IAFL Introduction to European Family Law
'Virtual Kyiv' Webinar

How decisions are made:
(1) Voice of the child – how does your jurisdiction listen to a child's views?
(2) Transparency of judicial decision making – private courts/private judgments?

Friday 19th March 2021

Supporting Documents

Chaired by: Julie Losson (Russian Federation)
Panel: John Bonello (Malta), Romualdo Richichi (Italy), Konstantinos Rokas (Greece), and Raphaëlle Svara (Monaco)

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VOICE OF THE CHILD AND FAMILY JUSTICE IN FRANCE AND RUSSIA

BY JULIE LOSSON, LAWYER PRACTISING IN PARIS AND MOSCOW

FRANCE	RUSSIA
What legal texts govern the words/views of the child before the judge dealing with family matters?	
- Article 12.1 of the Convention on the Rights of the Child - Articles 23 and 41 of the Brussels II bis Regulation of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility - European Convention on the Exercise of Children's Rights of 25 January 1996 ratified by France on 1 August 2007 - Article 388-1 of the Civil Code - Articles 338-1 through 338-12 of the Code of Civil Procedure (ordinance of 20 May 2009) - Circular of the Keeper of the Seals of 3 July 2009	- Article 12 of the Convention on the Rights of the Child - Article 57 of the Family Code of the Russian Federation: The child has a right to express his views in family decision making on any matter affecting his interests and to be heard in any judicial or administrative proceedings. The views of the child who has reached the age of ten must be taken into account except when this is contrary to his interests. In the cases stipulated by the Family Code of the Russian Federation (articles 59, 72, 132, 134, 136, 143, 145) the trusteeship and guardianship bodies or the court may take their decisions only with the consent of the child having reached the age of ten. - article 179 of the Civil Procedure Code of the Russian Federation
Have the courts and lawyers drawn up good practice guidelines for conducting a child's hearing by the judge?	
- In 2008 the Commission on the Rights of Minor Children of the Conference of Bailiffs (Lawyers) adopted the "National Charter on Defense of Minor Children" - Was also adopted the "Charter of Good Practice for Lawyers" elaborated by the Juvenile Division of Paris Bar Association. - About twenty French courts have elaborated an agreement for conducting a child's hearing on the basis of their judicial practice.	No, the Russian courts and lawyers have not drawn up good practice guidelines for conducting a child's hearing so far.

Under what circumstances can a child be heard by a family court judge?	
- Social and/or psychological investigation - Special investigation measure - Request for hearing made by the parents who are parties to the litigation - Request for hearing ordered by the judge - Request for hearing made by the child himself	A child can be heard in the course of an investigation requested by the parents, the judge or the trusteeship and guardianship body. A child is also heard as a party to a litigation when he is over the age of 14 years and takes legal action himself.
What are the legal grounds for hearing a child in court?	
- A child shall intervene in judicial proceedings relating to him and - Be "capable of discernment".	- A child can be heard in any judicial proceedings relating to him and to which he is not a party as well as in any judicial proceedings instituted on his own initiative after he has reached the age of fourteen (see below) - in the presence of an educational worker - if the child is under the age of 10, the court shall determine whether or not the child has reached a degree of maturity at which the court may take account of his views.
What are judicial proceedings relating to the child?	
- Any proceedings (divorce or other) concerning the parental authority between the parents (award, withdrawal, terms of the exercise, determination of residence, visitation rights, child support …) - Parental authority involving a third party (great parents) - International abduction or removal of a child - Filiation - Adoption - Changing the child's first name - Trusteeship, guardianship - Inheritance to which the child has a right - Reparation of damage that might be caused to the child - Alteration of the parents' matrimonial property regime (because of judicial homologation in the presence of minor children opposing the modification). As to the last point, the child can be heard in the course of proceedings concerning the financial relations of his parents, which is regrettable …	- Any family disputes concerning the child (determination of his place of residence, visitation rights of a non-custodial parent, etc.) - Changing the child's name and surname; - Termination of the parental rights of the child's parents; - Reinstatement of the parental rights of the child's parents; - Adoption of the child and selection of a new name and surname by the adopted child; - Registration of adoptive parents as the parents of the adopted child in the Birth Record Book; - trusteeship and guardianship over the child; - return of the child to his country of habitual residence in case of his abduction/retention by one of the parents (under the Hague Convention 1980)

Can a minor child ask to be heard by a civil judge under all circumstances?	
With the exception of matters related to minor children guardianship and the particular case of French divorce by mutual consent without judge (see the following question), a minor child cannot be heard by the family court judge if there are no pending proceedings. On the contrary, he can approach the juvenile court judge in order to warn him of a dangerous situation without any pending proceedings.	Pursuant to article 56 of the Family Code of the Russian Federation, the child has a right to the protection of his rights and legal interests. The child's rights and legal interests shall be protected by his parents (persons substituting for parents) and, in the cases stipulated by this Code, by the trusteeship and guardianship body, the prosecutor and the court. Therefore, a child cannot have recourse to the judge if there is no ongoing court proceedings with the exception of two cases: . A minor child recognized in conformity with law as having full legal capacity before reaching the age of majority has a right to exercise his rights and duties independently, including the right to protection. . In the event of the child's rights and legal interests being violated, in particular, if the parents (or one of them) fail to fulfil or properly fulfil their duties related to the child's education and upbringing or if they abuse their parental rights, the child may on his own seek protection at the trusteeship and guardianship body and, upon reaching the age of fourteen, in court.
Shall the child be informed of his right to be heard by the judge in case of divorce without judge /administrative divorce?	
Yes, the child shall be informed by his parents of his right to be heard by the judge. And pursuant to article 229-2 1° of the Civil Code, if a minor child asks to be heard by the judge in case of divorce by mutual consent in which in principle no judge is involved, the spouses must have recourse to the judge.	In Russia couples with minor children are divorced only in court. No administrative proceedings are possible in this case.
What does "the child's discernment" mean?	
The discernment is not a legal concept but it may be defined as a possibility to understand the presented information, to be able to analyze it and perceive its consequences. It is assessed on a case-by-case basis. In the English version of the International Convention on the Rights of the Child the translation is less vague than the term "discernment" since it makes reference to "the child who is capable of forming his or her own views". The notion of discernment has existed in the French law since the law of 8 January 1993 generalizing a child's hearing in civil proceedings and replacing the reference to the age (13 years) took effect.	The Russian law provides no definition and contains no special articles referring to "a degree of maturity at which it is appropriate to take account of the child's views". The degree of maturity and the capacity to give objective assessment to current events are mentioned in article 13, paragraph two of the Hague Convention on the Civil Aspects of International Child Abduction (1980) to which Russia acceded in October 2011. The article states that the child's return to his country of habitual residence may be denied if the child objects to being returned provided that he has attained an age and degree of

The discernment criterion is subjective, technical and brings divergence into the French judicial practice. Furthermore, it may seem strange to ask a judge to assess the discernment of a child (which is a precondition for his hearing) whom he has never met.	maturity at which it is appropriate to take account of its views. The court determines in each particular case whether or not the child has attained an age and degree of maturity at which his views shall be taken into account.
What are the criteria for determining whether or not a child is capable of discernment?	
- age (but not exclusively), - educational level, - presence of siblings, - mental deficiency or disability, - psychological troubles, - presence of a real loyalty conflict (domination of one of the parents), - ability to understand a problem, - ability to free himself from his parents' views, - capacity to give reasons and arguments for his wishes, - formulation of the request for hearing by the child (written, oral…), - and finally, the nature of litigation (patrimonial or not).	- age and degree of maturity, - academic progress at school or a preschool institution, - capacity to objectively and rationally assess the current events; - the child's psycho-emotional state; - influence that one or the other parent or another family member has on the child; - capacity to form his views and wishes
Is there a minimum age under which a child cannot be heard in court?	
No, the French law does not set any minimum age, it's on the basis of the judge's assessment. If the judge finds that the child is not capable of discernment, he will not be heard. The judge shall motivate his decision and not base himself only on the child's age. In practice, it is the age that the majority of the French judges dealing with family matters take into account in the first place (children heard are in the 7 – 12 age range depending on the court, hence the legal uncertainty associated with disparate practices) The French doctrine in family matters considers that "the discernment of the child shall be presumed from the age of 10" (in criminal cases, a minor child under the age of 13 is fully responsible for his actions).	The Russian law does not contain an explicit reference to the minimum age at which a child can be heard in court; however, article 57 of the Family Code of the Russian Federation provides that "the views of the child who has reached the age of ten must be taken into account". In view of the above provision, the age of 10 years is considered in the Russian judicial practice as the minimum age at which a child can be heard in court.

<table>
<tr><th colspan="2">Can the judge deny the request for hearing made by a child if he believes that such hearing is contrary to the child's interest?</th></tr>
<tr><td>It is no longer possible in accordance with the French legislative texts applicable since 2007. The judge shall respond to the child's right.
The judge can refuse to hear the child only if he finds that the child is not capable of discernment or if the proceedings do not concern him.
On the other hand, the judge can refuse to hear the child if the request for hearing is made by one of the parties to the litigation (parent).</td><td>Yes, while taking a decision on any matter relating to the child, the judge does not take into account the child's opinion only if it runs contrary to the child's interests (article 57 of the Family Code).</td></tr>
<tr><th colspan="2">Can the judge decide ex officio to hear a child?</th></tr>
<tr><td>Yes, the judge can decide ex officio to hear a child capable of discernment or to cause him to be heard on the basis of his own assessment.</td><td>Yes, he can.</td></tr>
<tr><th colspan="2">What is the procedural status of the child heard in court?
Is the transcript of the hearing transmitted to the parties?</th></tr>
<tr><td>"The hearing of a child does not confer on him the status of a party to the proceedings" (article 388-1 paragraph 3 of the Civil Code).
In compliance with the principle of adversary proceedings, the transcript of the child's hearing is transmitted to the parties. However, in order to protect the child's interests no form is required (oral, written, directly to the parents or to the parents' counsels…)</td><td>The procedural status of a child interrogated in court equates with the status of a witness (article 179 of the Civil Procedure Code).
In the event of the parties to the case being removed from the courtroom for the duration of a child witness interrogation, they shall be informed of the content of the testimony given by the minor witness after they return to the courtroom.
Upon reaching the age of 14, the child is a party to the judicial proceedings that he initiates himself.</td></tr>
<tr><th colspan="2">What are the material grounds for a child to be heard in court?</th></tr>
<tr><td>- the child shall be informed of his right to be heard
(since the Law of 5 March 2007)
- the child shall make a request to exercise his right to be heard
Though simple at first glance, these two requirements are difficult to comply with and clearly demonstrate that the hearing of a child in the family court proceedings is far from being automatic or systematic in France.</td><td>A child will be heard in court if his parents or guardians file a corresponding request and in the event of such request being granted by the court, ensure that the child appear in court together with an educational worker who will assist at the child's interrogation; or if the judge determines himself whether or not the child's opinion shall be heard in court and asks the parents or guardians to ensure that the child appear in court together with an educational worker who will assist at the child's interrogation.
Before the age of 14, the child cannot make a request for hearing himself.</td></tr>
</table>

In what way the child is informed of his right to be heard?	
The French law does not say that the judge shall directly inform the child by mail. This is regrettable. The petition or subpoena are simply accompanied by a notice requiring the parents to inform their child of his right to be heard. Nevertheless, the parents shall only do it if they believe that their child is capable of discernment and there are no legal consequences if the parents do not inform or the judge does not check. If the child capable of discernment finds out that a judgment has been made in the proceedings relating to him but he has not been heard, he will not be able to do anything since he does not have full legal capacity and cannot take legal action.	The Russian law does not provide for a procedure of informing/notifying the child of his right to be heard in court either. The parents or guardians of the child who will be heard by the judge shall ensure his appearance in court.
How can the child make a request to exercise his right to be heard?	
The French law does not impose any precise form: provided that a child is capable of discernment and asks to be heard in the course of proceedings relating to him, the judge cannot refuse to hear him, he has no power of assessment (which is different when the request for hearing comes from the parents). The request can be made in writing or orally at any moment of the proceedings. However, the court practices vary from court to court: certain courts insist on a written document, other – on a document written by the child himself and not by his counsel…	Before the age of 14, everything goes through the parents or the trusteeship and guardianship body. No direct right for the child to be heard. If the child who has reached the age of 14 initiates court proceeding on his own in pursuance of article 56, part 2 of the Family Code, he shall be do it by filing a petition to court.
If the parents come to an agreement, can the hearing of the child be cancelled?	
In practice yes, since the parents are the only persons who are required to inform the child of his right to be heard.	Yes, the parents as the child's legal guardians may raise objections to the child being heard by court.
Can the child appeal the denial of the request for hearing?	
No	No

Is the child's hearing conducted directly by the judge or through a third party?	
In accordance with the legal texts the principle is that of the child's direct hearing conducted by the judge in court (article 388-1 of the Civil Code), however, it is possible to appoint a third person to conduct the hearing "when the child's interests so require". The third person shall be a qualified specialist and work in the social, psychological or medico-psychological sphere. Although, according to the legal texts the child's counsel shall content himself with relaying to the judge the child's request for hearing, the Court of Cassation acknowledges that the child may be heard through the voice of his counsel. Since the judge is not obliged to motivate his decision to delegate authority, many French courts reverse the principle and the exception and practise systematic delegation of authority to a third person due to the lack of time, know-how, competence or when the child is too young, or content themselves with taking down the words said by the child during a more comprehensive social investigation.	In accordance with article 179 of the Civil Procedure Code the examination of a child witness under the age of fourteen and, at the discretion of the court, the examination of a child witness under the age of sixteen shall be conducted with the participation of an educational worker who is summoned to court. If necessary, the minor witness's parents, trustee or guardian shall be also summoned to court. The said persons may, with the permission of the presiding judge, ask the child questions and express their views as regards the personality of the child and the content of the testimony given by him. In exceptional cases, if this is necessary for establishing the circumstances of the matter, any of the persons participating in the case or present in the courtroom may be removed from it for the duration of the child's interrogation on the basis of the judge's ruling.
Can the child be heard in the presence of a counsel or any third person?	
The French law provides that a child may be heard with "a person of his choice" (choice that may be disregarded by the judge) or with a counsel, and if he does not choose his counsel himself, the judge asks that such counsel be appointed by the bailiff. The child is entitled to legal aid to pay his counsel's fee. The cases where a child actually chooses his counsel himself are rare. The parents' influence may be very strong here. The appointment of a counsel by the bailiff seems particularly advantageous for protecting the child's interests. The possibility for the child to be heard in the presence of a person of his choice is open to criticism, so is the judge's right not to take into account that choice.	The child shall be heard only in the presence of an educational worker who is invited to court for this particular purpose.

FRENCH CIVIL CODE
TITLE X. MINORITY AND EMANCIPATION Chapter I. Minority

Article 388-1
In all proceedings relating to him, a minor capable of discernment may, without prejudice to the provisions contemplating his intervention or consent, be heard by the judge or, when his interest acquires it, the person appointed by the judge for that purpose. This hearing is of right when the minor demands it.
When the minor refuses to be heard, the judge weighs the justification for this refusal. He may be heard alone, with a counsel or a person of his choice. Where that choice does not appear to be consonant with the interest of the child, the judge may appoint another person.
The hearing of the minor does not confer on him the status of a party to the proceedings.
The judge makes sure that the minor has been informed of his rights to be heard and to be assisted by a counsel.

FRENCH CODE OF CIVIL PROCEDURE
TITLE IX bis HEARING OF A CHILD IN COURT

Article 338-1
The minor child capable of discernment shall be informed by the person or persons exercising parental authority, the guardian or, where appropriate, the person or the institution to whose care he has been entrusted, of his right to be heard and to be assisted by a counsel in all the proceedings relating to him.
When the proceedings are instituted by petition, the writ of summons shall be accompanied by a notice containing the provisions of article 388-1 of the Civil Code and those of the first paragraph of this article.
When the proceedings are instituted by a bailiff's act, the notice mentioned in the previous paragraph shall be attached thereto.
Any agreement submitted for homologation to the family court judge in accordance with the procedure established by article 1143 or by articles 1565 et seq. shall mention that the minor child capable of discernment has been informed of his right to be heard and to be assisted by a counsel and, where appropriate, that he does not wish to exercise that right.

Article 338-2
A request for hearing shall be presented without any formality to the judge by the minor child himself or by the parties. It may be made at any stage of the proceedings and even for the first time on appeal.

Article 338-3
The decision ordering a hearing may take the form of a simple reference recorded in the file or in the transcript of the court hearing.

Article 338-4

When the request is made by the minor child, the denial of hearing may be only based on his lack of discernment or on the fact that the proceedings do not concern him.
When the request is made by the parties, the hearing may also be denied if the judge concludes that it is not necessary for the dispute resolution or believes that it runs contrary to the minor child's interests.
The minor child and the parties shall be informed of the denial by any means. In each case the reasons for denial shall be stated in the decision on the merits.

Article 338-5

The decision taken on the request for hearing made by the minor child shall be not subject to appeal.
The decision taken on the request for hearing made by the parties shall comply with the provisions of articles 150 and 152.

Article 338-6

The Office of the Court Clerk or, where appropriate, the person appointed by the judge to hear the minor child shall send him by ordinary mail a subpoena to appear for a hearing.
The subpoena shall inform him of his right to be heard alone, with a counsel or with a person of his choice.
On the same day, the defense counsels of the parties and, in their absence, the parties themselves shall be informed of the hearing procedure.

Article 338-7

If the minor child asks to be heard with a counsel but does not choose him himself, the judge shall by any means cause such counsel to be appointed by the bailiff.

Article 338-8

When the hearing is ordered by a panel of judges, they can hear the minor child themselves or appoint one of their members to proceed with the hearing and report it to them.

Article 338-9

If the judge believes that the child's interests so require, he shall appoint a person who must maintain no relations either with the minor child or with a party for the purpose of conducting the hearing.
Such person shall work or have worked in the social, psychological or medico-psychological sphere.
He shall be informed of his appointment without delay and by any means by the Office of the Court Clerk.

Article 338-10
If the person who has been appointed to hear the minor child face any difficulties, he shall immediately refer him back to the judge.

Article 338-11
The hearing procedure may be modified if there is a serious reason preventing the minor child from being heard under the initially envisaged conditions.

Article 338-12
A transcript of such hearing shall be made with due regard to the child's interest. The transcript shall comply with the principle of adversary proceedings.

The Voice of the Child in Family Proceedings – A Maltese Perspective

John Bonello
8Point Law

IAFL Introduction to European Family Law Conference
19 March 2021

Children at the Heart of Family decisions

It is generally accepted that decisions in family matters are to be taken in the best interests of children. However, different jurisdictions handle children matters differently. Most practitioners would probably agree that the voice of the child is important in the determination of family matters. Yet different situations and restrictions inevitably affect the way children are heard.

In this brief paper, I shall try to give an overview of the way children are heard in proceedings in Malta.

Proceedings for Dissolution of Marriage and Ancillary Family Matters

Divorce was only introduced in Malta in 2011, following a nationwide debate and a referendum. The notion of no-fault divorce is practically alien to this jurisdiction and a divorce can only be granted after four years of *de facto* separation. To this end, the ordinary course for the dissolution of a marriage begins with proceedings for personal separation.[1]

Personal separation takes place at the instance of one spouse against the other, or by the parties' mutual consent, subject to limitations set out in the Civil Code.

Even if concluded amicably, a separation must be authorised by the Civil Court (Family Section),[2] colloquially referred to as the "Family Court". With separation, the duty of cohabitation ceases and the spouses are released from conjugal duties. Separation may be consensual, in cases where spouses agree on all matters pertinent to their married life. In cases where no agreement is reached, the dispute is settled by litigation. The Arbitration Act provides for arbitral proceedings for the liquidation of the community of acquests, though such course of action is seldom pursued.

Familial matters between persons who are not married also fall within the sphere of competence of the Family Court.

Prior to engaging in proceedings before the Family Court, parties should obtain leave of Court to proceed. The Court will invariably grant leave provided that a court-sanctioned mediation attempt is made. The role of the mediator is to first try to reconcile the parties and, in the absence of agreement, to assist them in reaching an amicable settlement.[3] The parties discuss all matters—including children matters in an informal context. No record of the mediation is kept[4] and whatever is said in mediation may not be brought as evidence in eventual proceedings before the Family Court.

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[1] In December 2020, a Bill to amend the divorce laws was moved in Parliament. Once adopted the new law (which seems to have majority support) will reduce the period of *de facto* separation necessary to obtain a divorce from four years to six months in the last twelve months, provided that a joint application by both spouses is filed. The Bill is proposing that in the case of a unilateral application, the waiting period will be of one year. No waiting time is envisaged for spouses who are legally separated (by means of a separation contract).

[2] Art. 35, Civil Code

[3] In accordance with The Civil Court (Family Section), The First Hall of the Civil Court and The Court of Magistrates (Gozo) (Superior Jurisdiction) (Family Section) Regulations (Legal Notice 397 of 2003 – Subsidiary Legislation 12.20)

[4] Save for a note as to the date and time of sittings and who was present

In cases where mediation proves futile, the mediator refers the matter to the Family Court. Leave to proceed is usually issued forthwith. Litigation is to be commenced within two months (though the term may be extended by application to the Family Court).

In all cases brought before the Family Court, be it during mediation or litigation, either party may demand orders on collateral issues to be made *pendente lite*. Issues relative to maintenance, matrimonial home, care and custody of minors as well as visitation rights are usually decided in the course of the proceedings by way of interim measures which generally have a decisive impact on the case, as they set patterns for the individuals involved.

Children in Mediation Proceedings

As outlined above, the first step in a family dispute is mediation. Though a mediator is appointed by the Family Court, no hearings before a Judge are held. The only exception to this rule is that in case of complex requests for interim measures or orders, the Court has the discretion to hold hearings and gather evidence.

The Family Court Regulations provides for the appointment of mediators and Children's Advocates.[5] The Regulations provide that mediators shall examine draft deeds, hear the parties in the presence of counsel **and if appropriate any minor children**. In practice, children are seldom consulted during mediation.

In terms of law, a Children's Advocate may also be appointed either following a request by either parent, or by the mediator or where the Court deems it expedient. Since August 2020, the Regulations lay down the functions of Children's Advocates.[6] These involve providing legal assistance, representation and advice to the child, voicing the child's views during Court proceedings and through filing of judicial acts, and explain the consequences to the child should the Court adheres to the child's wishes. Moreover, the Children's Advocate must also provide the child with any relevant information and must always act in the best interest of the child.

The Regulations also provide that Children's Advocates are to act "faithfully" and "impartially" and subject to professional secrecy in relation to confidential information received by them in the course of their duties. It is pertinent to note that the Court must select the Children's Advocates from a list approved by the Minister responsible for Justice. The only qualification required for Children's Advocates is that they must be in possession of the warrant to practice as advocates and must have "experience in Family Law". No formal training is required.

Occasionally, children are heard by the Judge in private. In fact, the Family Court Regulations provide that the Judge may hear the children prior to providing the authorisation for the parties to sign the deed of personal separation by mutual consent. Neither parents nor lawyers are usually admitted to such colloquia and no record is usually kept. There is also the practice for the Court to direct that children be heard by social workers or psychologists appointed for such purpose. If such help is needed, either party in a mediation or the mediator may request the Court to make such appointment. In some cases, the Court may feel that a social worker from Aġenzija

[5] Art. 3 of S.L. 12.20
[6] Art. 3(6A) of S.L. 12.20 (as amended in August 2020)

Appoġġ[7] should follow the case. The appointed professionals will report their findings to the presiding Judge.[8]

Children in Contentious Proceedings

Where no amicable agreement for separation is reached the only way forward is judicial proceedings. Once the Family Court grants its authorisation to the parties to initiate a lawsuit, it may appoint a Children's Advocate where it believes that it is necessary for the best interests of children.[9] The same procedure also applies for the protection of children's views during divorce proceedings.

In such cases, Children's Advocates will likely hold meetings with the child and compile a report which will be available solely to the Judge and not the parents nor their lawyers. This practice was recently the subject of a human rights action whereby a father who had been stripped of visitation rights claimed a breach of the fundamental right to a fair hearing.

Transparency of the Decision-Making Process

In Malta, family-related hearings are normally heard in public, save in cases where the presiding Judge may consider valid reasons for the case to be heard behind closed doors. Mediation is private. When children are to be heard by the Judge, this is usually done in chambers in a bid to protect the child.

Decisions are generally published, though in an anonymised format – both in respect to the names of the parties as well as to other persons mentioned therein. In some instances, the Court may direct that certain decisions are only issued to the parties and not published on the Court online portal if the sensitivity of the case so requires.

Recently, the role and functions of Children's Advocate were dealt with thoroughly in the decision delivered on the 30th June 2020.[10]

In this case, the mother filed an application before the Family Court whereby she requested the suspension of the father's visitation rights. The Court directed a Children's Advocate to compile a report and acceded to the mother's request based on the findings. The report of the Children's Advocate was sealed and the parties were not given the opportunity to read it. The father claimed that he was not served with the mother's application and was denied the right to make submissions.

Citing ECtHR case-law, the Civil Court in its Constitutional Jurisdiction held that the fact that the report of the Children's Advocate was not made available to the father breached his right to a fair hearing. The Court also delved into the functions of the Children's Advocate, criticised certain aspects and called for amendments to the law which would streamline their duties. The Court criticised the binary role that the Children's Advocate is being expected to carry out in contentious proceedings whereby, on one hand, the advocate is expected to act as a court expert while at the

[7] Social Welfare Services Agency in Malta
[8] Ministry for Justice, Culture and Local Government; "The Process of Mediation in the Family Court" Information booklet issued by the Law Courts, Malta October 2014
[9] Reg. 7(2) of L.N. 397 of 2003
[10] AB vs. CD, First Hall Civil Court (Constitutional Jurisdiction), App. No. 82/2019, Decided on 30/06/2020

same time must represent the child's interests in an objective and independent manner before the Family Court.

The recommendations of the Civil Court in its Constitutional Jurisdiction were somehow addressed through amendments to the Family Court Regulations made in August 2020.[11]
In January 2021, the Constitutional Court confirmed the decision on appeal while relying on several ECtHR judgements such as 'Elsholz vs Germany'[12], whereby the ECtHR opined that

> *"...a fair balance must be struck between the interests of the child and those of the parent...and that in doing so particular importance must be attached to the best interests of the child which, depending on their nature and serousness, may override those of the parent."*

Is there room for improvement?

In a 2016 study[13] in which the Director of Civil Courts and Tribunals (Malta) was interviewed, it emerged that Children's Advocates play a rather passive role and do not actively participate in proceedings. It was also observed that there were only two Children's Advocates in the Courts of Malta; their services were required in 161 cases between 2004 and 2016. Though Malta is a small jurisdiction, these numbers are very low.

The lack of a mandatory system for the appointment of Children's Advocates unfortunately gives rise to a situation where the views of the parents are given much more importance than those of children. Parents are ordinarily heard first and unless evident causes of disagreement emerge, no appointments of children advocates are made. Despite the safeguards which the law provides, children's views may not necessarily be heard.

While it is premature to gauge the efficacy of the 2020 amendments, their implementation may serve as a stepping stone towards a system where Children's Advocates become a mandatory requisite in separation and divorce proceedings. With the recent appointment of several Children's Advocates some improvement is to be expected. Children's rights are indeed being given much more attention than in previous years due to increased awareness. At the same time, procedures ought to be improved so as to ensure that the role of Children's Advocates does not in any way impair fundamental human rights.

In today's day and age, children are very much holders of their own rights and they ought be protected and empowered.

[11] See footnote 6
[12] Elsholz vs. Germany, App. No. 25735/94, decided on 13th July 2000
[13] Camilleri L.M., "Introducing The Role Of The 'Child Advocate' In The Maltese Criminal Sphere (Magistrates' Court And Juvenile Court)", LL.D Thesis, University of Malta, 2016

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The "voice of the child" in Italian civil proceedings.

a.The right of the child to be heard in Italy: law and actual practice**.**

The hearing of the child in Italian civil proceedings ([1]) is mandatory under several provisions of law, which have mostly been introduced in our system in order to harmonize it with the principles of the New York Convention on the Rights of the Child of 20 November 1989.

Notably, according to the general provision of art. 315*bis* of the Italian civil code, a minor child aged twelve (or even less, if considered capable of discernment), must be heard in all the issues and the proceedings in which he is involved.

This general rule is specified by the following special provisions of the civil code, according to which the judge has the duty of hearing the child, again aged twelve, or less, if considered capable of discernment:

-art. 250 civil code, which applies when one of the parents refuses to agree to the request, made by the other alleged parent, in order to be recognised as lawful parent of a child born outside a marital relationship (formerly referred to as "natural child"). Furthermore, in such kind of cases, the decision about the acknowledgment, in order to take effect, must be approved by the child, if he is aged fourteen or more;

-art. 336*bis* civil code, which applies to cases concerning the disqualification of a parent and the consequent forfeiture of his parental responsibility (which is the most serious consequence which a parent may face if his behaviour is deemed to be prejudicial to the child);

-art. *337octies* civil code, which applies to cases concerning the custody, the visiting right and the maintenance of the child (which are the most common cases, because they happen every time a couple of parents, married or unmarried, breaks up);

-art. 15 Law 4 May 1983, n.184, (adoption law), which applies when the court is called to acknowledge that a child may be adopted ("*dichiarazione di adottabilità*").

All the abovementioned provisions, requiring that the child is heard when he is twelve (or less, if considered capable of discernment), are subject to an exception, which allows the judge to entirely dispense with the hearing every time he deems, either that it will not be in the best interest of the child, or that it will be patently superfluous.

The problem with this exception is that, since the law provision concerning the mandatory hearing of the child in "common" custody cases (art.337*octies*) has been introduced in the Civil code in 2006, this "exception" has been treated by the courts as the "rule": the child, therefore, is almost never heard in custody cases when they are settled on agreement by the parents, and, even when no agreement is reached, and a court decision is required, the child is not heard if no special (and, usually, quite

[1] In this paper the issues concerning the hearing of the children in criminal cases will not be addressed, because they are totally outside the scope of my experience.

serious) reasons, justifying the hearing, arise (which may happens, for example, when both parents demand to be given sole custody of the child); however these reasons should not be related to financial issues. When the child is not heard the wording of the law is simply bypassed with pre-printed forms, used for the hearing records and for the court orders, according to which the hearing of the child is patently superfluous.

Concerning the approach to the hearing of the child, there is a significant difference between what happens in "ordinary" courts (*Tribunali*, so called, "*ordinari*"), which are competent in cases concerning custody and acknowledgment of parents, and in Juvenile courts ("*Tribunali per i Minorenni*"), which are competent in cases of adoption and in cases when there is a need to protect the child from an alleged prejudicial behaviour by one of the parents, if no custody proceedings are already pending in front of the ordinary court. While "ordinary" courts are quite reluctant to proceed with the hearing of the child, indeed, Juvenile courts, which have panels composed not only judges trained in law, but also by psychologists, are much more willing to collect, directly, the opinions of the children, even if they have not reached the minimum age.

Furthermore, there is a second noteworthy difference between, on the one hand, a small minority of ordinary courts located in large cities (like Milan, where a semi-official protocol concerning the hearing of children is applied) and the large majority of ordinary courts. The former usually have a number of judges large enough to make it possible to form sections specialized in dealing with family cases, composed by staff, who, while being trained in law, has a deep experience in treating issues concerning children. In the large majority of ordinary courts, on the other hand, the same judges treat a wide range of cases, concerning most different matters (like breach of contracts cases, real estate litigations, torts, inheritances, etc.); being inclined to approach all these cases in the same way, they are usually very reluctant to take measures such as the hearing of the child.

While, with the abovementioned limitations, it could be said that there is a general rule, according to which Italian judges have a duty to hear the child, I would be quite cautious to derive, from this fact, that the child has a true and meaningful right to be heard: if, from an absolutely abstract standpoint, such right does exist, at least on paper, this right is not really enforceable, because, in the Italian law system, when rhetorical statements are put aside, children are not allowed to act as a party in the judgements concerning their life, but have a position which is more similar to the one of disputed things in a property litigation: children, indeed, may not take any initiative or submit any request, and have no specific right to receive any information concerning the case in which they are involved.

b.The assessment of the ability of discernment of the child by the judge.

As I have mentioned before, the general rule concerning the minimum age at which a child could be heard by the judge is twelve, but the law allows even younger children to be heard, if they are deemed to be capable of discernment.

There are no specific rules to be applied in order to ascertain the degree of discernment of which a child is actually capable, so the judge can solve this issue quite freely, provided that the relevant decisions are based on reasonable grounds. For example, in a case which I am presently following, the judge decided to hear three brothers, even if the younger was only eleven, on the one hand, because the third brother was near to the minimum age, and, on the other hand, because he could have perceived a denial by the court to hear him as well as a form of disregard for his feelings and opinions.

However, the relevance of the issues concerning the ascertainment of the minimum age for hearing a child is limited to the cases in which the child has to be heard, directly, by the judge, but, as I will explain in the following point, this happens very rarely, because, even when the judge believes that there is a need to collect the thoughts of a child in order to make a decision, the related activities, usually, are not performed directly by the judge himself, but by different professionals, appointed by the judge to that effect, who possess skills enabling them to hear (or, perhaps, more appropriately, to examine) the child, even when he is clearly uncapable of any meaningful discernment.

c.The sound of the voice of the child: how it may be conveyed to the judge**.**

When the need arises to listen to the voice of the child, in an Italian civil judgment, the court can follow three ways: the first one is the direct hearing of the child by the judge; the second is the delegation of the relevant activities to the social services, and the third is the referral of the issue to an expert, appointed by the court ("Consulenza Tecnica di Ufficio").

In the first case, which happens very rarely (at least in "ordinary" - i.e. non juvenile - courts), and mostly when the children are quite near to the coming of age (i.e. when they are close to be eighteen years old), the judge may decide to hear the child alone or with the assistance of a trained professional (usually a psychologist), appointed for the occasion, who may be also required to submit a report about the results of the hearing. In these cases, usually, the parents and the lawyers are asked to leave the courtroom, where the child will be heard, to receive, after the end of the hearing, a brief summary of what happened by the judge himself. I have no experience of children hearing filmed or recorded in court.

In the second case, which may happen when a family situation is deemed by the court to be "difficult" (because of reasons such as drug abuse, violence between the parents, serious limits in parenting skills of one, or both, parents, etc.), the court may order the social services to monitor the situation, or entrust the custody of the children to the social services of the city (which doesn't means, in most cases, that the children are removed from the family house, but only that the most relevant decisions concerning their lives must be taken by the social workers, under the control of the court and, if possible, in agreement with the parents).

After being appointed by the judge, the social workers will meet all the involved individuals, including, obviously, the child. The meetings with the social workers are conducted according to rules which may be set by the court or (as it happens more often) by the social workers themselves, on a case by case basis, and may take place in public structures (where, if the need arises, “protected” encounters may be arranged) or in the places of residence of the child, but never in the courthouse. The findings of the social workers are, then, communicated, periodically, to the court, via written reports, and may be discussed by the parties. If the parents reach an agreement to that effect (and are able to pay the related costs), the social workers may also appoint a private psychologist to follow the case, always under the control of the social services, but according to a schedule much tighter than the one rendered possible by the very limited resources provided by the social services alone.

Obviously, the real effectiveness of the social services is variable, and subject to the considerable differences that occur among local realities: while, in some places (and especially, in some wealthy neighbourhood located in Northern Italy, like the centre of Milan) the social services, despite being usually overworked, may be very good at their job, in other places, they are able to follow with depth and accuracy only a small minority of the cases entrusted to them, and, more often, turn out to be almost completely ineffective. However, in places where the effectiveness of the social services intervention is doubtful, usually, the judges try to avoid their involvement, knowing that it would be purposeless.

In the third case (which is the most common in circumstances when custody and visiting rights are being disputed in court), the issues in relation to which the hearing of the child is relevant are referred to an expert (usually a psychologist), appointed by the court, according to the rules of the “*Consulenza Tecnica di Ufficio*” (which means, literally, “technical advice ordered by the court”). This is a very general tool, which, according to art.191 of the Italian civil procedure code, may be used, by the judge, to solve any technical issue which may be relevant in any kind of judicial cases (for example, in a tort case, a medical doctor may be appointed in order to ascertain what went wrong in a surgical procedure, or in an inheritance case, an art expert may be called to set the value of a collection of works of art, or, again, in a breach of contract case, an engineer may be asked to decide if a piece of machinery was built according to the requirements agreed by the parties).

When the judge orders that a *Consulenza Tecnica di Ufficio* be performed, he formally sets a series of questions (which may be trimmed according to the remarks made by the parties, but, usually, are worded quite broadly - for example: “which is the visiting right schedule more appropriate with relation to the best interest of the child?”), and appoints an expert, chosen among those mentioned in the appropriate court list, in order to provide an answer, setting also a deadline for the filing of a written report. Both parties will have the right to appoint their experts, who will assist the expert appointed by the court in all his activities, and then will make their remarks concerning the findings of the latter. However, neither the court expert or the experts appointed by the parties are witnesses, because, while the former acts as an aid of the judge, the latters have a position similar to those of counsels, with regard to technical issues only.

The court expert, assisted by those chosen by the parties, will usually meet and interview all the involved individuals, including the children, and may also ask them to perform psychometric tests, in order to evaluate their personality. All the expenses related to the abovementioned activities are charged to the parties.

Obviously, if the child is not heard directly by the judge, but is heard (or, more appropriately, examined) by the social workers or by a court expert, assisted by the experts of the parties, every limit to his hearing, grounded on his age or on his discernment, becomes completely irrelevant, because the very purpose of the referral of the relevant issues to this kind of professionals is the ascertainment of the best interest of the child, in a way which should be barred to any people (such as the judge or the attorneys) lacking the technical skills needed to evaluate in depth the true needs of the child, who, as it happens in difficult cases (e.g. when the family situation is troubled, or when the child is very young), may often be the least able person to understand the situation.

While all the abovementioned remarks apply to cases in which the central issues faced by the courts concern the personal life of a child (and, especially, to custody cases, which may be related to legal separation or divorce judgements), children may be also involved in judicial proceedings, which may be completely unrelated to family law: on the one hand, indeed, a child may be heard as a witness in any kind of judicial case, because, under Italian law, there is no limit to the ability to act in this role grounded on age (anyway, in this case, even if common procedural rules are to be applied, the judge may take special measures in order to limit the stress possibly suffered by the child); while, on the other hand, it may happen that a child is called to be a party of a judgement.

In particular, the child must act as a party of a judicial proceeding whenever a court is called to settle an issue grounded on rights belonging directly to the child himself: for example, the child must take part in a property judgement if he is the owner of a piece of real estate reclaimed by somebody else, or, coming back to matters related to family law, if the issue to be decided is the legal status of one of his parents, with regard to the parental relationship: in all these cases, if a child cannot be represented by the parents (which may happen, for example, if he is an orphan or if there is a conflict of interest between him and the parents), under art.78 of the Italian civil procedure code, the judge of the same case must appoint a guardian *ad litem* ("*procuratore speciale*"), entrusted with the furtherance of the position of the same child. The guardian *ad litem* may be an attorney, directly representing the child in the judgement, or, otherwise, may appoint a counsel to that purpose.

Finally, even if the intervention of the Public Prosecutor is required in almost every kind of family law judgement involving children, this does not really happen in normal custody cases, because the intervention of the Pubic Prosecutor, usually, is limited to putting a stamp on the final order to approve the decision by the court, or to submitting a pre-printed statement, taking a neutral position. This kind of intervention is taken more seriously only in Juvenile courts (which have a specialized Public Prosecutor Office, attached to them), and in second degree proceedings in courts of Appeal, where, usually, the Public Prosecutor submits a short statement concerning

his opinion on the best way to protect the interests of the child, but these opinions are usually grounded only on documents. However, the Public Prosecutor may start many kinds of proceedings to protect children, especially when information concerning a dangerous situation are related to him, usually by the Police or by the social workers.

d.The evaluation of the opinions expressed by the children.

The only criterion which has to be followed by the judge in evaluating the opinion of a child is his appreciation of the best interest of the same child: the judge, therefore, has a very high degree of autonomy in this context and may disregard the wishes expressed by the child. However, the judge is faced with the problem of weighting a child opinion only when he proceeds directly to his hearing, while in all the cases (which are by far more common) when the hearing of the child is entrusted to other professionals, the same professionals will also use their technical skills to provide the judge with a considered evaluation of the best interest of the child, grounded not only on the opinions expressed by child himself, but also on all the other elements collected while surveying the actual situation.

e.The transparency of judicial decisions in Italian civil cases concerning children.

The level of transparency in Italian civil proceedings concerning children is quite low, because the Italian legal system tends to give priority to the protection of the privacy of the child and, especially where Juvenile courts are concerned, because it is based on the assumption that the courts “know better” and that, in order to ensure the highest degree of protection to the interest of the child, the usual dialectic confrontation between opposed positions, which is the main feature of a common civil judgement unrelated to family law issues, should be, somehow, limited.

The hearings concerning children, therefore, are never public, and, as mentioned above, when a child is heard directly by the judge, even the counsels of the parties are asked to leave the courtroom (if they have specific questions to be asked to children, they can submit them to judge in advance). Furthermore, the access to the files related to the proceedings is always restricted to the parties and their lawyers, who, in Juvenile courts, must request a special permission by the judge, to see even the statements and the documents submitted to the court by themselves (this permission is, actually, reduced to formality, but the need to ask for it tells much about the general attitude of the system).

Finally, decisions concerning children are motivated (usually in an extensive way if they are final, and more briefly if they are temporary, but this is not always the case and, sometimes, provisional orders can be quite thoroughly motivated, while final decisions may leave much to be desired); are commonly published in specialized publications and may also reach the general public when they are deemed interesting enough to find a place in the general press. However, the names of the people involved, and especially of the children, may never be disclosed.

The voice of the child in Monegasque proceedings

In application of Monegasque law, several proceedings may involve the hearing of a child:

- divorce proceedings,
- educational assistance proceedings,
- proceedings before the children judge (procedures for the exercise of parental authority for parents who are divorced or who have never been married),
- Adoption proceedings,
- Criminal proceedings,

In these proceedings, it is always in the best interests of the child that the judge takes decisions, including the decision to hear a child.

How decisions are made?

1/ Voice of the child – how does your jurisdiction listen to a child's view

a. Is the hearing of the child **a right**?

Civil proceedings

1. *Divorce proceedings*

Children could be heard, if (i) they ask for it directly to the judge (by letter during the proceedings) and if (ii) they are considered capable of discernment.
The divorce judges can refuse in practice to hear the children if they feel that it is not in their best interest. Plus there is no special dispositions in the civil code concerning the hearing of the children during a divorce proceedings.

In practice, it is rare to see children ask the divorce judge to be heard. Therefore, these hearings do not often happen.

2. Children proceedings

Article 303-6 of the Civil code states that : "*The children judge may hear the child or, where his or her interests so require, have the child's comments collected by a person designated by him or her for that purpose.* ***Where the child's capacity of discernment allows him or her to express his or her wishes, the hearing shall be held at his or her request****. The child may be heard alone, with a lawyer or a person of his or her choice. If this choice does not appear to be in the interests of the child, the judge may appoint another person. The hearing of the child shall not confer on him or her the status of a party to the proceedings."*

In these cases, the child shall address directly to the judge (generally by letter) and ask to be heard. His/ her audition is a right. The judges therefore hear the child unless they feel that it is contrary to their best interests (especially if they feel that the children can be manipulated by one parent) and if the child is considered to be too young and therefore not capable of discernment.

In 90% of the cases in children proceedings involving questions related to custody of the parents and parental authority, when children ask the judge to be heard, the judge grant them with their request. However, before hearing, the judge first convokes the parents and requires their position and opinion on the hearing of the children. Even if the parents disagree, the judge grants the children with their demands if it is in their best interest and if they are capable of discernment.

3. Educative assistance proceedings

Article 317 of the civil code states that: *"a measure of educational assistance may be taken in respect of any minor whose health, safety, morals or education are compromised."*

In these proceedings, children are always heard by the judge – if they are at least aged 7 years old - whether they ask for it or not.

4. *Adoption proceedings*

Children can be heard by the judge if they ask for it and if they are capable of discernment (in general 12 years old and more).

Criminal proceedings

Criminal proceedings involving minors necessarily imply their hearing before the judge.

Children are first heard before the children judge acting as an investigation judge. They are then heard by the criminal court, where they will be judged.

b. Do lawyers have to insure that the child has been informed of its right to be heard?

In Monaco civil proceedings involving children, children are not assisted or represented by lawyers. It is therefore up to the lawyers of either party to inform, where appropriate, his or her client that their child has the right to be heard.

In criminal proceedings involving children, children are always assisted and represented by a lawyer; In this context, the lawyer has the duty to assist them and inform them of their rights.

c. How does the Judge assess whether a child is **capable of discernment** (age scale, appreciation by the judge...)? What is the minimum age -if any - for a child to be heard?

Monegasque law does not impose a minimum age for a child to be heard. The judge must assess whether he will listen to the child or not according to the capacity of discernment shown by the child in question. The objective criteria taken into account are; the age of the child, the content of the comments made in his / her letter to the judge (allowing the latter to assess his/her abilities), the complexity of the dispute.

In general, children above 12 years old are heard by the children judge and in a context of education assistance proceedings.

Below 12 years old, it depends on the proceedings initiated (children judge proceedings, educational assistance proceedings or divorce proceedings), the capacity of discernment of the child and the complexity of the case.

In a case I dealt with – educational assistance proceedings- a child was only 7 years old and was heard by the judge. Indeed, his hearing was required and necessary in the context of an educational assistance measure.

d. How is the child's "voice" **conveyed**? is it heard by the judge? by a social worker? through a representative? Is the interview filmed? can it produce a written statement? Is it a testimonial? Is the child a party to the case? Are guardians at litem appointed? How frequently? By whom? Is it routine that the parties' lawyers interview the child or regulated ? Or is a specific lawyer appointed for the child? Do lawyers hearing the child have a specific training? What is the State's role, if any? Does the State representative have to take part in the hearing/procedure?

The child's hearing can be lead in three ways.

1. By the judge himself

Before the children judge and in the context of educational assistance matters, the children's judge shall convoke the child and question him or her personally.

The children's judge personally questions the child when he or she so requests. The judge is not assisted by a psychologist or any other children expert. The child is received, alone, in the judge's office. The hearing is held behind closed doors.

The children judge then draws up minutes of the child's hearing that the parties can consult. A hearing is then scheduled during which the parties discuss their requests. To rule, the judge also refers to the minutes.

In the case of educational assistance, the judge systematically convokes the child - unless the child is too young (under 7 years old) - even if the child has not requested it. The child is then heard alone by the judge. There is no psychologist or expert.

No record is taken of the child's words. On the other hand, the judge reports to the parties in court what the child has said.

2. By social services instructed by the judge

When a child is said to be in danger, when his health or morals are compromised by one or both of his parents, the judge shall order the opening of an educational assistance measure.

The judge then mandates social services (the DASO) to monitor the child in his environment. Depending on each case, the social services meet with the parents and the child once or twice within 4 to 6 months. In this context, the social workers hear the child during their mission and draw up a report which they then transmit to the judge. The parties are aware of this report and have access to it. A hearing is then scheduled to discuss it.

3. By psychologist or psychiatrist experts

The divorce judge and the children judge may, when the situation so requires, order a psychiatric and/or psychological expertise in a decision prior to issue their final judgement.

In these cases, the experts get in touch with the parents and children and hear them.

A report is then drafted and submitted to the judge. The parties have access to it. A hearing is then scheduled and the parties and the judge refer to the report.

It should be noted that in some cases, children can be heard first by the judge, then by an expert and finally, a social measure can be ordered and therefore, the child is followed by the social services for a few months.

This happened in a particular case I currently deal with. The father abandoned her child for 10 years (the child is now 13 years old) and refused to give his consent for her to be adopted by the new husband of the mother who actually raised the child. The mother seized the children judge and ask for the withdrawal of the father's parental authority exercise and the suspension of his visiting rights. The child asked to be heard by the judge.

The child was first heard by the judge. Then, considering the importance of the measure to be taken, the judge ordered a psychological expertise of the child. The child was therefore heard again. A report was drafted and submitted to the judge. A hearing has been scheduled and the judge will rule on the demands.

In adoption proceedings, a social expertise is systematically ordered by the judges who want to make sure that the adoption has been requested in the best interest of the child.

Children's auditions are never filmed.

Children are not considered to be a party to the trial in Monaco.

Only very rarely is an ad hoc administrator appointed to assist the child. When it is the case, the ad hoc administrator asks for the designation of a lawyer to assist them. In practice, we see these situations in criminal matters, more often than in civil matters.

e. What **criteria** do judges consider when assessing a child's statement/ wishes?

The judge is not bound by the child's words and wishes. The judge shall act in what he or she considers to be in the best interests of the child considering the family context.

2/ Transparency of judicial decision making (civil/criminal cases/cases with children).

a. Are **hearings** public? Is access to the court file restricted? Is the press allowed?

Hearings related to children – criminal and civil cases - are not public. The file is accessible only to the parties and it is possible to obtain a copy only if the parties appoint themselves as lawyers.

The media are never allowed.

b. Are children **cases** published? What is the percentage of published decisions?

Some cases related to children are published, however they are all anonymous.

c. Are your **court decisions** motivated? easy to read?

Decisions made by the courts must be motivated. They are in general easy to read and detailed.