

 JUST CLOSER 

EXECUTIVE SUMMARY

NATIONAL REPORT ON THE YOUTH JUSTICE
SYSTEM - SPAIN



© Defence for Children International Italy, April 2024

The Just Closer Project is co-funded by the European Union (JUST-2021-JACC). Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union. Neither the European Union nor the granting authority can be held responsible for them.

Author(s):

María González Marimón, Assistant Professor of Private International Law,
University of Valencia

Introduction

In Spain, juvenile justice is regulated by Organic Law 5/2000, of 12 January, regulating the criminal responsibility of minors¹ (hereafter Organic Law 5/2000); as well as by Royal Decree 1774/2004, of 30 July, approving the Regulation of Organic Law 5/2000, of 12 January, regulating the criminal responsibility of minors² (Organic Law 5/2000 Regulation). Therefore, our legal framework is previous to Directive 2016/800, although over the years it has suffered various modification of different aspects and importance³.

The constant legislative reforms conducted in the 25 years of application of Organic Law 5/2000 has had an important impact in the initial system, some legal doctrine even referring to a “desnaturalisation” of the system. Both with regard to the obligatory nature of detention measures for the most serious crimes, as well as with regard to the mandatory minimum duration of such measures. Therefore, the legislative reforms that have been undergone for the most serious crimes, for example, terrorism⁴ or crimes against sexual freedom⁵, limit the principle of flexibility on which the system is built. This leads to conclude that there is a double speed in the Spanish system.

The Spanish juvenile justice system is therefore a completely different jurisdiction from adult criminal justice, with specific and specialised courts – the Juvenile Judge, together with the instruction of the Juvenile Public Prosecutor-. However, the Organic Law 5/2000 is essentially a procedural law, as it contains few substantive provisions. The main substantive differences between adult criminal law and juvenile criminal law are only to be found in the system of legal consequences.

Moreover, the presuppositions for the application of the measures are the following: Organic Law 5/2000 will apply to persons over 14 years of age and under 18 years of age who have committed acts classified as a crime classified in the Criminal Code or in the special criminal laws.

Accessibility

Regarding the accessible justice principle, and, in particular, the right to information, it has been identified that for the proper transposition of Article 4(1) of Directive 2016/800 it is necessary to complete the list of rights contained in art. 17 and 22 of Organic Law 5/2000 and add the following rights: the right to have the holder of parental authority informed; the right to protection of privacy; the right to free legal assistance;

¹ BOE n. 11, 13.1.2000.

² BOE n. 209, 30.8.2004.

³ The most relevant are: Organic Law 7/2000, of 22 December, amending Organic Law 10/1995, of 23 November, of the Criminal Code, and Organic Law 5/2000, of 12 January, regulating the Criminal Responsibility of Minors, in relation to terrorist offences (BOE n. 307, 23.12.2000); and Organic Law 8/2006, of 4 December, amending Organic Law 5/2000, of 12 January, regulating the criminal responsibility of minors (BOE n. 290, 5.12.2006). More recent reforms include Organic Law 8/2021, of 4 June, on the comprehensive protection of children and adolescents against violence (BOE n. 134, of 5.6.2021); or Organic Law 4/2023, of 27 April, for the modification of Organic Law 10/1995, of 23 November, of the Criminal Code, in crimes against sexual freedom, the Criminal Procedure Law and Organic Law 5/2000, of 12 January, regulating the criminal responsibility of minors (BOE n. 101, of 28.4.2023).

⁴ By way of example, the Fourth Additional Provision of LO 7/2000 of 22 December, which modified the CP and the present Organic Law 5/2000, fundamentally in the area of terrorist crimes.

⁵ LO 8/2006 or LO 4/2023 for offences against sexual liberty.

the right to a medical examination; the right to be accompanied by the holder of parental authority during hearings; and the right to be present at the trial. It is suggested the express introduction in Article 22.1 a) of the Organic Law 5/2000 of the right of the child to be informed orally in clear and understandable language in accordance with his or her age and maturity, together with written information that he or she may consult at any time.

On the question of whether language is used that is understandable and appropriate to the age and maturity of the children, the response is not uniform. What is certain is that the professionals interviewed agree in affirming that the professionals involved are very familiar with dealing with children and receive specific training for this purpose. Therefore, when interacting directly with them, they adapt their language. On the contrary, the same conclusion is not reached in a study carried out specifically on the group of foreign children in conflict with the law, which concludes that children do not correctly understand the information provided to them orally during detention, therefore, it is recommended to establish a protocol clearly defining the criteria for assessing the language skills of detained or accused children⁶. However, the problem lies in the written language, especially in procedural documents, in which complex legal language is used and is not adopted in such a way that the child concerned can understand it properly. Indeed, there is no specific material available to the child.

Age-appropriate

The Organic Law 5/2000 on the Criminal Responsibility of Children establishes the compulsory intervention of the Technical Team in article 27.1. The interviewed professionals agree on the fact that the procedures for individual assessment are effective. They provide invaluable information for determining the most appropriate measure. The first is not a single assessment, but rather the professionals monitoring the measure will be sending reports updating this initial assessment, especially in long proceedings, so that the child has a “permanent individual assessment”.

Furthermore, this system allows to modify the measure, either to shorten it, replace it, to make it more severe, or to cancel it due to the fulfilment of the purposes for which it was imposed (Article 51 Organic Law 5/2000). It should be remembered that the Organic Law 5/2000 even allows for mediation during the enforcement of the measure (article 51.3 Organic Law 5/2000). All these possibilities are the clear manifestation of one of the main principles of the Spanish juvenile justice system, the flexibility.

In relation to age responsibility, the Spanish system follows a biological criterion. Within the framework of the 14 to 18 years of age, the Organic Law 5/2000 distinguishes between two stages: between 14 and 16 years of age; and between 16 and 18 years of age. The differences are only applied to set the maximum limits for the duration of the measures, which are more tenuous in the first group than in the second. Children under 14 years of age are absolutely unimpeachable for the purposes of criminal law, according to both the Criminal Code and art. 3 Organic Law 5/2000. Therefore, the rules of protection will be applied to this age group. In this section, it is interesting to note that the Spanish system initially

⁶ FERNÁNDEZ MOLINA, E., "Derechos procesales de los menores sospechosos o acusados en la Unión Europea. Informe Nacional España", PRO JUS Project, 2016. Available at: <https://blogextranjeriaprogestion.org/wp-content/uploads/2016/12/derechos-procesales-de-los-menores-sospechosos.pdf>, last access 20.1.2024, p. 48.

provided for special treatment for the 18-21 age group, who were classified as "young people". However, this framework was totally suppressed. Perhaps this special treatment for young adults should be rethought in our system.

Speedy procedures

The professionals interviewed consider that the length of the proceedings is not at all adequate in the light of the principle of the best interests of the child. It has been suggested that a fast-track procedure should be incorporated into the juvenile justice system, as it is already established for the Spanish system for adults.

Diligence

In relation to the functioning of the Spanish system, a significant lack of coordination between the Autonomous Communities and, in turn, between them and the central State has been identified. Thus, for example, the Organic Law 5/2000 was approved without an economic report, and therefore there are problems in the management of resources, for example, technical teams. In addition, there are many differences in the application of the Juvenile Justice system between the Autonomous Communities.

Adapted and focused on the rights of children

The different types of measures are established in article 7 of the Organic Law 5/2000, and in general terms they can be classified by their nature into custodial measures and non-custodial measures or measures restricting rights. Article 6 of the Organic Law 5/2000 Regulation sets out the principles underlying these measures. In Spain, the Autonomous Communities are competent for the enforcement of the measures adopted by the juvenile judges. The juvenile judge has the power to control the enforcement of the measures.

In the Spanish juvenile system, the measure consisting of the deprivation or limitation of freedom of movement or ambulatory freedom is called "internment". Four types of internment can be distinguished: closed regime; semi-open regime; open regime; and therapeutic internment (requiring the child's consent in the case of treatment for addiction). Within the modality of deprivation of liberty, it is also worth mentioning the measure of "weekend stay". Moreover, the Spanish juvenile system offers a wide variety of alternatives to deprivation of liberty, designed to provide an adequate response to the situation of each child. Among the mentioned measures, probation is the most frequently imposed, as it was also stated by the professionals interviewed.

It is highlighted that it would be advisable to carry out a review of this list of measures in the light of the new times, contemplating others that have to do with the use of mobile devices and access to the Internet or to certain applications, content or time limits, as this would involve intervening directly in the reality of the child with sanctions that could be implemented in an open environment and could have a greater punitive effect than other measures.

As far as the principle of a justice adapted and focused on the rights of the child is concerned, the anchor of the Juvenile Justice system is the principle of flexibility, together with the principle of opportunity (in Spanish "oportunidad reglada"). A manifestation of this flexibility principle could be the already mentioned individual assessment of the child conducted by the Technical Team and the permanent individual assessment. Therefore, the system allows to modify the measure, either to shorten it, replace it, to make it more severe, or to cancel it due to the fulfilment of the purposes for which it was imposed (Article 51 Organic Law 5/2000). The criterion or guiding principle is always "the interests of the child" (established by the specialists on the Technical Team), according to age and circumstances. Hence, the file may even be closed.

In general, Spanish legislation is very flexible and allows these measures to be applied as a last resort. Only in relation to certain offences does it establish the mandatory measure of internment. These are the legislative reforms that have been undergone for the most serious crimes, for example, terrorism⁷ or crimes against sexual freedom⁸, limit the principle of flexibility on which the system is built. This leads to conclude that there is a double speed in the Spanish system. In this regard, it is also very interesting to point out that one of the main reasons that the professionals have pointed out for this tendency is, precisely, the role of the media in showing a Juvenile Crime reality which is far from what is shown in official statistics, and therefore, creating a false sense of alarm in the society.

Respecting the right to a due process

The professionals interviewed agree in confirming that the right to legal aid is effectively respected, either through an appointed lawyer or through the duty lawyer. In the latter case, it is worth mentioning the Fourth Final Provision of the Organic Law 5/2000 on the Specialisation of Judges, Prosecutors and lawyers, which establishes in paragraph 3 the obligation of specialisation. For this reason, the Bar Associations have a Section of lawyers specialising in children, which is exclusively devoted to this jurisdiction. The requirements for access to this specialised shift are more demanding than in other specialised shifts, which means that the lawyers involved tend to have extensive knowledge of the subject matter. There are specialised training courses to gain access and refresher courses to remain, which are compulsory.

Additionally, it is important to note that in Spain there are no preliminary or informal interrogations. Consequently, the presence of a lawyer is guaranteed during the first interrogation with the police. The presence of a lawyer is guaranteed at all other stages of the legal proceedings.

Respecting the right to participate in and understand the proceedings

In the Spanish system there is a real "possibility" of the child's participation, at least from a formal point of view. In addition, the child can take the floor and carry out what is known as an act of self-defence, arguing what he or she considers relevant in relation to the evidence presented. The Spanish

⁷ By way of example, the Fourth Additional Provision of LO 7/2000 of 22 December, which modified the CP and the present Organic Law 5/2000, fundamentally in the area of terrorist crimes.

⁸ LO 8/2006 or LO 4/2023 for offences against sexual liberty.

Constitutional Court has ruled on the right of defence in relation to the procedural guarantee of the right to the last word.

Respecting the right to a private and family life

Regarding this principle, and in particular, the right to protection of privacy, there is a worrisome regulation of the antecedents in cases of sexual crimes, where the antecedents remain in the Central Registry of Sex Offenders for the period of 10 years since the person has reached the age of majority. This is a severe impediment in practice to work at several institutions where they ask a certificate of no sexual antecedents, which means that a child that has committed a sexual crime, irrespective of its gravity, will not be able to work until 28 years old in any place with contact with children.

Respecting the right to integrity and dignity

As far as the right to a medical examination is concerned, in the Spanish system, Royal Decree 650/2023 of 18 July, approving the Protocol for the forensic medical examination of detainees, fulfils this objective. In all the Juvenile Sections there is a guard service to which the detained child is presented. Among the staff on duty is the forensic doctor. The child is informed of his or her right to be assessed by the forensic doctor and the public prosecutor may agree to this ex officio.

Secondly, it must be pointed out that the interrogations of children are not recorded. What is always done is to record in writing the information from the reading of rights and the statement to the Security Forces or the Public Prosecutor's Office. The signatures of the minor, legal representatives, lawyer and, if necessary, interpreter must be recorded.

Thirdly, some considerations should be made with regards to the special treatment of children after detention. Detention is carried out by the State Security Forces and Corps, which must take into account the fact that the person is a child, and the least burdensome measures possible shall be adopted. He or she may not be detained in police custody for more than 24 hours. He or she may be handcuffed if necessary. The usual practice, in contrast to adults, is that they will be released in the care of their legal representative once the necessary steps have been taken by the police, and only in the most serious cases will they be placed directly at the disposal of the public prosecutor. The lawyer and the legal representative will be present at any police procedure that is carried out, and they will be notified immediately as soon as the arrest is made.

Regarding the treatment by police officers, the treatment is usually appropriate and takes into account the age of the child, although it obviously depends on the individual. In general, the officers tend to be quite sensitive to the circumstances of the adolescents they deal with. With regard to prosecutors and judges, they are specialised in children, and in general their treatment is very correct and adapted. Likewise, the technical team, which is a specific resource of the juvenile jurisdiction, and which is made up of social workers, psychologists and educators who draw up a report on the circumstances of the minor. Also in the internment centres and the technicians who execute the open environment measures are specialised resources and know very well how to deal with adolescents.

Final comments

The Spanish Juvenile Justice system is previous to Directive 2016/800, and even previous to the adoption of the Child-friendly Principles of the Council of Europe. Despite this, in general terms, it can be concluded that the system is in compliance with both instruments. However, it may also be logical to adopt a new legislation making sure that all the rights covered by the Directive are included in the Spanish system. This report has identified some legal amendments that could improve the legal system, some best practices that could be useful for other countries as well as some challenges for a better articulation of the child-friendly justice principles in practice.



The Just Closer Project is co-funded by the European Union (JUST-2021-JACC). Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union. Neither the European Union nor the granting authority can be held responsible for them.