being obligated to have contact with her father she was unable to go away on vacations during the two and a half years of the order.

Without ordering any of approbatory investigation, the presiding judge handed down a provisional dismissal. This decision is currently being appealed by Raquel's mother, who has presented a new report from a specialized expert, which showed an elevated level of credibility of the girl. In this report it warns that Raquel's father realized manipulations of her vagina on various occasions, introducing object in it, and at times producing pain.

In January of 2010 the Audiencia Provincial confirmed a dismissal. After which the father and mother were sent to the family courts for "family mediation", without considering and recognizing that in couples with domestic violence issues mediation does not provide solutions. After the dismissal, and in spite of the negative report, the family court awarded increased visitation rights for the father, even to the point of being more than normally allowed (four days each 2 weeks with over-night visits).

In September of 2010, after returning from an overnight visit, the girl —now six years old—said that her father "had touched her pipi" and presented pain and redness in the

genital area. The mother once again took her daughter to the hospital, where the girl was examined for signs of sexual abuse. The hospital's report declared that there was "suspect sexual abuse" and the mother returned to the courts requesting a protection order for her daughter. However, the presiding court denied the protection order without hearing any testimony from the mother or girl. Eight months after the complaint, the judge ordered an evaluation by the psychosocial team over the credibility of the testimony of the girl.

The exam was conducted seven months after having been ordered by the judge. Initially, the judge filed an order with the Clínica Médico Forense, which was appealed by the father, requesting that it be the court "psychosocial team" and not the Clinic who perform the exam. A court-psychologist (without being licensed, and with accumulated complaints for malpractice) realized an evaluation that addressed a different question than that demanded (it did not evaluate the credibility of the testimony of the girl in respect to sexual abuse, but rather the paterno-materno-filiales relationships). The lack of diligence in this report, reflecting information found in court records rather than examining the evidence in question, puts in question the subjectivity of the evaluators. The psychologist recommended a change of custody in favor of the father, and found "falseness" of complaints filed.

This is the only evidence collected by the presiding court, and which appear in court-records along with reports included in the original complaint. Without any additional evidence, one year and four months after the complaint (January 2012), the presiding judge closed the case. The reasons given by the judge in the resolution are literally copied from the resolution accorded in the refusal of the protection order in September 2010 ("lack of subject incredibility" of the mother for in context of conflicts with the father; contradictions in the testimony of the girl and lack of clear confirmation by hospital personnel, that affirm the "the story of the girl is credible, that is credible only up to a certain point for a girl of 7 years"). To these reasons are added the last paragraph in which the presiding judge affirms that "such arguments have not distorted the justice process". Additionally, the court adhered to the findings of the psychosocial team who "observed clear signs of maternal manipulations" and have used the previous dismissal as proof of the veracity of said findings. The sentence concluded that once a dismissal is final, they would initiate criminal proceeding against Raquel's mother for a "false complaint".

Raquel's mother has appealed the decision of the Audiencia Provincial and, at the closing of this report, the courts have not pronounced a final decision. She has also denounced the psychosocial team for deontological malpractice. In response to her complaint the Consejería de Justicia de la Comunidad Autónoma, she was directed to the Colegio Oficial de Psicólogos as the competent organization to which she should file her complaint. This organization however, declared that the person in question is not licensed with them and therefore they cannot take any action.

At present, the father has liberal visitations with his daughter. According to the mother there continues to be incidents of abuse by the father. In spite of physical evidence of these incidents Raquel's mother is unable to protect her daughter. Her lawyer has advised her not to file any more complaints, as it would substantiate the theory of "maternal manipulation" and end with a change in custody in favor of the abuser.

At the time of publication of this report, there was an outstanding motion to the courts by the father requesting custody of the child. Raquel's mother has expressed her fears over a change in custody, which the father has presented to the court ordered "family mediators", who used in their determination of possible "PAS or maternal manipulation."

Caso 3: JESÚS AND PABLO

Jesús and Pablo are two brothers of seven and five years old respectively. In 2008, when Jesus was three years old and Pablo was one, their parents separated with the mother being awarded custody of the children. By mutual agreement, the father and mother decided on a progressive visitation regime, which would increase as the children grew older. At the beginning the children would spend all week-end with the father without over-night stays due to the young age of the children, as well as two afternoons a week.

In the first year of the visits in 2008, the mother of the children began to observe strange behavior in the older child, which at first she attributed to the separation of the parents. But, after consulting a psychologist, the mother became concerned about sexual references that were so explicit for young children that they could only have originated from an inappropriate behavior by an adult in close contact with the child. At first the mother did not suspect the father, to whom she expressed her concerns.

But, due to the continued behavior of Jesus and the explicit abusive comments, in June 2008 she decided to take him to a psychologist specialized in analyzing the testimonies of young children. During several of the visits, the child revealed a rejection of the paternal figure, as well as a series of sexual games the father had taught him.

This is when the mother informed the Public Health Services, requesting a specialized psychologist for the treatment of Jesus. This public entity gave her an appointment for the child and initiated treatment 3 months later. Jesus's mother wanted a quicker response, and therefore requested that the psychologist who had identified the possible sex abuse make a report, which was subsequently presented to the presiding court along with a complaint for suspected sex abuse. At the same time the mother made the decision to not take her children to their father's for their visits until the judge pronounce a possible suspension of the parental visits, or a restriction on the regime of visits.

In October 2008, the family court handed down a decision on a preliminary hearing of divorce in which the visits between father and sons would occur in the Family Meeting Place (PEF), and under supervision. The father appealed this decision and solicited that he be awarded full custody of his children, joint custody, or a regime of visits that include regular visits and over-night stays. The Audiencia Provincial dismissed the appeal and confirmed the supervised visits in the PEF, until which time a decision was made on the pending criminal allegation of sexual abuse.

In regards to the pending criminal offense, with the first complaint filed in July 2008, the mother solicited a protection order and an investigation; the suspension of the father's custodial rights, registration of the paternal domicile and place of work in case of material relationship with the sexual abuse (the child indicated that at times there was a camera present) and an exam of Jesus by the forensic team of the Instituto de Medicina Legal. For this process the Instituto de Medicina Legal, realized by a forensic without specialization in child psychology nor sexual abuse that after only one session, concluded that it was impossible to evaluate the credibility of the child because, given his young age, he had not talked about the abuse. On the 4th of December in the presiding courts, without any more exams, handed down a provisional dismissal and close the case arguing that there did not exist and indication of sexual abuse indicated in the complaint. The district attorney was in agreement with the decision.

In 2009, the mother of the child presented herself to the Guardia Civil supplying new evidence of sexual abuse produced during the visits in the PEF. However, the center produced a report, at the request of the presiding courts, indicating a normal relationship between father and child during the visits.

Also, a clinical report was realized by a specialized infant psychologist of the Hospital Público Materno Infantil that had treated Jesus since 2008, describing that the acts of sexual abuse the child had suffered in the majority of instances appeared "plausible". In spite of the information provided in this report, the presiding judge decided not to require further investigation, and in May 2009, handed down a provisional dismissal of the charges against the father. The district attorney, in accordance with the first dismissal, requested that the case be closed, arguing that the psychologist had affirmed that "at the moment we cannot deduce that what the child is living is traumatic", forgetting to add the second part of the sentence. "This is not an indicator that this will not have a future impact on the child, and in his future development".

The mother appealed this dismissal before the Audiencia Provincial and, in December of 2009, the courts handed down a resolution of a page and a half citing lack of motive, confirming the decision of the lower court. In 2010, supported by a dismissal from the presiding court and confirmed by the Audiencia Provincial, the father solicited custody of his children (or shared custody) and, in the case custody was not awarded, requested normal visiting rights.

In response to this petition, the mother presented a new psychological report from the Hospital Público Materno Infantil that had treated Jesús in which there were indications of new acts of sexual abuse, and which recommended that the father's petition for non-supervised visits be rejected. In spite of this in December 2010, the family courts accorded an amplification and flexibility of visitation rights to the father. The basis for this change was due to the report by the Instituto de Medicina Legal which recommended "normalization" of paterno-filial relations through a regime of progressive visits, finishing with over-night visits. This judicial decision implied that between December 2010 and September 2011, visits had not occurred in the PEF. At this time the decision of the Audiencia Provincial is in effect, ordering that the visits take place in the PEF and in the presence of family members of the father.

During the months that the visits occurred without supervision the two brother once again related acts of grave sexual abuse, that implicated Pablo, the smallest child, that described inappropriate touching and introduction of objects in his anus

The mother during this period had filed four new complaints (2011), with pediatric reports, that in the case of Pablo indicated anal tears. One of the complaints included the testimony of Jesus, the eldest child, who describes that “there was he, his brother and father naked, that he had also put cream in the anus and then had introduced a stick in his anus, that his father had licked his entire body and that he had forced him to lick him [the father], that his father had ordered him to touch his rear-end, but that what he found most disgusting was that his father had obligated him to suck his penis”.

One of the courts that investigated the complaint requested another report by the psychologist of the Hospital Público Materno Infantil that since 2008 had treated Jesus. The professional, in this report, after including a description of the evolution of the child in the past 3 years, affirmed that he presented symptoms compatible with sexual abuse, (psychological encopresis or incontinence, and hipersexualization, for example). After receiving this exam the judge interviewed the child in the presence of the district attorney, defense attorney and a psychologist of the Medicina Legal during which, in spite of the lack of appropriate emotional support, testified in a very explicit manner the abuse and the related acts. However, the presiding judge without further examination, used what had been utilized in previous complaints. The judge solicited an “exam of credibility” of the testimony of the two children by the Instituto de Medicina Legal, by professionals that are not specialized in child sex abuse. After only one session, concluded using methodology that did not induce the children to spontaneous testimony and which could re-victimize them, above all the eldest child, the forense concluded the credibility of the children was doubtful.

The report of the forensic doctor regarding the anal lesions of Pablo discard the possible of sexual abuse, because there are no abrasions According to this professional “the logical [explanation] is that (the child) would have resisted” the sexual abuse, which would account for the abrasions in the anus, that did not exist in the case of Pablo.

The two presiding courts charged with the investigation of the facts decided to dictate provisional dismissals, in November and December 2011. In neither case did they evaluate the testimony of Jesus in the judicial exploration, in that at six years of age, related sexual abuse suffered and asked to be believed.

In March 2012 the father solicited for the third time a change of custody in his favor or an amplification of visitation rights. This question is still pending a resolution by the family court. The judge of the family court in this occasion decided to practice all of the necessary exams in order to obtain a conviction the most accurate possible in the interest of the two children. Since this conviction, the family court judge has admitted measures of fundamental evidence (psychological evaluation of Jesus and the pediatrician of the two children, for example) that the mother had not been able to admit and be examined in none of the other criminal proceeding for sexual abuse. At the closure of this report, the cited courts had not yet handed down the resolution, but the “diligence” at present looks like a positive outcome.

Caso 4: ALMUDENA

Almudena is a girl of 6 years. Before being born, in January 2006, her mother was the victim of domestic violence (physical, psychological and sexual) at the hands of her partner, the father of Almudena. After the birth of the child, aggression of the father became habitual, for which the mother decided on a separation. Almudena witnessed the domestic violence that the mother suffered, including aggression and insults during the time of co-habitated and, after in the exchange of custodial visits. The father, who also desired to end the, initiated the divorce.

In the first year after the separation (2007), the mother of Almudena promoted the maintenance of the relationship between the father and daughter, including leaving the domicile so that these visits could take place, because the father did not have an adequate domicile. In light of this and the young age of the girl, the family court fixe (first, provisional then later in the divorce decree) a regime of visitations of various days of the week and alternate weekends without over-night, except during vacations.

Because of the visits, Almudena's father continued to aggress the mother. For this reason and in spite of the fact that she never had initially filed a complaint, she filed a complaint in which she told about the more than ten years of aggression and solicited a protection order, which was awarded in April 2009. In spite of this situation, Almudena's mother continued to encourage a relationship between the girl an her father, to the point of hiring two people to deliver the girl to her father, thereby avoiding contact with the father. According to Almudena's mother, these two people, as well as her family, are witnesses to the violence of the father and the reaction of fear and rejection of the girl to him.

The protection order established that the exchange of the girl would occur in the Family Meeting Place (PEF). The protection order remained in effect until January 2010, due to the provisional dismissal of the domestic violence complaint. In spite of the fact that Almudena's mother continues receiving psychological treatment in the municipal support center for victims of domestic violence, a fact known by the presiding courts and family courts, psychological counseling for Almudena continued until the protection order expired.

From the first year of the separation the girl increasingly rejected visits with her father. This rejection, in spite of the mother's efforts to encourage the visits, manifested itself first in physical illness. The girl was often sick, with respiratory afflictions (bronchitis, pneumonia), cutaneous (dermatitis) and gastrointestinal problems, especially before and during the visits. But as the girl grew older, she began to verbally express her desire to not visit her father, stating "he is bad and he hurts me". In spite of the fact the girl's rejection increased during 2009, the mother continued to comply with the visitation schedule, causing confrontations with the girl when she was to visit her father, with her rejection of the father increasingly vehement. In these moments, Almudena would hurt her mother, hurt herself, and exhibit other behavior which indicated her distress.

During Easter vacation, 2010 Almuena was obligated to travel with her father. At the return of the trip, while in the PEF, the girl complained to her mother that “her rear-end hurt”, indicating her vaginal zone, and upon return home and during her bath, Almudena again said “mama, it hurts a lot”. Upon seeing the state of the child’s vulva (red, inflamed, and irritated), she took her to the hospital where the girl was diagnosed with inflammation of the vulva. Upon asking the possible cause the attending physician said it could be caused by a lack of hygiene and prescribed a cream and antibiotic. In spite of these symptoms being a possible indication of sexual abuse, the hospital did not realize any other exams nor did they analyze the substance present in the vaginal zone.

Almudena’s mother continued to take the child to the PEF for her visits with her father, but began to suspect the father’s abuse of the daughter. She therefore, with the medical report and the child’s complaints in hand, asked her lawyer to officially notify the divorce courts about the facts of the case. The family court did not take any action, nor did they forward the complaint to the district courts. And, after a hearing 3 months after the mother’s notification of the facts of the case, decided not to award a protection order for the girl and ordered her to spend summer vacation with the father.

The mother continued to comply with the visits and took her daughter to the PEF visits. But, once at the PEF, Almudena suffered an anxiety attack and during 2 hours cried and screamed that she did not want to go with her father, and was inconsolable to all efforts to oppose her rejection. At the closure of the PEF, the girl maintained her position that she did not want to go with her father, upon which the mother took her home.

A friend of the mother who had accompanied her to the PEF was witness to the episode. Upon leaving the PEF, the mother presented the child to the courts so that they could evaluate her, fearing that the father would denounce her for not complying with the visitation schedule, she also spoke with her lawyer and the local police, who assured her that “this was not a crime”.

In the following months (end of 2010), the rejection of the girl towards her father increased to the point that she suffered from sleeping disorders (she is medicated for insomnia by the children’s hospital— improper protocol in cases of suspected child sex abuse), and she hides and has nervous crisis when the mother tells her she is going to take her to see her father. She is unable to attend school because of her psychological state, insomnia and fear of having to meet with her father. In one of her anxiety attacks, in which the girl banged her head against the floor, emergencies services attended her, and psychological services documented wounds due to possible abuse. The mother presented these reports to the presiding courts, including the family court.

Because of Almudena’s rejection of her father, in 2010 the mother took her to a child psychologist and forensic expert, who after evaluating the girl concluded that there were “rational indications of abuse and severe childhood suffering at the hands of the father”.

Also, given to the family court and other presiding court was a report prepared by the public hospital services for abused children, which concluded that Almudena presented signs of abuse: sphincters control disorder, psychosomatic disorders, anxiety attacks, and inflammation of the vulva.

Since then, in October 2010, the girl has been attended by emergency services, the mother decided not to take her back to the PEF. She has not gone to school, being attend by a tutor of the Consejería de Educacion for children with problems, in response to the reports for sexual abuse of the child. During this time, the mother once again solicited a suspension of visitation rights of the father, for the protection of the girl. However, at the beginning of 2011 the father of Almudena filed a demand for the enforcement of his visitation rights, as well soliciting custody of the girl. In response, the presiding judge solicited a report by the “psychosocial” team of the family court, the PEF and CAF (Center of Attention of the Family). But, refused to consider the findings of the psychologist who had been treating the girl for more than 2 years (report in 2010), and who had become a key figure in supporting the girl. During this time the father of Almudena filed a complaint against the mother for disobedience, and for not having handed over the daughter for his custodial visits.

In 2011 Almudena’s case was delegated to a “round-table” discussion, in which CAF and PEF professionals, representatives of the girl’s school, the clinical psychologist, and the psychologist of the municipal domestic violence service, that had attended the mother participated. In these meeting it was concluded that Almudena should be treated by her therapist of confidence without any other therapy, who would decide on a visitation schedule for the father. The “psychosocial” team of the family courts received all of the professional reports (medical, psychological, and social) that existed until that time, but the court did not have an oral hearing in order to ratify said reports. Neither did they admit the expert test and testimonials introduced by Almudena’s mother in their deliberations.

On the 12th of November 2011, Almuena confided in her mother regarding the sexual abuse she had suffered at the hands of her father through drawings, which were immediately faxed to the psychosocial team of the family court by the mother. Who also, filed another petition for a provisional protection order with the family court. The mother, accompanied by the maternal grand-mother of Almudena, filed a complaint and petition for a protection order for the girl with the Attention Services of the Family of the National Police (SAF). Along with her complaint were all of the medical and psychological reports regarding the girl, as well as a list of witnesses. Several witness offered their testimony to the SAF after being called by the police.

The court assigned to the case, after examining the evidence, detained the father and accorded a protection order (with suspension of visitation rights and restraining order of 500 meters) in favor of the girl. However because of this decision another court of the same judicial district found in favor of the father against the mother for “disobedience” after not having respect the visitation rights of the father because of the abuse and the girl’s rejection of her father.

This court, after having received notice of this case, decided to cite the girl (5 years old at this time) and ordered a judicial exploration in presence of the district attorney, the defendant's attorney, the defense attorney, and the psychologist of the Forensic Medical Clinic. The girl testified about the sexual abuse she had experienced and requested protection, but after being intimidated by the questions of the aforementioned, she hid her head in her coat and refused to continue. The judge contended that the girl's testimony lacked credibility, failed to order a forensic exploration of the testimony, deciding instead to order a report from the "psychosocial" team of the family court. This team examined the father's petition for amplifying his visitation rights and the provisional civil measures, and linked the girl's rejection of her father to a possible manipulation by her mother.

Due to this report, the withdrawn behavior of the girl at the end of the court interview, and the testimony of the girl which was qualified as "improper given her age", in January 2012 the presiding judge handed down a provisional dismissal. The district attorney approved the dismissal. The mother appealed this judgment, which is at present pending.

On the 20th of December 2011, when the presiding court was still collecting certain evidence, the family court handed down a resolution that did not accord the a provisional protection measures for the girl (requested by her mother), ordering her to comply with the visitation of the father as dictated in the divorce decree "with the possibility of a change in custody in case the visits and stays with the father do not resume." At the same time, the family court threatened the mother to "immediately cease to submit the minor to psychological explorations and therapeutic treatment, taking the child to the Attention Center of the Infant (a municipal entity), or any other professional assistance". The mother appealed the decision to the Audience Provincial, which to date has not yet handed down a decision. In January 2012, the family court dictated another decision imposing on Almudena's mother a fine of €500/month "as long as she refused to comply with the visitations of the father."

After the dismissal, and based on the fact that the courts would not examine the evidence presented, Almudena's mother engaged a forensic psychologist of international prestige to analyze the contradictory reports which existed in the case. This professional in his report found the methodology and the processes used by the "psychosocial" team of the family courts in their reports to be flawed and dubious. With this report an expert, Almudena's mother denounced the psychologists, presumed "psychosocial" team for lack of rigor and subjectivity in their report. The expert, amongst other considerations, manifested his surprise at the lack of psychological tests of the father and presumed aggressor, which contrasts with the battery of test and other exams made on the mother. The expert conceded an objectivity and professionalism by the other reports outside of the Administration of justice, and concluded that "there exists indication of severe suffering of the minor as a result of the relationship with the father."

Finally, the expert recommended a protocolized study of the credibility of the girl, which the mother at her own cost, ordered in February 2012, an expert report by forensic experts in psychology and child sexual abuse in order to evaluate the degree of credibility of the girl's testimony. This report attributed and elevated level of credibility of the girl's testimony and observed indications of sexual abuse and mistreatment.

These reports were sent to the family court, that affirmed that they did not introduce any new information and, in March 2012, handed down a third refusal to the petition of provisional protection measures for the girl. This resolution was appealed. The Audiencia Provincial has set a date in May 2013 for an oral hearing in regards to the appealed resolution

In the week that the mother was interviewed and documentation of the case was carried out (May 2012), a notice of inadmissibility of "recurso de amparo" (appeal for legal protection of Constitutional right's) by the Constitutional Courts which the mother had filed against the family courts over the execution of the visitation rights of the father, considered inadmissible important evidence that demonstrated sexual abuse of the child.

At present, Almudena, her mother and her father, are being evaluated by the municipal Attention Center of the Infant where they reside.

In the interview with Almudena's mother she expressed a huge preoccupation for the uncertain situation that her daughter is living, diagnosed with "post-traumatic stress" by the treating psychologists, who recommends stability and basic protection from the abuse for her recuperation. Almudena, after confessing to her mother about the sexual abuse suffered, has asked her repeatedly to protect her, and not to hand her over to her father. At present the mother's appeal of the resolution by the family court obligating the mother to resume visitation with the father, and the fact that the provisional dismissal is not final, are the only the child only protection.

Before approaching Save the Children, the mothers of the children in the cases presented in this report had denounced the lack of diligence in the protection of their children to the Fiscalía General del Estado, el Consejo General del Poder Judicial and el Defensor del Pueblo, amongst other organizations. This is a resume of the cases analyzed, in accordance with their testimonies and documents presented.

RECOMENDACIONES

In order to eliminate the obstacles identified [in this report], Save the Children considers it urgent to modify certain legislation and a series of institutional reforms necessary to guarantee full application in the administration of Spanish justice, in order to respect the principles and measures in international and European instruments which define the statute of minor victims in judicial procedures and the obligation of the State to afford effective protection to children confronted with sexual violence. In framework or action, Save the Children recommends the following practices:

- Approve a **normative that recognizes and promotes in an expressed manner the rights of children in judicial process**, in particular penal processes in which the victims and witnesses, and also in the civil procedure where judge must determine the legal regime of paterno-filial relationships. The pillars of the this normative revision must be; in full respect of the dignity of the children and their protection against all possibilities of re-victimization in the processes.
- Assure **adequate preparation and specialization of professionals and methodologies** in obtaining children's testimonies, including those in their first infancy (0-8 years). Precisely to change the logic that attributes the young age of children as their inability to provide valid testimony in criminal process. Identification of existing gaps and undertake the necessary steps to assure specialization (professional and methodology) in obtaining the testimony of young victims using the most adequate techniques with rigor, tact, and respect.
- Promote **the denouncement of this type of crime** from the onset. Improve the coordination between medical and educative services with the Administration of justice and urge the other entities (Family Meeting Places, centers of child attention, schools, and others) to promptly and rigorously denounce and inform possible indicators of sexual abuse.
- Guarantee **assessments and specialized information** about the rights and how to implement them during judicial procedures, focusing attention on legal representatives who are responsible for informing the police and Administration of justice of cases of abuse.
- Implement **assistance of court-appointed specialized legal counsel** in attending children victims of violence, including sexual violence.
- Assuring **the specialization and transparency of the experts in the Administration of justice**. Given the fundamental role of these professionals in this type of process, there should be strict requirements regarding continual training of professionals and evaluators, which guarantees their specialization in the evolution of psychological theory and practices, as well as in diagnosis and treatment of sexually abuse children.

Also, they should establish channels of periodic evaluation and mechanisms of accountability for cases of malpractice.

- Promote **the formation and actualization** of rights of children and the obligation of the State when faced with cases of violence, improving coordination between **judges and district attorneys** involved in pleading and judging family law cases. These groups must impart amongst themselves basic formation about evolutions in psychology and child sex abuse, including criteria in the evaluation of evidence and expert testimony during the process.
- Guarantee **the right of the children to be heard** and to participate in the issues that affect them. This is a fundamental right whose effective realization opens the doors to all other rights of which children are entitled. For this the Administration of justice should put all the resources at their disposition in order to guarantee that they are complying with international norms and directives.
- Protocolize **the determination of the “best interest of the child”** by judicial authorities, so that fundamentals of a concrete decision should respond to a series of requirements preview by international and European instruments (for example, those established in the Directives of the European Counsel about justice adapted to the infant). This protocolization would not only prevent subjectivity in the interpretation of principles, but would facilitate comprehension decision-making by the people affected.
- Establish guidelines for the adoption of measures and precautions guaranteeing **that the aggression will not be repeated, utilizing judicial protection measures** (in the civil orders as well as the criminal ones) for children victims of sexual abuse, especially in cases where the defendant is a father, mother or primary caregiver.
- Guarantee **priority in the judicial investigation of these crimes**, recognizing that precipitated dismissal of allegations can cause irreparable damage to the affected children in future procedures. In the context of the couple in crisis, the courts should initiate an exhaustive investigation of the family dynamics of the case at hand, instead of promoting biased opinions, in order to arrive at an expeditious judicial decision. The reason for a child rejecting a parent should be thoroughly explored, as well as any possible antecedents, such as the existence of a relationship of domestic violence between the mother and father.
- Evaluate **implementation of Circular 3/2009*** by the District Attorney that intervenes in criminal proceedings for child sexual abuse. The information received demonstrates the importance of reviewing the actions of district attorneys, agents who are key in assuring that allegations of these crimes are properly investigated and prosecuted, as well as that judicial decisions comply with Spanish law and that the best interest of the child are held to the highest standard at all times.

* Circular 3/2009 on protection of minor children and witnesses, that provides exhaustive information regarding the role of the district attorney in criminal procedures involving child sex abuse.

INTERNATIONAL LAW & HUMAN RIGHT IMPLICATIONS

Spanish justice system in relation to child sex abuse within the family

A case analysis in light of international standards and human rights

REGULATORY FRAMEWORK

The framework in the protection of the human rights of children faced with sexual abuse in three areas:

- International law and human rights treaties ratified by Spain
- Treaties and other related frameworks of the European Union
- Spanish substantive law (civil & penal code) and procedural law.

International norms and treaties are agreements that generate the obligation for the State to implement this framework into domestic law. This supposes that international treaties are part of domestic law as established by the Spanish Constitution of 1978 (art. 96). But, also it establishes the obligation that norms regarding fundamental rights and liberties, recognized constitutionally, are interpreted in accordance with international norms and treaties (art. 10.2 of the Spanish Constitution). (Therefore, Spanish laws (substantive, procedural, as well as budgetary law) must abide by the provisions of international norms.

CONVENTION ON THE RIGHTS OF THE CHILD AND THE DOCTRINE OF ITS COMMITTEE

Spain ratified the principle human rights treaties, amongst them the UN Convention on the Rights of the Child, that in article 19 establishes the obligation of the State to protect children from all forms of violence, including sexual abuse, through legislation, administrative measures, and effective procedures in order to establish social programs with the object of providing the necessary assistance to children (...) and for the identification, notification, referral to an institution, investigation, treatment and observation of the cases of child abuse included and, when appropriate judicial intervention”.

The UN Committee on the Rights of the Child, organization which watches over the fulfillment of the Convention by the State its General Observation #13 that “the protection against all forms of violence should be considered not only from a child rights perspective to life and survival, but also en relation to his or her right of development, to be interpreted in consonance with the global objective in the protection of the child.”

The obligation of the Spanish state to act with “due diligence” faced with human rights violations committed by implicated individuals most especially when acting in an official capacity in the administration of justice. Article 2 of the International Pact on Civil and Political Rights obligates a State to establish effective channels for denouncing abuse and obtaining justice, which implies, in cases like those presented in this report, the diligent investigation of the facts and sanctioning those responsible, as well as the adoption of measures of protection and reparation for victims. The UN Committee for Human Rights affirms that “these means must be adapted adequately in order to take into account the special vulnerability certain classes of people, **particularly children**.”

Therefore, in the Observation General nº 13 on protection of the child faced with violence “the Committee recognizes the utmost importance of the family, including the extended family, in the attention and protection of the child and in the prevention of violence. It also recognizes that **in the majority of cases acts of violence occur within the family** and that, consequentially, **it is necessary to adopt intervention measures and support when children are victims of the difficulties and hardships produced within the family**.”

Children as “Holders of Rights”

The signature of the Convention of the Rights of the Child assumes the universal recognition that all people under 18 years old are holders of universal fundamental rights... The right to not be the object of any form of violence requires that the State adopt the necessary measures to assure that protection is effective..

The duty to special protection in the first infancy and the right not to be discriminated against. The Committee of the rights of the child in the n° 7 General Observation on the real “the first years of small children are the base of their physical and mental health, their emotional security, and their cultural and personal identity, and development of their aptitudes” ...The art. 2 of the Convention on the rights of the child enshrines the right of the child to not suffer discrimination and the protection of their rights....

The Committee identified obstacles in the performance of the State that renders difficult the recognition of rights of young children. The importance of preventing the risk of discrimination has brought the formulation of n° 7 General Observation on the realization of the rights of the child in the first infancy in which there is concern because “signatory States have not paid enough attention to small children as holders of rights, nor have they developed laws, politics initiatives or programs that effectively realize their rights during this phase of their childhood”. For this reason, the Committee has urged States to “adopt measures for the well-being of young children at risk”

The superior interest of the child and the right of children to be heard

Article 3 of the Convention on the Rights of the Child established the principle that the “superior interest of the child” will be a primordial consideration in all measures concerning the children.

In particular, the Committee of the Rights of Children holds the position that the superior interest of the child is in the center of responses and institutional actions implicates two fundamental obligations:

- *Prevent all forms of violence and promote the positive upbringing of the child, insisting on the a national coordinated framework in the primary prevention;*
- *Invest sufficient human, financial and technical resources in the application of an integrated system of protection and attention of the child based on rights...*

EUROPEAN FRAMEWORK

*Within the context of the European Union, the Council of Europe converted the promotion and realization of the rights of the child in Europe is a priority. In the strategy of Building a Europe for and with children has raised the key objective of the protection of the child in front of violence, particularly sexual violence. In order to do this they have promoted awareness campaigns and approved directives and binding rules for the protection of the child faced with violence and the **guarantee of the access to justice for the victim of said abuse....***

INTERNATIONAL AND EUROPEAN DIRECTIVES ON AN ADAPTED JUSTICE FOR THE CHILD

*In 2005 the UN Economic and Social Council approved the **Directive on Justice in Issues Concerning the Child Victims and Witnesses of Crimes** (hereafter called, UN Directive) with the finality of guiding the States in the realization of human rights of the child in judicial process. This documents part of the recognition of children victims and witnesses in judicial require a protection adapted to their age, level of maturity and specialized individual necessity, including the protection of girls faced with gender-based discrimination at every stage of the judicial system.*

In this document the conditions of “holder of rights” of children is re-affirmed and the recognition of their special necessities within the justice system . At the same time it urges the State to act in a specific form and with all measures at their disposition in order to guarantee a series of basic rights.

*This international standard establishes a common series of action that a State must put in practice in order to guarantee an effective realization of the rights of child victims of a crime within the administration of justice. Using this criteria, **the State must guarantee:***

- *Diligence in initiating and carrying-out a criminal process*
- *Adequate evaluation and information for the age of the child about his rights and how to have them respect during a judicial procedure, including assistance of specialized free legal counsel.*
- *The mechanisms by which children are heard and can express their preoccupations and opinions, and that they are taken into account.*
- *Respect for their dignity and protection from all possible sources of revictimization*
- *The motivation of all resolutions that affect children, using as a base the “superior interest of the child”*
- *The existence and application of effective measures of protection so that those who denounce the abuse are not subject to repetition of the abuse*
- *The maximum of speed in procedures that affect children*
- *Special conditions in interviews and declarations in judicial centers*
- *The specific formation of those who participate in procedures that affect child victims (judicial actors and forensic experts)*
- *The mechanisms for a just and adequate reparation*

SPANISH FRAMEWORK AND PROTOCOLS

The Spanish Constitution establishes in art. 39.4 that “Children enjoy the protection provided in international agreements that watch out for their rights”. – This norms, that in its preamble recognizes that “Minors enjoy the rights recognized in the Constitution and international treaties of which Spain is signatory, especially the Convention on the UN Rights of the Child.” It presumes the incorporation of the general principle of “the superior interest of the child” and of the consideration of the child as “holders of rights” into the Spanish legal system.

Therefore, they must provide them with all the information in order to exercise there rights and participate and be heard in the issues that effect them. The Spanish penal code incorporates several specific types of crimes, whose penalties have recently increased, that sanction sexual violence committed against children within the family and establishes that the custody decisions are always in the best interest of the child, in accord with their personality, and with respect to their physical and psychological integrity (art. 154).

The civil code also permits the judge to adopt “any measure” in order to keep the child out of danger or avoid prejudices (art.158), including the suspension of custody visits and including temporary deprivation of custody rights. ..

Civil Process

The process in order to resolve a legal and economic situation before a divorce, separation, annulment, are special procedures regulated by art. 748 to 755 and 769 to 778 of the law for Civil procedures. Amongst the measures adopted in this process is the decision about the custody of affected children: ruling on a shared custody, upon which both parents hold custody, as well as

the determination of the visitation of others. The enormous impact these measures have in the life of the children, that are not always adopted taking in account their superior interest, is based on a series of criteria that have been established in the law and jurisprudence and the differentiate these processes from ordinary civil ones. Amongst them, include the preferential processing of these procedure, the exclusion of publicity, and the discretionary ability of the judge to solicit evidence and adopt the measures that consider the most adjusted in the realization of the superior interest of the implicated child.

In addition to the measures that can be adopted in the civil cases in respect to the parents, in criminal cases when the courts have knowledge of a criminal offense of sexual abuse against a child they can adopt protection measures that permits criminal prosecution (arts. 13, 544 bis and 544 ter)²⁹. Concretely, these precepts make reference to restriction order of aggressors and the prohibition of communication with the children. Including permitting the judge to send the aggressor to prison as a preventative measure is evidence exists that the physical safety or life of the minor child is in danger and a protection order is not sufficient.

RESULTS OF THE INVESTIGATION

Three barriers to the access of justice and the ability to obtain an adequate response in all of the cases of alleged sexual abuse within the family have been identified. These barriers are related to the age of the victims, the family context in which the sexual abuse occurs and the identity of the denounced.

Additionally, identified are four spheres of related preoccupation with the failure to comply with the public authorities legal obligation to assure the realization of the rights of the children be upheld: the determination of the “superior interests of the child,” be listened to, the obligation of the specialization of the professionals who intervene in the process, and the obligation of a rapid access to justice.

Lastly, detailed are the principle obstacles identified in the judicial process identified; obstacles in denouncing the sexual abuse, lack of due diligence in the administration of justice in filing of complaints and the investigation of the facts, lack of due diligence in the protection of children affected and the deficiencies related to judicial decisions to close the cases.

Also, included is a resume of the results obtained by the Audiencias Provinciales in the examination of appeals of the dismissals by the presiding courts, confirming the findings of this investigation and the facts of the cases included in this report.

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