



The Child Testimony

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Foreword by Luis Pedernera

Luis Pedernera is vice-president (former president 2019 – 2021) of the Committee of the Rights of the Child of the United Nations.

When the Convention on the Rights of the Child was about 15 years old, Mary Beloff, in a text entitled Legal reform and economic and social rights of children: the paradoxes of citizenship, pointed out, paraphrasing part of the Communist Manifesto, the following:

*A ghost roamed Latin America...: the ghost of legal reforms regarding children. People working in specialized justice and other state child protection organizations in Latin America in the late 1980s and early 1990s (judges, employees, operators, social workers) were terrified. What was behind this desire to “change the law”? What was happening that made people who had worked with children for decades feel so threatened? Two unassailable premises of this reform movement generated commotion among operators of the classic *parens patriae* system (or paternalistic approach) in the region. Firstly, a message had begun to be strongly installed: everything they had done for so long, with so much self-denial, with so many good intentions, to “save” children, had been of no use or useful for so little that it did not deserve recognition. The whole eighty-year effort of reforms and humanitarian aid for children did not seem to have achieved worthy results. Secondly, and at the same time, the flag staff of this reformist ghost was the International Convention on the Rights of the Child, a treaty signed and celebrated by these very operators who then considered it very useful in order to continue the mission of saving children. On the other hand, within the movement of the “reformers” (de-*

fined as the group of people who understood that the parens patriae system for minors was completely inadequate and obsolete in both empirical and theoretical terms and that, therefore, it was necessary to build from scratch a completely new response both to protect children in need of help and to punish offenders) no serious thought was given to convening so many hundreds of experts (in the sense of having “experience”) to this process of recasting the protection of children in terms of fundamental rights, and no longer in philanthropic terms. The reason was obvious and was expressed as absolute distrust, throughout Latin America at that time, of the possibility of “recycling” the parens patriae system for minors, as had happened twenty years earlier in Europe, particularly in Italy, when it was proposed to abolish the juvenile court. The transformation had to be substantial. Despite the apparent conceptual and political clarity that guided the legal changes, the results of these reform efforts, in practical terms, are not very encouraging.¹

I recalled this after reading *The Child Testimony*, by Margarita Griesbach, a very good document that synthesizes a lengthy process in the defense of children’s rights within the realm of justice developed by the Office of Children’s Rights in Mexico. This work is relevant for three reasons. Firstly, because it raises the importance and complexity of positioning the voice of children in the field of justice, secondly, because it underscores the necessity for justice systems to adapt their practices in order to accommodate age related particularities in its formalities and rituals, and thirdly, because the work collects and systematizes an experience from a region where the translation of policies with a focus on children’s human rights into concrete practices is unusual. As Mary Beloff cautioned, despite the discourse advancing in remarkable terms, the modes of treatment and relationship between institutions, adults and children have not progressed in a like fashion.

As Margarita tells us, the book is a product of the experience cultivated from 2003 to the present. It imparts lessons learned around one of the crucial issues raised by the Convention on the Rights of the Child: how to make the spaces through which the lives of underage persons transit prepared to put into play the voices of these subjects within the relationships built in these institutions (in this case the justice system) and the adults who lead them.

¹BELOFF, Mary. Legal reform and economic and social rights of children: the paradoxes of citizenship. Extraído de la Presentación en el IV Séminaire “Perspectives régionales: intégration économique et une protection sans discrimination des droits sociaux et économiques dans les Amériques”, organizado por el Centre d’Études sur le Droit International et la Mondialisation, Montreal, Université de Quebec, 25/11/2005.

As the Convention on the Rights of the Child approaches its 34th anniversary, Mary’s observation about an evolved discourse next to practices that continue to do the same as ever, remains relevant. For this reason, I underscore from *The Child Testimony* the idea that the process does not happen by magic. Rather it emerges from accumulated experience and only then is it possible to visualize what needs to be transformed. That it is a path of back and forth, where the main obstacle to be faced is skepticism and derision, as is clearly made manifest in the text.

History is clear: from 1989 to this day only the discourse has changed and this is not enough. It is not enough for the rhetoric to sound consistent with the times and a child rights - based approach if it still fails to transform the everyday reality where the voice of children is expendable. There lies one of the fundamental values of *The Child Testimony*: the voice of the child is necessary and must be enabled and cared for. For this, as the author lays out throughout the work, changes have to arise from within the institutions that have long functioned and been conditioned to reject everything that comes from children.

The author constructs along the text a very useful thread in which she tells how, from her and her team’s forensic experience, the process for children’s voices to be heard in judicial proceedings was developed. A process that was complex, reflective, stirring, controversial and not always linear.

Margarita tells us that it is necessary to document, that it is impossible to build “in the air”, that evidence is a central element for the design of policy regarding children; something practically forgotten in our region, where policies are basically based on ideas for the future and born of good intentions that fail to transcend and impact the lives of children.

It is a text that does not boast, although there are plenty of reasons to do so. From the start, Margarita warns us, with caution, that it is a qualitative approach, not a representative one, which analyzes good and bad practices. For now, there are no recipes and these are not needed; with humility the author stands before us to document an experience. This trait is relevant because, generally, in the field of childhood, it would seem that the important thing is to find a formula that solves everything. Here instead, the experiences of a process that took place in a particular region of Mexico are collected. It must be read with this in mind, knowing

that there is no definitive model because the models arise when they are planned with clear objectives, the resources to carry them out and the permanent and sustained evaluation of how to better realize the human rights of children.

In this sense I always remember my Icelandic colleague Bragi Guðbrands-son who has been behind the system developed mainly in the Nordic countries known as Barnahus (Children's House in Icelandic) a model for the comprehensive care for children who have been victims of abuse. Bragi, when describing the model, always alerts us indicating that this model was possible in Iceland due to its own particular characteristics and that it is not possible to transplant it to other countries without recognizing the particularities that make each place a different place. But he revindicates it with passion for the concrete results it produced.

The work is also profound in methodological and bibliographical terms and in its important jurisprudential references that offer us a wide range of tools and sources for consultation. I want to highlight this aspect given this is a topic little studied in our region where mostly Anglo-Saxon literature predominates. In this sense it is also a useful synthesis of debates that take place outside our region and are placed on hand for the avid reader of this type of information. But also, and I say this with a little bit of pride, it emerges as those documents that little by little our region offers for debates here and beyond our borders.

Taking up the idea from Walter Benjamin, for whom the negative utopia would consist in illuminating plots of reality that deserve to be definitively destroyed, this work is a great tool and help for the task. The rituals, formalities and staging that takes place in a courtroom in relation to the testimony of children are a clear sign that for now there is no place to receive and protect the voice of this subject that in 1989 the treaty of human rights placed in the social scene. What happens in court remains a hostile environment for children and hence the urgency and need for a work as this.

And, finally, the other element of great relevance of the work, is to place in sight the tensions between established institutions and the need for an urgent change towards adapted and friendly structures that provide channels for access to justice for children, without a doubt one of the greatest challenges of our States in terms of children's rights. Without change in this matter, the testimony -the voice- of children will only continue to be empty rituality that as always would only prestige adults. That is why this work is welcome for contributing to an incipient debate and on which we have to move forward urgently, but also for the contributions that it gives us from concrete forensic experience. I have no doubt that it will resonate in those of us who fight and work for the human rights of children.

Introduction

This book is the product of experience. Since 2003, O.D.I. has been litigating on behalf of children and adolescents who are victims of violence. In the beginning, when O.D.I. demanded that child testimonies be taken with special adjustments, the request was treated as laughable. How could JUSTICE adjust to suit a boy or girl? Over the last twenty years much has changed in Mexico and around the world. Accessible justice for children is an issue that is becoming increasingly important. In Mexico, discussions about child testimony no longer debate whether justice should or can be adapted for children, now the debate is centered around how it should be done.

Over the years a lot has been learnt about what works and what doesn't work. Both successes and failures in child-accessible justice have been documented. In 2019, a unique experience began with the judiciary in the State of Chihuahua in collaboration with ODI. With the cooperation of the Supreme Court of Justice and UNICEF- Mexico, a specialized court room for child testimonies (SAPCOV) was installed. For its design and methodology, the model collected the lessons learned. Best practices were materialized so documentation and learning could continue.

This book reflects experiences with children's testimonies obtained before and after the implementation of the SAPCOV model. This is not an attempt to present representative research, but rather a qualitative approach that analyzes good and bad practices in hopes to guide access to justice for child and adolescent victims. The present text recognizes that appropriate child testimonies are a matter of public interest. The specialized testimonials serve the child or adolescent who participates and also serve justice by obtaining more and better information to clarify what has happened.

There is still a long way to go. Child accessible justice is slowly becoming a more present issue. However, children and adolescents still face enormous obstacles regarding judicial proceedings. Society still struggles to fully recognize the imperative need for children to have equal and effective access to justice as requisite for their rights to be upheld.



1

Obstacles regarding child testimony

Research on child development is extensive. There is rich and detailed knowledge about how one thinks during these critical stages of development. Language, cognition and emotional development during a person's first two decades of life have been studied extensively from their neurological bases to their behavioral manifestations.

At the same time, international legal frameworks have strengthened their capacity to protect children and adolescents. Since the full recognition of special rights for children, the scope of public obligations they generate has continually grown.

And yet, in spite of robust scientific and legal frameworks, a child's testimony continues to be an obstacle to justice for children and adolescents. Multiple experiences and models for adapted testimonials continue to leave children and adolescents frustrated and to leave authorities none the wiser about what took place.

The obstacles are not unique. Experience after experience demonstrates similar problems: Child testimonies are treated with lower standards than the adult testimonial. Persistently, their testimony is treated as an opinion, adult based communication leaves both adult and child confused, justice does not obtain useful information and children are emotionally damaged by the proceeding.

I

DISCRIMINATORY TREATMENT OF EVIDENCE: ASSESSING THE INDIVIDUAL AND NOT THE TESTIMONY

Child testimony is often surrounded by speculation about the credibility of children and adolescents. Not only do debates arise in case-specific discussions, the credibility of children is part of conversations regarding child testimony in general.

Discussion on whether a certain type of person is credible or not with regard to their right to be heard in court, would be untenable regarding any adult. To ponder the credibility of a group of people and based on that, assess an individual's testimony is legally unheard of if the person is over 18 years old. To argue that one group is more or less credible than another is clearly discriminatory and unacceptable.²

However, when the discussion is about children and youth, the discriminatory aspects of this logic are dismissed. Mistakenly, this discussion does not focus on what a person needs in order to effectively exercise their right to be heard. Rather the debate is centered around the characteristics of persons under the age of 18 and whether they are credible enough to be heard. The debate is an assessment of the individual and not of his or her testimony.

A) PROOF OF CAPACITY REQUIRED TO EXERCISE A RIGHT

How capable must a person be in order to be allowed to exercise a right? Must he or she be able to execute it excellently? Is mediocre execution good enough? Or will it suffice to do it poorly? What is the parameter? Who determines it?

It would be untenable to subject the recognition of a right to an individual's capacity. In any case, significant differences in capacities impose obligations on the State to provide the needed adaptations to exercise rights. In no case should an individual's capacity raise doubts about whether the person has the right or not.

However, regarding children and adolescents there seems to be no resistance when discussing the individual's capacity in order to determine whether or not he or she can exercise a recognized right. In fact, many legal frameworks formally incorporate this discriminatory act. Several states in Mexico, for example, include in their legislation a test of capacity in order to determine whether children or adolescents can testify.³ In spite of full recognition of his or her right to do so, in the case of children and youth, the individual must pass an examination to demonstrate his or her ability to execute his or her right. Contrary to any definition of human rights; children and adolescents must "earn" their right to be heard by demonstrating their ability to express themselves.

There are no serious discussions that openly debate the right of any adult to give testimony based on his or her particular characteristics. The closest likeness to the reasoning applied to child testimonies can be found what is known as enemy criminal law⁴ This refers to when the nature of a trial is turned into an "inquisition over the person"⁵ and not over the facts. Assessing a person's ability in order to allow the exercise of a right is discriminatory. The same principle, recognized as inapplicable to adults, is equally invalid in the case of children and adolescents.

The way of expressing oneself varies among all people. The degree of knowledge about the justice processes, language skills, intellectual capacity or clarity to organize ideas, the degree of education and mastery of language, among countless other characteristics, vary enormously between individuals. They all affect the way in which the person expresses himself or herself and the quality of their testimony. In no case, however, except for children, is it considered that the way of expressing oneself can justify the annulment of the person's right to do so. In all cases the characteristics of the person must be taken into account to ensure effective access to justice, as would be the case if an interpreter were required. Individual characteristics should also be taken into consideration when assessing the testimony. In any case, the way in which an individual expresses him or herself may imply a burden on the authority and never an obstacle to the exercise of rights.

³ Pliego, Yuli. et al. 2022. Pp. 25- 28

⁴ Ferrajoli, Luigi, 2022. pp. 5 - 22

⁵ Ibid, p.11

² Ortega, R. 2022

For arguments sake, even upon assuming it were valid to determine a person's ability to exercise the right to be heard, this would be an impossible task. The way in which a person expresses him or herself varies throughout the individual's lifespan. To assume that upon reaching a certain level of development the person acquires "capacity for expression" is a non-existent threshold. The gradual acquisition of communication skills and the characteristics of each stage of life or individual context determines the way in which the individual expresses ideas and the type of concepts mastered.

Human development is complex and diverse. Various skills and capabilities intervene in specific situations in different ways. Even one same person changes in relation to what he or she is capable of doing depending on particular circumstances. Absolute capacity or incapacity is non-existent. People, of all ages, have relative capacity and depending on the proposed task may require different conditions to exercise it. Rights however, are absolute and universal. Diversity among individuals presupposes a burden on the State to ensure the required adaptations and adjustments for the individual in order to exercise his or her rights.

Since the threshold regarding inability/ ability to express oneself does not exist, it turns out that every effort to determine the ability of a child or adolescent to express himself, and therefore testify, is based on stereotypes and subjective expectations. The type of language, the willingness to talk about a subject, or even prejudices about the content of what is narrated are often used as arguments to determine a child's ability of expression.

Based on ignorance and prejudice, some authorities seek to incorporate formalisms or other improvised means to satisfy their need to evaluate and determine capacity of expression. The degree of knowledge that boys and girls have about irrelevant topics is often used as a means of determining their ability to give testimony.

It is common to find examples where the authority tests the degree to which a child comprehends the concepts of truth and falsehood as a requisite to determine their capacity to give testimony. It goes without saying that whether or not a person understands these concepts is irrelevant to his or her right to be heard and that their testimony be assessed as evidence. This knowledge is certainly irrelevant to the ability to narrate a personal experience or event witnessed. It will be the obligation of the authority to comprehensively assess the testimony as part of the evidentiary acquis in order to determine the veracity of what was said. The degree of comprehension of the "concepts of truth and falsehood" cannot prejudice a testimony, whether it be from an adult or a child. In most

cases when these conceptual questions are placed before a child, he or she responds appropriately and this formalism is a useless, but harmless gesture. However, there are cases where it does become an obstacle for the individual's access to justice.

Thomas Lyon has documented that preschool aged children will strive to avoid placing themselves in a negative situation even when done hypothetically. In particular, they record that multiple young children say they do not know what a lie is as a way of proving to be "innocent" of some fault. In these cases, the child's response is not a reflection of his or her knowledge, but rather an infantile strategy to prove innocence. In the same study, Lyon and her colleagues document cases in which a judge denies the possibility of a child giving testimony due to their inability to demonstrate understanding the difference between truth and lies. They reproduce the dialogue between a child and a judge in which it is evident that the child does not understand what is being asked of him. The child associates "the truth" with that that has happened to him. He is in court to tell the judge "the truth". The judge noticing that the child does not understand his inquiries, tries to clarify his questions and ends up confusing the situation even more. The child, says that he has never told the truth and that he has not told anyone what happened. The judge determines that the child has no capacity to testify.⁶ While inquiring about truth and lies, commonly using simple questions such as the color of a garment, may make sense to the authorities, for boys and girls it will be incongruous with regards to why they are in court. The proceeding and its requirements are not something young children can comprehend. This will increase their confusion and anguish when giving their testimony. In no case is the degree or manner in which a child understands the concepts of truth and lies a valid reflection of his or her ability to tell the story of what has taken place, what they have witnessed and relevant to his or her right to participate⁷.

When not applied as a test of ability, questions about truth and lies may be used as an unfortunate way to attain the person's commitment to speak truthfully. In the case of adults, many countries incorporate formalities where an oath is taken and the witness is informed of the legal consequences of lying in court. It is not a candid gesture that presumes that a person will stop lying, were that his or her intention, because of a promise. Rather, it is a disincentive to falsehood by informing the individual of the negative consequences this may have. The application of the same precept in the case of children would be to inform the child on the importance of telling only what happened to them, that they saw, heard or felt even when it does not carry any penalty.

⁶ Lyon, T. D., 2013. pp. 126-136.

⁷ Ibid pp. 129-131.

It is also common, in cases of sexual abuse, for boys and girls to be asked to prove that they know the names of various parts of their bodies and then ask them where they have been touched. The brief examination of anatomy is irrelevant. Anyone can show with his or her hand where they have been touched without knowing what that part of the body is called. In fact, most young children, who prove to know how to name their head, arms and legs, will then use informal names to refer to their genitals. To clarify what happened it doesn't matter how the child refers to different parts of their body. As with the discernment between the truth and the lie, having to pass a test of irrelevant knowledge can not only result in an impediment for the child to exercise his or her right, but also increase the level of anguish felt during the testimony. The tests emphasize the idea that there is a correct and incorrect way of answering and thus inhibits the free and spontaneous narration of what was lived.

Often these tests to assess the ability of a person to express him or herself is based on what the authority needs and not the needs of the person. This "State - centric" view is common in justice systems. For example, if a person is provided with an interpreter only during the time when he or she testifies and not for him or her to understand the full body of evidence in the case, it is a procedural adaptation in order for the authority to understand what the person says and not for the person to have access to justice. Similarly, determining the capacity of expression of children is more about defining when the authority believes he or she can understand what a child or adolescent says and not about what adjustments the child requires for access to justice.

These examples are not the most serious obstacles in children's testimonies, but they are examples of ways in which the exercise of a right is undermined by a premise of doubt about the person's ability. These are obstacles that must be overcome simply to exercise the right to be heard and to have their testimony assessed.

These are also actions which, if applied to an adult, would be easily identified as discriminatory. It would be untenable to question a male victim of robbery about his understanding of the concepts of truth and falsehood in order to determine whether his testimony will be given value. This would be just as invalid as to condition the credibility of a female victim of sexual violence on her degree of knowledge of anatomy.

B) PROOF OF PROBITY REQUIRED TO EXERCISE A RIGHT

Unfortunately, it is common to hear criticism regarding the defense of human rights of a person who has acted unlawfully and it is common for a violation of a person's rights to be justified on the basis of "guilt". In the face of these suggestions, every argument based on reason and law affirms that human rights belong to all people and not only to those who can be presumed to be honorable. It would be untenable to affirm that rights are meritocratic and even less so, to state that a person must demonstrate to be incapable of wrong in order to be worthy of their exercise. These arguments, when referring to adults, are obviously unsustainable. Every individual has the possibility of intentional wrongdoing and this does not limit his or her rights.

Es igualmente cierto que el derecho a ser escuchado por sí mismo no prejuzga la veracidad o falsedad de lo dicho. Será tarea en cada caso particular que la autoridad valore lo dicho por una persona a la luz del cúmulo probatorio relevante. Solo con base en una valoración comprensiva de lo dicho y no así de la persona será que se arribe a una valoración de la credibilidad y el valor que se le concede a la testimonial.

It is equally true that the right to be heard in and of itself does not prejudice the truthfulness or falsity of what has been said. It will be a task, in each particular case, for the authority to assess what a person has said in the light of the relevant body of evidence. Only on the basis of a comprehensive assessment of what has been said and not of the person, will it be possible to arrive at a conclusion regarding the credibility and value given to the testimonial.

When regarding a child testimony however, it is common to introduce the ability of children to intentionally lie while deliberating on the credibility of their testimony. As with adults, the credibility of their testimonial is based on what has been said and its comprehensive assessment as evidence, but not on the *ability of the person of intentional falsehood*.

The mere discussion of the capacity of children to lie is based on a stereotyped and romantic notion of them as angelic and non-human. The discussion about the capacity for wrongdoing or willingness to cheat during childhood is not only useless to the law, but it occults the child as a holder of rights. The admission of arguments contrary to the general principles governing human rights are mainly based on prejudice. Such is the case of considering that if a child has the capacity of lying, this should affect his or her right to be heard in court and have the testimonial objectively assessed as evidence.

One of the many problems with this type of reasoning is that it is not about assessing specific and measurable capabilities. Similar to the presumption of the existence of a generic capacity for expression, the generic capacity to lie is nonexistent. The discussion is not built around establishing motivation to act falsely in a particular case. Rather it is a question of determining whether or not a person has the generic ability to wish to deceive another.

Once established that children's ability to lie is irrelevant their right to give testimony, there is one area of interest for justice in relation to how children lie. Persons with very different abilities may or may not act with a malicious intent. However, according to their specific capacities, each will be able to achieve this mission with greater or lesser success. The question is not whether boys and girls have the capacity to want to lie, but rather what does a lie look like in a child's narrative.

Children and adolescents share characteristics based on neurological development that determine thinking. These are not cultural or educational styles, but evolutionary stages that within certain parameters of individual diversity are fixed. Of particular relevance to justice and child testimony are egocentric and concrete thought. These traits are interesting because of their importance in children's narratives.

Both ways of thinking, in a concrete and egocentric way, make it very difficult if not impossible for a child or adolescent to describe in detail what he or she has not lived. In particular when it comes to experiences that can be presumed to be alien to the daily experience of a child, such as sexual experiences in the very young. Empathetic thinking, vs. egocentric thought, is a key element for every successful lie. One who cheats must put himself in the place of another. He must put himself in the place of the one who lived what he falsely narrates having lived and only then can he relate the facts from a coherent perspective. In order to fabricate this narrative, he or she must also exercise deductive and abstract reasoning, and thus manage to describe what would have been perceived by the hypothetical bearer of a fictional experience.

Of course, in order for the cognitive difficulties that a child faces when manufacturing a false narrative to manifest it is necessary that they have the possibility to express themselves amply. Anyone, regardless of their age and abilities, can falsely answer a closed question. *Yes or No; Good or Bad*, will not give the authority the possibility to assess the narrative of a boy or girl. Nor will this type of interrogation allow the person the possibility to exercise their right and express what they want to say. The key

to assessing a child testimony is the free and spontaneous expression by the person and not a prejudged assessment of his or her ability to lie.

c) PROOF OF REASONABLENESS REQUIRED TO EXERCISE A RIGHT

A commonly debated issue regarding child testimony, is whether children can distinguish between fantasy and reality. Two problems arise with this debate. The first problem is that it once again focuses on evaluating the person and not the testimony. The second problem is that the debate is muddled because very different concepts are used indistinguishably in the same discussion. There is a huge difference between holding false beliefs, incorporating foreign narratives as part of one's own history and not distinguishing between what is lived and what is imagined. These three concepts are very diverse but are often mixed when talking about the ability of a boy or girl to distinguish fantasy and reality. They need to be addressed separately.

It is clear that children tend to hold fanciful beliefs. They believe in the Santa Claus and the tooth fairy without any problem. In this sense, it can be said that they do not distinguish between reality and fantasy as to what is and is not plausible. The discussion would then refer to the child's ability to hold false beliefs, which is quite different from not distinguishing between what was lived and what was imagined.

There are no studies that show that children, even pre-school age children, are not able to distinguish between what is imagined and what is lived. Rather much of the research on the ability of children to distinguish between fantasy and reality actually refers to how children believe evidently impossible things to be true. Most of this research does not analyze their ability to distinguish between experiences and fantasies. One of the best-known studies on this subject, developed by Carrick and Quas,⁸ presents several images to children and asks about which ones can and cannot be true. The images depict things like a mother cat scolding her kittens or a human mother scolding her children. As could be easily anticipated, young children tend to select a large number of unlikely images as plausible.

Often this and other studies introduce a bias in debates about the credibility of the child witness by establishing a faulty premise: Assuming that holding false beliefs is the same as not distinguishing what is lived and what is imagined. A little girl can pretend she is Superman. She may believe that Superman is real and that he can indeed fly. But this doesn't

⁸ Carrick, N., & Quas, J. A., 2006.

mean that while playing that character, she loses track of reality. The girl doesn't think she truly was Superman and doesn't think she really flew. The child knows she was pretending to play a character whom she believes to be real. Children often distinguish between dreams and reality. They may believe that the characters or fears of their dreams are true and even present anguish regarding their possible appearance in the real world, but they can identify and narrate that it was in fact a dream. It is clearly documented that boys and girls tend to hold false beliefs and there is no documented information that supports that they do not distinguish between living and fantasy⁹.

A second concept is often brought into the discussion causing greater confusion: When children incorporate other's narratives as their own memories. Every person depends on others references in order to reconstruct the part of our own personal history that cannot be remembered. Where and how we were born is a fact that obviously depends on what others have told us. Similarly, it is plausible, and has been documented, that boys and girls incorporate into their own story events narrated from the perspective of an adult, it has also been documented that this is the case even when that narrative is maliciously false. These handed down stories can be firmly believed to be true, but they will not generate the vivid memory of an experience lived. The specific details recalled from one own's perspective regarding something lived will not be present. Others narratives, even when they evoke imagery in the child, are sketchy fragmented narratives of what he or she believes to have lived.

A third concept is often mixed in the same discussion regarding the capacity of children to distinguish between fantasy and reality: the hallucination¹⁰. The main distinction between fantasy and hallucination has to do with sensory perception¹¹. A hallucination is characterized by auditory, tactile or visual perception of non-existent things. A boy or girl will be able to incorporate events that are the product of someone else's story, but not the experience itself. A child, unless a clinical explanation were at play, will not see, hear and feel things that are not there and later recall them as a memory.

The most relevant characteristic of children with regards to fantasy and reality is their propensity to hold false beliefs, whether they be error in judgement or the product of another's narrative. Of importance to the matter of child testimony, also of relevance are their neurological difficulties for empathetic and abstract thought. This means that it is particularly hard for children to describe events that they did not live, even if they

⁹ Sharon, T. & Woolley, J., 2010.

¹⁰ Al-Issa, I., 1995.

¹¹ Courvoisier, H., Labellarte, M. & Riddle, A. 2001.

believe them to be true. The key to the proper assessment of a child's testimony is allowing for a spontaneous and free narrative. Closed questions will only collect the person's belief regarding an event. The free and detailed description may establish the distinction between a belief and an experience.

Having established that the most relevant issue regarding fantasy/reality distinction with children is their propensity to hold false beliefs, the question arises: How should this affect their right to be heard in court and have their testimony objectively and neutrally assessed as evidence? As with the issues previously discussed, the possibility of holding false and fanciful beliefs is not a matter exclusive to children. It would be untenable to exclude or prejudge the testimony of a person for being capable of holding false beliefs. In fact, if this principle were applied, it would end up excluding a large number of adults and not just children and adolescents.

Having established that the most relevant issue regarding fantasy/reality distinction with children is their propensity to hold false beliefs, the question arises: How should this affect their right to be heard in court and have their testimony objectively and neutrally assessed as evidence? As with the issues previously discussed, the possibility of holding false and fanciful beliefs is not a matter exclusive to children. It would be untenable to exclude or prejudge the testimony of a person for being capable of holding false beliefs. In fact, if this principle were applied, it would end up excluding a large number of adults and not just children and adolescents.

People's beliefs should not prejudge the veracity of their testimonial. The testimonial must be assessed and the judge must reach reasonable and legal conclusions regarding its veracity and usefulness in the matter at hand, regardless of what the person believes. For example, one case¹² documents a woman who recounts having suffered an assault. She is convinced that the aggression is part of a series of supernatural actions orchestrated by acts of *Santeria*¹³. The belief that the facts were supernatural and the product of Santeria is irrelevant to the authority's assessment of the person's testimony about what she lived. Her belief and interpretation of what happened should not prejudice her testimony of the events.

In the case of boys and girls, their belief in elements of fantasy can make their testimony more complicated. This is particularly true in testimonials that do not allow for the child's spontaneous and free narrative. In one case regarding¹⁴ the production of sexual exploitation materials, a three-

¹² Office of the Ombudsman for Children's Rights. 2006. p. 18.

¹³ An Afro-Cuban religion also practiced in Mexico.

¹⁴ Oral Proceedings 15/2021. Federal Criminal Justice Center of Mexico City.

year-old girl reports that while the sexual violence was taking place, her parents were present. The reference seems to constitute an incongruity that makes the event improbable. However, this was clarified when the girl had a greater chance to freely describe what she experienced and referred that the aggressor told her that her parents were there but that “they were made invisible”. The girl, because of her age, easily believed the claim of her assailant. The susceptibility to believe in fanciful things reinforces the State’s obligation to guarantee and facilitate a free and comprehensive narrative by children and adolescents. It does not justify the annulment of their right to be heard.

D) PROOF OF INDEPENDENCE REQUIRED TO EXERCISE A RIGHT

One of the most recurrent themes in the debates regarding child testimony, is that children and adolescents are vulnerable to suggestion, manipulation or deception. Arguing vulnerability to deception and manipulation, takes the inquisition of the person and not of the facts, to its maximum expression. It is even common for judicial rulings to incorporate evidence regarding an adult’s motivation to manipulate a child and based on the sole motivation of a third party, determine not only that there is manipulation but deny the child his or her right to be heard and that testimony be duly assessed¹⁵.

It is impossible to address the role of child vulnerability to suggestion without addressing the so-called parental alienation syndrome. It is necessary to clarify the enormous confusion that exists around this issue in order to be able to then reasonably address issues of greater relevance for the child testimony.

The parental alienation syndrome suggests that there are times when a parent includes children in the conflict with the other parent. The problem with this so-called syndrome is that it confuses very different things under the same definition. The existence of the phenomena called triangulation within a parental conflict has been widely documented¹⁶. The formation of alliances and other dynamics in this scenario have been documented, as have the highly damaging effects it has on the children caught in a conflict between two highly significant beings. Entrapment in a parental conflict is undoubtedly a type of family violence that does exist and is widely recognized by judges who are in daily contact with family disputes.

Similarly, sexual abuse within the family is a widely documented phenomenon. At the international level, the highest rates of sexual violence

¹⁵Direct amparo in revision 3797/2014 Minister Rapporteur Arturo Zaldivar Lelo de Larrea. Mexico, 2015.
¹⁶ Bilbao, M. y Barbero M. 2008.

against children are committed by family members¹⁷. Child sexual abuse within the family is a type of family violence that exists and is widely recognized by judges who are in daily contact with family disputes.

So, what’s the problem with parental alienation syndrome? The problem with this syndrome is that in its definition it uses exactly and only those indicators that are shared between these two types of family violence¹⁸. Being indicators shared by both types of violence, they are useless to differentiate them. The risk of using identical indicators is that one case can be confused with another, even when the consequences are diametrically opposed.

A review of the indicators proposed as a definition of parental alienation syndrome makes it clear that these are only indicators that also occur in cases of sexual abuse.

Proposed indicators to identify parental alienation.	Present in cases of sexual abuse in the family	Present in cases of parental conflict
The reporting parent acts aggressively towards the other parent, including taking actions solely to harm the other parent.	Yes	Yes
The reporting parent openly criticizes the parent denounced to third parties, sometimes called a denigration campaign.	Yes	Yes
There is evidence that the reporting parent has warned the child or adolescent of the risks or dangers of being with the accused parent.	Yes	Yes
The ill-will of the child or adolescent towards the parent denounced is not ambivalent and may be manifestly blameless.	Yes	Yes
Animosity extends to the extended family.	Yes	Yes
The child or adolescent claims that no one has induced or indicated what to say.	Yes	Yes
The child or adolescent acts as an ally of the reporting parent.	Yes	Yes
The child or adolescent may have difficulties during visits with the accused parent.	Yes	Yes
The child or adolescent shows ambivalence of behavior regarding the bond with the accused parent.	Yes	Yes
The child or adolescent presents emotional consequences that may or may not be those referred to as “typical” of victims of sexual abuse.	Yes	Yes

¹⁷Sanjeevi, J., et al. 2018.
¹⁸Castañer, A. and Griesbach, M. 2014.

The overlapping use of precisely these indicators as a means of definition of the syndrome is extremely striking. However, the fully documented explanation is available to any reader. Richard Gardner is the undisputed author of the term parental alienation and its definition as a syndrome. Through multiple publications he openly refers to parental alienation as the hysterical reaction of women to sexual activity between a father and his sons or daughters¹⁹. Gardner, as can be seen from his initial publications, is an active defender of pedophilia as a human right²⁰. The coincidental use of indicators that are present both in sexual abuse and entrapment in parental conflict is due to the fact that in its origin, the parental alienation syndrome referred to a conflict generated by the presence of sexual abuse.

Parental alienation syndrome in its classical or gardnerian definition presents other serious contradictions with human rights. Gardner and other exponents of the syndrome, propose that in the presence of these indicators, the right of the child or adolescent to be heard should be completely annulled. In fact, many propose that the judge must stop assessing any evidence that could contradict the existence of parental alienation. Some propose the court should order that the only treatment the child should receive will be given by the person who made the diagnosis of parental alienation²¹. The limitations and contradictions of this supposed syndrome have been amply documented. Suffice it in the present work, to remove the topic of the supposed parental alienation syndrome as part of any serious discussion regarding child testimony.

Returning to the question of what role does the vulnerability of children to suggestion and manipulation play when considering child testimony?, it is important to note that this condition is not exclusive to children and adolescents. Many groups in society are in vulnerable conditions that make them more prone to deception and manipulation. Lack of information, processes of indoctrination or extreme dependence on another individual or group, among many other factors, can make a person vulnerable to influence or manipulation by a third party. However, in no case can vulnerability - presumed or proven - justify the annulment of the right of the person to be heard and that his or her testimony be duly assessed.

¹⁹ "If the mother has reacted to the abuse in a hysterical manner or using it as an excuse for a campaign of denigration against the father, then the therapist does well to try to "sober her up". ... One has to do everything possible to help her place the "crime" in proper perspective. She has to be helped to appreciate that in most societies in world history, such behavior was ubiquitous, and this is still the case." Gardner, R.A. 1991. P. 576 and 577.

²⁰ "... The child has to be helped to appreciate that we have in our society an exaggeratedly punitive and moralistic attitude about adult-child sexual encounters....He (the father) has to be helped to appreciate that pedophilia has been considered the norm by the vast majority of individuals in the history of the world.... That even today, it is a widespread and accepted practice among literally billions of people..." - Gardner, R.A. 1991, pp. 549 and 593. ; "Children are naturally sexual and can initiate sexual encounters by seducing an adult" - Gardner, R.A. 1986, p. 93 and "There is a bit of pedophilia in every one of us" - Gardner, R.A. 1991, p. 118.

²¹Tejedor Huerta, A., 2006.

In addition, research shows that vulnerability to suggestion and manipulation presumed in childhood is based on stereotypes and greatly overestimated. Children have less information than adults and among other reasons this makes them more vulnerable to deception. However, studies show that they are not necessarily more vulnerable to suggestion. Experimentation regarding susceptibility to believe to have suffered a violent act presents obvious ethical limitations. However, one study manages to overcome these limitations in an interesting way²². A supposed toy salesman visits children in preschool classrooms. The salesperson does unusual things to maximize the chance of the event being remembered by the children. In this case the salesman measures each student's foot and draws a happy face on their big toe. Sometime later "authorities" interviewed the children to determine if the seller had behaved badly and yelled at them. After repeated attempts to suggest that this behavior had happened, 96% of respondents denied that the seller had yelled at them. In other studies, it was found that the margin of possibility to influence the testimonial of a child considerably increases when closed questions are utilized²³. When children respond to closed questions they may be responding in order to please the adult or to answer what they perceive they should answer and not necessarily what they experienced.

Denying a person's right to be heard and his or her testimony duly assessed based on stereotypes about his or her susceptibility to the influence of another is clearly unsustainable when considered in the case of an adult. In the case of an adult, this would be as if a judge determined that the testimony of a female victim is not credible given that an expert in psychology found her husband to hold a grudge against the accused. By assuming, on the basis of prejudice, that a woman is liable to be influenced by her husband the above judge would dismiss the woman's testimony and evidently incur in discriminatory and illegal practice. However, when regarding a child witness this logic is common. Some cases have documented the use of psychological assessments of a third party (usually the mother) in order to determine if what the child states is credible.

As with the testimony of every person, the attention of the judge should focus on the assessment of the veracity of what was said and not on the alleged degree of susceptibility of the individual. Either by deceit, influence or manipulation the quality of a testimony can be identified only when the person has the opportunity to speak freely. Once again in the face of manipulation or deceit, the neurological characteristics of children and adolescents make it difficult for them to describe what has not been lived. Only when authorities facilitate a children's expression without fear so he or she can naturally, in their own style and structure, freely describe their experiences, will authorities attain objective elements for assessment.

²² Shyamalan, B. & Lamb, S. 1995.

²³ Fivush, R. and Schwarzmuller, 1995.

II

CONFUSION BETWEEN OPINION AND TESTIMONY

The application of lower standards and discriminatory treatment to child testimonies is in great part due to frequent confusion between opinion and testimony. As will be seen, these are two very different acts. Of greater relevance for the topic at hand, is that the consequent obligations for the authority are very different in each case. When a testimonial is treated as an opinion, far lower standards are applied.

A testimonial is the detailed narration of something lived. It refers to an act, commonly produced as evidence, in which the person recounts everything he or she perceived or is known about an event. Usually, testimony is used to clarify what happened and on the basis of it, and other evidence, make decisions that are a consequence of the event and will affect the interests of those who were involved. Giving testimony is part of the person's right to clarify what happened and thereby affect its consequences.

Opinion is a subjective desire or consideration. There are no absolute truths in opinions. It is the expression of subjective impressions on a given matter. An opinion is individual and personal. Testimony and opinion are very diverse in nature and therefore their legal treatment is also different.

Different standards apply to both acts in court. Credibility is irrelevant to an opinion. The opinion cannot be truthful or false, it is simply an opinion. An opinion is not binding, it is a factor to be taken into consideration to the extent possible.

Conversely, a testimonial is a person's version of an event. The testimonial of every person must enjoy the presumption of truthfulness and must be assessed as credible on the basis of objective elements. If the assessment of a testimonial determines it to be true, it is binding within

the reasoning that is executed on the evidentiary mass. The standard applicable to the treatment of testimonial is much higher than that given to the treatment of an opinion.

Why, if both are such different things, is there confusion between opinion and child testimony? This is due to the fact that for children, the right to opine on matters that concern them is explicitly stated in international treaties and many domestic legal frameworks. Rights of participation are of enormous importance to children and adolescents. However, erroneously the recognition of special rights of are often interpreted as being in lieu of other human rights that are not exclusive to children.

Special rights arise from the recognition of structural, historical, cultural or any other type of conditions that are systematic and widespread and that affect the exercise of the human rights of a specific group of people. It is not a question of these groups having different rights in lieu of the human rights of every person. Rather they are special rights that are necessary to give validity and effectiveness to the same human rights shared with the rest of humanity. Special rights recognize human diversity and that there are no neutral rights. The rights were originally designed with a standard applicable to adults, of productive age, male and belonging to the dominant racial or social group. As human rights evolve, there is growing recognition that given real conditions, various groups require adjustments and special rights in order for these same human rights to be effective for them in particular.

In the case of children, a systematic and widespread element that affects the exercise of rights is the fact that children and adolescents are perceived as the private property of the family or as objects of protection. There is a long history that ignores them as holders of rights. This leads to the recognition of a number of special rights necessary for human rights to have a useful effect for children. In view of the long-standing tradition of ignoring the views of children and adolescents, the State has an additional obligation to hear and take into account their opinions on all matters that affect them. The rights of participation recognized for children and adolescents impose reinforced obligations on States to ensure their inclusion as holders of rights in private and public life. Special rights seek to give effect to human rights and in no way replace them.

In practice, however, many authorities, replace human rights with children's rights when it comes to under-age people. The material conclusion is that adults enjoy the right to testify and children and adolescents the right to give their opinion. Obviously this is not an explicit act, and probably not even conscious, but it materializes in applying to the child

testimony the legal treatment of an opinion. The standards applicable to its production and assessment correspond to an opinion and not to a testimonial.

The differential treatment that should be given to testimony and opinion is evident in cases of convergence between criminal and family law. If a child gives a testimonial in which he or she recounts having suffered sexual violence by one of his or her parents, his or her testimony must, as all testimonials, enjoy the presumption of truthfulness and be assessed as evidence through objective and legal reasoning. This is part of the human rights recognized for all persons affected by criminal proceedings.

If it is determined that the violence did take place, this will have consequences for the family relationship between the convicted parent and the child. A family judge must make determinations about the child's custody. As these decisions have traditionally ignored the wishes and views of the child concerned, the special rights of the child oblige the authority to listen and take into account the views of the child. The judge must assess this opinion in consideration of the child's age and may even know his opinion through his representative (a notion that cannot be applied in the case of a testimony). These are two distinct rights, harmonious and coexisting.

III

ADULT-CENTRIC COMMUNICATION AND ITS INTERFERENCE WITH CHILDREN'S TESTIMONIAL

Human communication is about much more than words. Words and their structure matter, but communication is marked by other factors within which the words are inserted. Communication is shaped by the social relationship among those involved. One's position before the other and the relationship particular to the moment is relevant. Communication is also shaped by an individual's worldview. Different cultures interpret identical phrases in different ways. Words have a literal meaning and a contextual meaning. And their interpretation has a cultural bias.

Communication is also the expression of cognitive structures and at the same time thought is the result of a linguistic structures²⁴. Thought and language are appreciably intertwined in a dynamic of mutual influence.

While the subtle aspects of cognitive and linguistic development may be foreign to much of the population, the existence of a relationship between how one thinks and how one speaks is not surprising. On a daily basis we see this with those around us. However, when it comes to a child testimony, this obvious observation seems to be ignored. Few would say that boys and girls think like an adult, however when asking for their testimony, it is produced and assessed as if they were an adult.

At best, efforts are made to make the situation and interaction with children in a context of justice, a more friendly event. Few interventions are constructed from a cognitive approach. That is, few models structure the child testimonial based on how a child or adolescent thinks.

The language of law and justice is alien for almost everyone. Legal scholars master this new language and many would say that they too are affected by it in the way they think. In general, those who are not part of this environment, are confused and have difficulty understanding the legal

²⁴Ellis, N.C., 2019.

vocabulary, procedures and protocols that give order such solemn occasions as a trial. In particular, children are unable to understand the adult, formal and abstract language of the law.

The result is that communication faced by children and adolescents in judicial proceedings is adult-centric and generates serious confusion for all. It is not necessary for those involved in the production of a child testimony to understand in detail the neurological, cognitive or psychological aspects of human development. It is however important to understand how these elements interact with justice. With this in mind, this document will make a very brief presentation of some elements of human development relevant to a child testimony. It indicates, as a foot note, various resources that can provide more information to those interested. The focus of the following section elaborates how some features of childhood interact with justice and the communication problems they generate.

A) CHILD COGNITION AND COMMUNICATION²⁵

Much has been studied and documented about cognitive development during childhood. Human development is increasingly understood as a continuous process throughout one's entire life and as a more complex matter than only what happens within the individual. However, for the purpose of this document it will serve the discussion on the child testimony to highlight only three aspects of the development of thought and communication during the first 18 years of life.

The first aspect to highlight is that cognition and communication corresponds in great part to structural and immovable features. Those characteristics most relevant to child testimony are of a neurological nature²⁶. This means that it is not something that can be modified at will or as a result of adult efforts. This statement has important implications with respect to child testimony and the necessary procedural adjustments.

The structural nature of these characteristics in children and youth imply that any argument regarding legal impediment to the necessary adjustments based on cognitive and communication patterns is unsustainable. It is a dilemma without possible compromise. Either legal proceedings adjust to the way in which children think and communicate or it excludes them from justice

²⁵ Supreme Court of Justice, 2014. Pp. 25 - 37.

²⁶ Saxe, R., 2006.

negating their human rights. Children and youth are materially incapacitated to make the adjustment, the justice system must therefore adapt.

It also means that the degree and type of adaptation to produce child testimony should use as a parameter that which is dictated by the neurological structures of childhood. In addition to seeking a valid purpose (access to justice) and seeking proportionality (balance between the rights of the parties), it must be reasoned on the basis of how children are known to be. This is not an issue on which there is a lack of information, and therefore there is a surplus of objective and rational inputs to guide the procedural adjustments to be made.

Finally, it implies that the multiple and generous efforts to make child accessible justice simply child-friendly are unfortunately useless. Many genuine efforts on the part of authorities to be kind to children who give testimony, still leave them in a state of confusion. No amount of kindness can catapult a child into a developmental stage that has not been reached. Children will still operate with the cognitive and neurological structures that corresponds to their developmental age. An example of this can be seen in the words of a judge who, in a soft tone, tries to explain to a child the mechanics of a traditional interrogation: "Before answering, take a short pause. If you hear the word "objection," please don't answer. When responding, as far as possible, direct your gaze to this judge in order to be able to better capture your answers."²⁷ ". In this case, the well-intended kindness could not overcome the child's difficulty to comprehend this complex instruction. Procedural adjustments need to contemplate the cognitive characteristics of the child and the language and the structure through which communication takes place.

The second aspect to be highlighted regarding the characteristics of children that are relevant to the child testimony are egocentric and concrete thinking. Egocentric thinking refers to a child's difficulty for putting himself or herself in someone else's shoes. Children, well into adolescence face significant limitations to thinking from a perspective other than their own. At an early age it even means difficulty considering that others may know or not know things other than what they are aware of. It is not a lack of interest or will, but the cognitive impossibility of even considering the perspective of others. As will be seen later this has important implications for children's narrative and their testimony in particular.

Concrete thought refers to difficulty for abstraction. It translates into the need to understand and express concepts through their concrete manifestation such as an experience or an object. Concrete thinking requires

²⁷ Oral Proceedings 278/2021. Bravos Judicial District, Chihuahua.

a conceptual landing of sorts on something specific and also limits reasoning to one variable at a time. This feature of thought makes deduction, generalization, or metacognition (thinking about one's own thought or action) difficult. As will be seen ahead, concrete thought will also have significant implications for the child testimony.

Both cognitive traits will affect how the child or adolescent understands the context and interactions within a justice scenario and how they express themselves. Children and adolescents will present a narrative that is descriptive and not explanatory; it will be subjective and shall not consider the listener when expressing an idea; and it will be jumbled as a result of subjective associations thus not adhering to a chronological or causal order for the sake of clarity.

Finally, the third aspect to highlight about child cognition relevant to their testimony, is that these traits diminish with age, but last until adulthood is reached. To a lesser extent, adolescents still maintain these traits. Their manifestation will be more sophisticated but despite enormous similarity with an adult, the adolescent mind still faces difficulties for empathetic and abstract thinking. Especially in times of distress, it will be common for the adolescent to involuntarily manifest a cognitive regression and resort to concrete and egocentric thought structures that have been partially overcome under normal conditions.

When the cognitive and neurological characteristics of development are not taken into consideration, a child and adolescent's testimony will result in scant fragmented information.

B) EGOCENTRIC NARRATIVE

One of the outstanding features of the child's narrative is the almost complete lack of consideration for the listener. The child or adolescent does not think about whether or not what is being said is understood by others, and this has important consequences in the structure of their narrative. In children it is a difficult or impossible mental exercise to think about what the listener may be understanding. This would require thinking both about the subject one is narrating, while considering what the other is hearing and understanding. This is a complex exercise that involves handling various variables simultaneously and putting oneself in the others

shoes. The ability to think about what one is communicating is a skill that develops slowly and gradually through childhood and adolescence²⁸.

Notably, the child or adolescent may change from one subject to another without giving notice to the listener. Children's narratives are capriciously tethered to their subjective attention. Focusing on one variable at a time, when an idea comes to mind, the child's full attention will gravitate to this topic. The change of subject matter can be triggered by any subjective association. Along with his or her attention, the narrative will address the new subject or event. The key issue relevant to justice is that the child will not announce that the subject or event has changed.

In the following example, a 12 year-old victim of sexual exploitation is narrating his experience²⁹:

The child says to the interviewer:

I knew a friend from the pool hall named Jocelyn. I talked to Jocelyn and everything, and she introduced me to xx and there like I *asked for money* and that, but there he didn't touch me. And he already *gave me money and like, right? So..what ya call-it? And I went, my mother and me to buy us a...* because that day we asked him for money and that's it. (The emphasis is the authors).

"Following a subjective thread, the narrative jumps from one event to another. ... Structured around memories and ideas about "money" the child begins his story and from there connects:

- The event in which he was introduced to the aggressor (who gave him money)
- Later events in which the child asked for money but was not yet abused.
- Later events in which he received money in exchange for abuse.
- And another event where he went shopping with his mom.

These are four different events, linked in the child's mind but not clarified as such. The child does not warn that he is mixing events, he simply tells narrates them as they come to mind".

²⁸ Melogno S, Pinto MA, Lauriola M. 2022.

²⁹ Office of the Ombudsman for Children's Rights, 2014.

This characteristic of the child narrative is particularly problematic for the child testimony when various events are referred. Justice will require a clear distinction of events, but the child or adolescent will not offer this order spontaneously. While describing one event, a subjective association can spark the memory of another event, and he or she is likely to start talking about the new event recalled. By not warning of the change of event, the narration might seem to introduce incongruous elements. In court a 13-year-old girl narrates³⁰:

“...(she narrates an event of sexual violence) ... and he told me not to say anything, that he would harm my sister or my mom. And I didn't say anything. And days passed and I didn't sleep, I didn't sleep. Then on a Thursday... (she explains that her mother had to go out to work on Thursdays) ... we did not want to stay with him. And then on the 21st he was in the kitchen, he was drinking. And I was in the room ...(describes how she was in her room)... and he was watching me from the kitchen... and it was like three in the morning and I was still awake. I saw that the sun was starting to come out and I lay down to sleep, I lay down to fall asleep... (she narrates another event of sexual violence)... and so like that the next day was when we were taken to my grandmother's house.”

The teenager seems to refer to four different events. She refers to a day in which an aggression occurred without specifying elements that allow one to establish the approximate date. She speaks of a period when she could not sleep without specifying whether during those days and nights another aggression occurred or how long that period lasted. She immediately jumps to refer to a Thursday when her mother had to go out to work. She narrates that they did not want to stay with the aggressor, but does not finish describing if in fact they stayed with him or if an aggression took place. Instead, the teenager jumps, for some unspoken reason, to a day when the aggressor was in the kitchen and an event of violence happened. Even as a teenager the girl has enormous difficulty keeping the narrative orderly. Subjective associations move her from one event to another and no explanation is offered to help to understand these jumps. Without adult assistance to obtain more spontaneous descriptions of each event, it will be very difficult to clarify the details and number of events that took place. This is a mental exercise that she cannot complete on her own.

It is not that children and adolescents are unable to differentiate the events lived, rather that they narrate what specific memory is thought about at the moment. They do not consider the confusion that these jumps cause

³⁰Oral Proceedings 10/2022. Morelos Judicial District, Chihuahua.

to those who listen. Children will need assistance in structuring their narrative to obtain as much spontaneous information as possible about each particular event.

c) SUBJECTIVE CONTENT

Adults constantly introduce elements into their communication that are of no subjective importance. This is the result of efforts to express themselves in a way that can be better understood by the listener and also to provide information that will be of interest or utility to that person. Adult communication is very aware of the listener, adults introduce endless data to give context, background and explanations so that their ideas are understood. However, when the “awareness” of the listener is removed from communication, as happens with children, the result is a narrative structure that is very similar to ones internal dialogue (speaking/thinking to oneself). In the internal dialogue, only what is subjectively important is “said” and it is not contextualized, explained or corrected. Ideas run through one’s own mind without pause.

As with the internal dialogue, the child testimony will spontaneously share only the information that is subjectively important. This can mean leaving out information that is highly relevant to justice. Some information only gains importance in a specific context and when considering what the other needs, particularly in matters of justice. For example, if an adult victim of a robbery notices the number of the license plates of the car used by the assailants, he or she will surely mention this fact to the police. This is done because he or she knows it is relevant to the task of investigating the crime and he or she is aware of what the listener needs. The number on the license plates is not significant in and of itself for the victim, it becomes relevant only when thinking about what the other needs to investigate. The exercise of thinking about what the other needs is something that escapes children and adolescents. This means that they may have a great deal of useful information that goes unmentioned simply because it is not subjectively relevant.

Some information is not relevant because the child’s narrative is unaware of what the other needs, and other information is not relevant to children due to a lack of knowledge. Children have a limited understanding of the world and do not know of the existence of many things they have never seen or lived. Knowledge of some things makes certain information

relevant. For example, if an adult suffers sexual violence and during the event notices the presence of cameras, he or she will surely think that the aggression is related to sexual exploitation. This is because he or she is aware of the existence of such crimes even without having previously been a victim. However, in cases of possible child sexual exploitation, child victims may omit data such as the presence of cameras. They are likely to not have any knowledge regarding these types of crimes, thus the presence of a camera is not deemed as subjectively important.

In one case 7 adults are condemned of sexual violence against more than 30 children in a preschool in Mexico City³¹ and only 5 victims mention the presence of cameras. This does not mean that the other victims were not recorded, it only means that the presence of a camera is not necessarily relevant for such young children. It is common for boys and girls to see phones used to take pictures on a daily basis, unaware of sexual exploitation, the significant link between the violence and its photographic record is meaningless.

A four year old girl describes the event of probable sexual exploitation incorporating the presence of cameras from a subjectively relevant perspective. Instead of mentioning the presence of a camera, the girl reproduces parts of the dialogue as she lived when describing the aggression.

“She made me sleep. (then changing her tone of voice)” Photo, photo”³²

The subjectivity of the child narrative does not only generate omissions. It can also lead to confusion of important consequence. Boys, girls and even adolescents may use common words with a subjective meaning. For example, an eleven-year-old uses the word “date” with a subjective meaning:

PROSECUTOR: When did it happen?

CHILD: *Shall I tell you the date?*

PROSECUTOR: *Do you remember it?*

CHILD: *Yes, when the weather was cold³³.*

In the above example, it is evident that the child uses the word “date” to mean the season of the year and the result is not problematic. However, the confusion can be greater when boys and girls use conventional terms

with subjective and imprecise meanings. A 6-year-old girl uses numbers with a meaning of her own.

PROSECUTOR: *When did your dad scratch you?*

GIRL: *Only when I saw him*

PROSECUTOR: *When did you see your dad?*

GIRL: *I saw my dad millions of days.*

PROSECUTOR: *How many times did your dad scratch you?*

GIRL: *About twenty-five time³⁴.*

In this example the girl is obviously using figures symbolically or with a meaning of her own. Millions of days, a figure that would be implausible for a little girl to register, is more likely to mean many times or constantly. When she subsequently refers 25 times, it is also unlikely that the girl would have recorded this precise number of events. From the subjective meaning one can infer that it means that the event did not take place not every time she saw her father, but that it did happen on more than one occasion.

In the example, there is no way for the girl to deploy the ability to use abstract concepts such as numbers. This is a neurological limitation and any insistence for her to provide more information in this adult fashion will only end up generating more confusion. Specialized methods, based on age-specific cognitive traits, must be used to identify probable particular events and then obtain further spontaneous description of each one. It will be the task of the adults to then determine how many events she has described.

³¹Case 47/2017 Second Federal Unitary Criminal Court, Mexico City.

³²Oral Proceedings 15/2021. Federal Criminal Justice Center of Mexico City.

³³ Oral Proceedings 278/2021. Bravos Judicial District, Chihuahua.

³⁴ Direct amparo in revision 3797/2014 Minister Rapporteur Arturo Zaldivar Lelo de Larrea. Mexico, 2015.

D) DESCRIPTIVE NATURE OF THE NARRATIVE

Concrete and egocentric thought implies that children and adolescents describe their experiences rather than explain them. As adults we often explain because we understand that the listener needs this information to understand us. From this perspective, adults involved in a child testimony often ask for explanations. However, when children or adolescents are asked to explain their experience or their narrative, they are being asked to do something that is extremely difficult if not impossible. Explaining an event involves managing multiple variables. On the one hand we must consider the event itself, that is what happened. One also must consider elements of causality that explain the event or specific aspects about it. Additionally, it would be necessary to take into account how this information is expressed so that the listener can understand the reasoning offered to explain the event. An eleven-year-old is unable to give simple explanations about an event that happened in his family's business:

DEFENSE: *What did you do when you saw him with the knife?*

CHILD: *I went to the back where the fryer is.*

DEFENSE: *Why did you do that?*

CHILD: *mmmm I don't know.... I don't know³⁵.*

Most likely the child does know why he withdrew to where the fryer was. It is more likely that the child's answer refers to not knowing how to answer the question. Possibly if the child was asked to describe what he felt when he went to the where the fryer was or what he thought when he did this, he might respond that he was afraid and wanted to hide. The child, despite being eleven years old, may describe but not explain his own action.

Explanations usually require abstract thinking and the use of conventional references such as time, directions, etc. in order for others to understand. When children and adolescents are asked to give explanations of this kind, the information obtained is often useless. A child entering adolescence tries unsuccessfully to answer the questions asked during his testimony. The defense wants to establish the relationship between a park and the child's home. After trying to get this information in various ways, she desperately tries to adjust her questions so that the child can answer. She does not succeed.

³⁵Oral Proceedings 278/2021. Bravos Judicial District, Chihuahua.

DEFENSE: *Where you live, how many streets are there?*

CHILD: *So... when you go in and then another.*

DEFENSE: *How do you go to the park?*

CHILD: *I leave my house and go to the park³⁶.*

Most likely the child knows the way between his home and the park as he has gone this way many times, but he is not able to explain it. Possibly if he were asked to describe what he sees along the way or if he was allowed to show the path using some material, such as play-dough, information of greater use could be obtained.

Explanations are often given in consideration of what the listener needs within a specific context. If an adult is at home with someone who wants to go to a nearby school and is asked "where is the school?", they will most likely respond with directions on how to get there. If instead this adult is in a trial about events that took place in a school and the authority asks "where is the school?", they will most likely provide the school's address. In a concrete and egocentric way, a 4-year-old girl answers this question describing her own experience:

PROSECUTOR: *Where is the school?*

GIRL: *At the door³⁷.*

The exchange is not only useless for the process. Answering questions that do not make sense and cause difficulty can generate confusion and increase anxiety in a boy or girl who is giving testimony. Increased levels of distress can interfere with the child's ability to speak freely. At best, they are a waste of time that prolongs testimony in an unhelpful manner and to the emotional detriment of the child or adolescent, as well as the trial itself.

³⁶Oral Proceedings 278/2021. Bravos Judicial District, Chihuahua.

³⁷Oral Proceedings 15/2021. Federal Criminal Justice Center of Mexico City.

E) THE IMPACT OF QUESTIONS OR INTERRUPTIONS

Few things are as problematic for the child testimony than questions. This is so for many reasons. Multiple studies show that the chances of inducing or skewing a child's or adolescent's testimony happen most when questions are asked³⁸. Various types of questions have been analyzed and the findings are not surprising: The more information or premises contained in the question, the more disruptive it will be to the child's testimony. However, it is a fundamental element of due process to have the right to question and cross-examine. Anyone whose freedom is at stake without having had the opportunity to confront and contradict the charges brought against him or her would suffer a serious violation of rights. The protection of the child testimony cannot be at the expense of the protection of due process, it is essential to apply proportional measures that allow the harmonious coexistence of the rights of all parties involved. Child testimony must admit contradiction in an adequate manner in consideration of their cognitive characteristics. The lack of specialized interventions, generate at best useless information and at worst inaccurate data that can hamper the clarification of what happened.

One of the most common problems with questions asked to children and adolescents has to do with their complexity. It is common for lawyers to have difficulty moving away from the formal language of the law. Despite striving to simplify questions, inquiries like the following are very common.

Question asked to a 7 year old girl³⁹: What did you do the day after you arrived in Chihuahua in your aunt's house?

Question asked to a 12-year-old girl⁴⁰: You tell us that G comes in through a window, can you tell us where this is located?

In general, questions containing more than one variable are difficult for children and adolescents. Concrete thinking leads them to focus on one variable at a time, and the answer will not necessarily reflect the juxtaposition of the variables proposed by the question.

³⁸ Lamb, M, et al. 2018. Pp. 59 – 62

³⁹Oral Proceedings 89/2020. Morelos Judicial District, Chihuahua.

⁴⁰Oral Proceedings 42/2021. Morelos Judicial District, Chihuahua.

Similarly, the unusual syntactic construction that is common in legal proceedings is extremely confusing for children. In court, a six-year-old girl is asked the following question:

“Going back to the scratch, I want to know if it caused you pain⁴¹”.

The question may seem strange and may cause distress or confusion to the child. Some systems still use formalisms of expressing the question as if it were addressed to the authority and not speaking directly to the respondent. Phrases such as “For him/her to state...” at the beginning of a question is incomprehensible to children.

Many questions make sense only within the context in which they are being asked and in consideration of what the person who is asking wants to know. For example, it is important in a trial to establish the specific elements that conform the legal definition of the crime. In the case of sexual violence, it is relevant to establish whether rape or sexual abuse has taken place. These motivations will not be understood by children. They cannot put themselves in the position of another person and they do not comprehend matters regarding legal definitions, thus, they will interpret the questions in a concrete and subjective way. In the example of the six-year-old girl mentioned in the previous paragraph, the lawyer continues to try to establish the specific elements of the criminal definition and asks:

PROSECUTOR: ¿When he touched your private parts, what did you feel?

GIRL: I felt sad⁴².

The word feel can refer both to the physical or the emotional. Boys and girls often answer this question referring to their feelings. The question should simply be more precise and indicate that the inquiry refers to what she was felt in her body.

When faced with closed questions, the child or adolescent will give a concrete and literal answer⁴³. From an adult perspective, it is assumed that the answer will be given in consideration of what needs to be known. So, when an adult asks, “Do you know what time it is? The person who answers usually gives the time and does not answer literally about whether he or she has knowledge of what time it is. With children and adolescents this logic does not always apply.

⁴¹ Oral Proceedings 247/2019. Morelos Judicial District, Chihuahua

⁴² Idem

⁴³Evans, A. D., Stolzenberg, S. N., & Lyon, T. D. 2017

PROSECUTOR: *Do you know why your dad didn't live there anymore.*

CHILD: *Yes*⁴⁴.

DEFENSE: *You know your cousin's name*

CHILD: *Yes*⁴⁵.

Both examples come from testimonies that are taken using a method in which the child interacts with a specialist who communicates to the child the questions that have been previously admitted by the judge. The specialist cannot alter or add questions other than those that have been admitted. The questions phrased in an adult-centric manner, make it necessary to conduct a second round of admission of inquiries in order to explicitly ask the child to state the reason why his father no longer lived at home and to say the name of his cousin. This unnecessarily extends the duration of the testimony.

In almost every child testimony, one of the parties will ask the child or adolescent if someone has instructed him or her on what to say. It is of legitimate interest to investigate the possibility of an induced testimony. However, this question is often asked without considering that the child or adolescent will give a concrete and literal answer. In a ruling, a judge reasoned when assessing the answers given by a 3-year-old girl:

«...In the conversation that the girl had with the family judge, induction is also noted, given that when asked why she had gone to testify, she spontaneously replied "my mom told me I had to tell the judge some things," and when asked him to specify what things? He said, "About my daddy"⁴⁶».

It is to be expected, and it is recommended, that adults who are in charge of the care of a boy, girl or adolescent should explain to them that they will give their testimony. This is extremely important in order to avoid the fear that would be caused by being in court without understanding why. It is necessary for children to anticipate what will happen and understand that they will be able to tell a judge what has happened. Commonly the adult caregiver will tell the child that he or she will talk to someone about "what happened with "X". This does not mean that they have been told what to say. In a concrete and egocentric understanding of the question,

⁴⁴ Oral Proceedings 284/2020. Morelos Judicial District, Chihuahua.

⁴⁵ Oral Proceedings 42/2021. Morelos Judicial District, Chihuahua.

⁴⁶ Direct amparo in revision 3797/2014 Minister Rapporteur Arturo Zaldivar Lelo de Larrea. Mexico, 2015.

"Did anyone tell you what you came here to say?" almost every child or adolescent will answer: Yes, meaning that someone told them they would go and speak to a judge. However, this does not mean that the legitimate and important inquiry as to the existence or not of induction cannot be made. It is a matter of how to ask the question so that both child and adult understand the same thing. It is convenient for the question to be explicit, asking if what the child has said is something that happened to him or her or something they were told to say.

In some cases, losing sight of the fact that the child responds from a concrete and subjective perspective can cause confusion that is relevant to the process. One girl reports that a neighbor touched her while playing hide-and-seek. The defense wants to establish whether the duration of the game makes the occurrence of events plausible.

DEFENSE: *How long did you play hide and seek that day, do you remember?*

GIRL: *Well, just a little while...*

DEFENSE: *Just a little while?*

GIRL: *Just a little bit... and then we played again.*

DEFENSE: *Excuse me?*

GIRL: *We rested a little and then we played again.*

DEFENSE: *OK*

GIRL: *And the second round he started playing with us...*

DEFENSE: *First you started playing alone?*

GIRL: *Aha and then we rested, watched TV for a while, drank water and then played again and he said "I'll play too"⁴⁷.*

For all the adults involved it is clear that the lawyer is asking about the duration of the game while the accused was participating. It is evident to the adult that games in which the defendant was not present are irrelevant to the subject matter of the trial. However, the girl answers the question about how long they played she refers to an event before the accused was present when playing alone with her sister. In this case, the girl spontaneously provided more information and clarified what she meant. However, she could have simply responded without ever clarifying that she referred to the game she played alone with her sister. As a result, inconsistencies in the accusation could have been argued when in fact child and adult were talking about different matters.

⁴⁷ Oral Proceedings 94/2020. Bravos Judicial District, Chihuahua.

It is also common for questions to fragment the testimonies of children and youth. Concrete though leads children to refer particular moments within an event without giving further explanation. In the same case mentioned above, the prosecutor attempts to clarify how the events occurred:

PROSECUTOR: *And why was M there in your house?*

GIRL: *Because he was going to visit, to talk to my parents, they were just there outside.*

Subsequently, during cross-examination, the child responds to questions from the defense:

GIRL: *M was just a neighbor; we didn't know him.*

DEFENSE: *Was he a friend of someone in your house?*

GIRL: *No*

Later the prosecutor tries to clarify what seems to be a contradiction about the relationship that was maintained with the aggressor:

PROSECUTOR: *When M came to your house, who invited him?*

GIRL: *... no, like he just came out of his house and we were playing with my parents, he said ah ok and began to come by himself... like alone.*

PROSECUTOR: *Did he talk a lot with your parents?*

GIRL: *... more or less⁴⁸.*

The girl's first answers seem to indicate that M was a friend visiting her parents. With the subsequent answers it appears that in fact M is a neighbor who upon seeing them in the street, approaches to make a conversation and lingers while talking with the parents. Later, when asked if her parents talk a lot with the neighbor, the girl says more or less. In each answer the girl is describing a specific moment, while the adults who ask are talking about a relationship. The result is that the information is confusing and unhelpful to the legal proceedings. In a case like this it would be better to obtain spontaneous narratives in which the girl could provide more details that help to understand what she means. Between adults both parties may assume that question and answer refer to the same thing. In the case of boys and girls, the fragmented answers leave only doubt as to whether the answers refer to the same matter as the adult's questions.

⁴⁸Idem.

A problem with questions in child testimony, is that if they are not phrased correctly they can be inductive. Many countries maintain procedures in which the discussion of the admissibility of a question takes place in front of the child who will testify. With respect to adults, the judge asks the person to ignore a discarded question. The adult, able to govern his own reasoning, may ignore the information heard which was not admitted. This exercise is impossible for children and adolescents. Children and youth cannot govern their own reasoning and decide to "ignore" information they have heard.

PROSECUTOR: *You mention that two of your friends grabbed you, how do you dodge them?*

DEFENSE: *Objection, the child never said he dodged them, so I think the question is suggestive.*

PROSECUTOR: *Yes, I'm going to rephrase your honor. Buddy, you say your friends had you by the throat. How do you get to your mom?*

BOY: *I try to dodge them⁴⁹.*

It is of course impossible to know if the child would have spontaneously used the same word had he not heard the discussion over the previous question. What is clearly unreasonable is to consider that asking the question will be inductive, but listening to it and then being instructed to ignore, it will not have the same effect.

Multiple studies document that boys and girls tend to answer closed questions even when they don't understand them⁵⁰. The documentation on the effect of questions on children and adolescents is consistent in that the more a question is closed, that is the less extensive the possible answer requested, the less certainty one can have about the accuracy of the answer.

One of the most damaging effects of questions on children's testimonials has to do with what children and adolescents do not say. An adult person with an interest in clarifying an event will provide relevant information even if it is not specifically asked by the parties. He or she will expand responses in order to say whatever is considered necessary for other to understand what took place. Children and adolescents will focus on one variable at a time. The question asked will draw their attention and direct the information they provide.

⁴⁹Oral Proceedings 278/2021. Bravos Judicial District, Chihuahua

⁵⁰Waterman, A. H., & Blades, M., 2011.

In a somewhat exceptional way, a very young girl shows a surprising ability to attempt to narrate what she has lived. Her narrative is complex not only because of her age but because she tries to describe organized abuses that involved several adults and probable games incorporated in the aggression. The judge asks the girl about events that took place in her school involving teacher X. The girl responds by mentioning events involving two other teachers (teacher A and teacher B). Despite her best efforts to tell the judge about teacher A and teacher B, the questions asked end up guiding her narrative and everything that she would have wished or could have told remains unknown⁵¹.

...

JUDGE: *And where did you see him at school? Where was he?*

GIRL: *In the bathroom*

JUDGE: *Which bathroom?*

GIRL: *The girl's*

JUDGE: *Did he go into the girls' bathroom? What did he do or what did he say?*

GIRL: *"Hey! Girl, girl, go, come!" and she is a joke. Or she would say "girl, girl, girl come" but it was just a joke*

JUDGE: *Just a joke?*

GIRL: *Yes*

JUDGE: *Oh, and what was going on in the bathroom?*

GIRL: *She said no, no, I can't listen to my dad, she said I didn't listen and once I broke TEACHER X's "face" (mispronouncing face).*

JUDGE: *Once what? You broke what?*

GIRL: *His "face" and so he left the prison and I never saw him, now he will bring more. Now, one time I killed some like (TEACHER A), (TEACHER X) and also (TEACHER B), and all the others I don't know have gone to the prison and some didn't. They're alive and they are never coming back and they ran away and that's it.*

...she keeps narrating things that involve teachers A and B...

GIRL: *Because her eyes were very strange and she was very ugly and I never want to see her and she left prison and some are good and some are bad. (TEACHER A) I couldn't fight and once I told the good ones, they didn't hurt me. And a little while and then they calmed down... and that's it.*

JUDGE: *Okay, can you draw a picture of when you were in the*

bathroom?

GIRL: *yes*

JUDGE: *Let's see*

GIRL: *Like I was in the bathroom I was*

JUDGE: *Yes, you tell us who is who and where they were*

GIRL: *And I was like this and I was happy and nobody saw me*

JUDGE: *Nobody saw you*

GIRL: *But once I was in the bathroom going*

JUDGE: *Uh-huh And then?*

... narrates details about (TEACHER X)...

GIRL: *I told my parents everything*

JUDGE: *You told them?*

GIRL: *and... to you I will leave my drawings of the bathroom*

JUDGE: *Thank you very much. Is that the bathroom?*

GIRL: *Yes, here I was sitting and there he touched my private parts*

...

The little girl answers questions about the bathroom by referring to someone with female pronouns. The judge does not seem to take note or attach importance to this detail. Then the girl names two people besides the defendant. However, as her narrative is messy and difficult to understand, the judge returns to the terrain of her initial interest and asks again about the bathroom. The information the child could provide about what happened is lost.

Every interruption or question when a child or adolescent is trying to narrate something that he or she has lived, carries the risk of diverting their attention. When guided by questions, the child's testimony becomes tautological describing facts that are known and therefore are asked about. The clarification of what has happened to a child or adolescent can only be properly investigated by recovering a free, uninterrupted and spontaneous narrative before asking questions.

⁵¹Oral Trial 15/2021 Unitary Trial Court of the Federal Criminal Justice Center of Mexico City.

F) THE EFFECTS OF ADULT AUTHORITY ON AN INTERROGATION

All questioning must take into account, in addition to the cognitive features of childhood, the authority of the adult figure and its influence on the child's performance. The relationship between adults and children will always be marked by inequality. Adults will always be seen as an authority and even more so if they are officials associated with justice. The importance of this authority over children's responses cannot be underestimated.

Children are accustomed from an early age to answer adult questions and obey their instructions. From school age onward, they also incorporate the notions that there are correct and incorrect answers. The vast majority of children will seek to satisfy the adult's expectation of their behavior. When they do not understand what is expected of them, they often arrive at their own conclusions about what it means to do the right thing. The tendency of boys and girls to give an answer urged by a sense of obligation, even when they are not sure of the response, has been documented⁵².

Some procedural formalities or styles of questioning give rise to situations where the child or adolescent must contradict the authority of the adult in order to give a truthful answer. This is very difficult for children who often will give precedence to respecting the adult's authority or fear of contradicting him or her over truthfulness. It is important to note that this is not a malicious act, the nature of adult-child relationships simply rule over the child's response.

This is the case with questions that state a premise. Question such as: "You got there first. Right?" imply that if the answer was negative, the child would have to contradict the adult's statement. The answer leaves uncertainty of whether the child is yielding to the adult's authority rather than telling what happened⁵³. A similar effect is obtained when the adult paraphrases what was said by the boy or girl adding at the end the question, right⁵⁴? To deny the statement would force the infant to contradict what was said by the authority.

⁵²Waterman, A. H., & Blades, M., 2011.

⁵³Zajac, R., O'Neill, S., & Hayne, H. 2012.

⁵⁴Evans AD, Roberts KP, Price HL, Stefek CP., 2010.

During a trial, it is common that perceived contradictions between a testimony in court and previous statements made to police are addressed. There are many reasons why circumstantial variations may exist in children's narratives of an event. They may narrate specific parts or aspects of the event without referencing other moments or they may be affected by the particular circumstances under which the interview takes place and be silenced by anxiety. In any case, adults are more consistent in the way an event is narrated because they are aware of each interview being part of a continuous proceeding and aware of the effect that perceived contradiction would have on others. Circumstantial contradictions in child testimonies are extremely common given their cognitive traits and it does not have the same implications that these hold in adult testimonies. It is common that when these contradictions appear with regards to previous statements some justice systems incorporate proceedings that expose the contradiction to the child and ask him or her to explain it. Explaining one's own actions is at best difficult if not impossible for a child or adolescent. Not only does it require the person exercise thought processes that are not yet available, but it places the child in the position of having to contradict the adults authority.

In court, the prosecutor asks to show a teenager a copy of a previous interview held with him during the investigation. The teenager is asked to read the part of the transcript marked in yellow that records the date of the interview. After he has read this, he is asked:

PROSECUTOR: *Can you tell us when you went to the prosecutor's office to file the complaint?*

TEENAGER: *September 17 (repeating the date he just read)*

PROSECUTOR: *Do you remember the year?*

TEENAGER: *2019 (repeating the year he just read)*

PROSECUTOR: *When you went to file the complaint, who came in with you?*

TEENAGER: *mmm to file to... How? What do you mean to file a complaint?⁵⁵*

The teenager's last answer shows that he is not understanding the questions being asked. Upon asking him to confirm the date on which he went "to file the complaint" he simply confirms the date shown to him. When asked to provide more information, it becomes clear that he does not understand what it means to go "file a complaint" His initial answers do not arise from understanding, but from doing what he believes he must

⁵⁵ Oral Proceedings 259/2021. Bravos Judicial District, Chihuahua.

do. Uncertainty about whether the answer is the result of what the child or adolescent knows happened or of the pressure he feels to do what he considers is expected of him does not serve justice nor the clarification of the truth.

IV

ADULT-CENTRIC EVIDENTIARY ASSESSMENT OF CHILD TESTIMONY

In addition to the many problems that arise in relation to the production of child testimony, children also face enormous challenges when their statement is assessed as evidence. It is not enough for testimonials to be collected using methods appropriate to the way in which children and adolescents think and express themselves. It will also be essential that what is stated be assessed in consideration of the characteristics of age and development.

By using adult parameters to evaluate the testimony of a child or adolescent, errors of interpretation and biases will inevitably be applied. A child's narrative congruent with egocentric and concrete thought, is often interpreted as contradictory and indicative of falsehood.

A) EXPECTATION OF AN ADULT NARRATIVE STRUCTURE

From an adult testimony, a judge expects an ordered narrative. Usually, the order is chronological and other times it explains causal relationships. In any case, the adult testimony usually structures his or her statement so that the judge understands what has happened. The child testimony does not adhere to this logic. Children and adolescents narrate to the beat of internal associations and describe each memory evoked. The child or adolescent will describe one fragment of what is recalled, and by a subjective association evoke another one. The narrative will move along with the memories evoked without explanation. A clear and common example is the way in which a young child narrates a movie. As the child recalls parts of the movie that were memorable to him or her, the narrative jumps from each memory without notice or explanation. Children may evoke every step of an event and describe it as an isolated event. In a seemingly unconnected manner, they may begin to describe another detail of the same or a related event in a disorderly manner.

This generates obvious problems for the production and assessment of the child testimonial. One of the most common problems it generates is that from an adult perspective, the judge assesses this subjective narrative as contradictory and indicative of falsehood.

A judge reasoned regarding the testimony of a ten-year-old boy⁵⁶:

...So, up to this point, we have the following versions of what the minor said:

...

... the minor said that one night he was alone on the swings in the park and [xxxx] came accompanied by two other people who held him from behind, and [xxxx] squeezed his testicle very hard and it hurt a lot and that was all he did. He went home and told his mom.

...

(Referring to the mother's statement of what the boy said)...[THE BOY] behaved inappropriately while in the house of some friends, and the lady of the house, who is a friend, informed her that she heard [THE BOY] tell the children that they should play "the uncle" and that "he would put a stick up their ass. That after she heard her friend, she was alarmed and thought it important to inquire, and when questioning her son on why he had said something like that,

⁵⁶ 278/2021 Judicial District Bravos, Chihuahua.

he told her that “BECAUSE THEY DID THAT TO HIM AND NO ONE WAS THERE TO HELP HIM”...

...

... they approached him and [xxxx] stood in front of him and his two friends behind him so he wouldn’t leave and [xxxx] he reached under his shorts and boxers and TOUCHED HIS PENIS AND HIS TESTICLES and squeezed his testicles ...

...

However, the minor testifying in court never mentioned that [xxxx] touched his penis, therefore, if this version is incongruent to the minor’s statement, or other means of proof, it is evident that this judge cannot give any value to the testimony of the minor....

In this case the child narrates particular aspects or moments of an event without reference to other moments that he has previously described or mentioned to others. An adult would normally keep in mind what he has said before and offer some explanation that what is narrated is in addition to what was said earlier. A child or adolescent by focusing concretely on one aspect of the experience, will describe what he has in mind without considering the details he has narrated before. Depending on the degree of fear or comfort he or she may feel at a given moment, it is common for children to provide more or less details about something that happened. It is common for children and adolescents to disclose more information as they feel safer which usually coincides with multiple interviews taken over time. It is important to emphasize again that this is a narrative determined by neurological characteristics of human development and impossible to control at will. The child cannot narrate differently.

In a ruling, a collegiate court reasoned on the statement of a four-year-old girl⁵⁷:

... However, in this statement again there are contradictions, as she points out that he touched her “potito” while gesturing a rubbing movement in her genital area, behavior that does not justify the application of a “cream” so that it does not hurt when “poked” (what the girl said in previous interviews), the latter is an expression typical of a penetration or introduction of some object. Also, when answering the question concerning “how many times did your father touch your “potito”? She replies that it was once, at home, and then he says that they were many times, which is also confusing and contradictory.

⁵⁷ Direct amparo in revision 3797/2014 Minister Rapporteur Arturo Zaldivar Lelo de Larrea. Mexico, 2015.

The court reasoned that there was contradiction and subsequently interpreted that contradiction as indicative of falsehood and inducement of what the girl had said. However, if one assesses her statements in consideration of the characteristics of a four-year-old girl, one can observe that it is not a contradiction but a fragmented narrative typical of that age. The girl, narrates one memory at a time and while the complete set of memories recalled maintain general congruence. The adult interprets each narrated memory as being the totality of what happened and erroneously concludes that there is contradiction between the facts described.

The subjectivity in the narrative is not only manifested in a fragmented description of what has been lived, the perspective and meaning given to words will also be subjective. Children and adolescents will use words subjectively to describe their perspective of an experience. Assessing their statement using conventional meanings commonly used by an adult will be inappropriate.

A judge assesses the description made by two sisters of the same event⁵⁸:

*Another inconsistency detected between the two minors is that **** reported that their father formed them in a file and had **them kneel on the bed; while** *** commented that her **sister was beside her.***

One of the girls uses the word “file” and the other says that her sister was “beside her”. Both describe the same general situation of being placed side by side on the bed. The judge considers the word “file” from its most common adult usage to mean one in front of the other. She therefore concludes that the statements of both girls are contradictory. Although the example seems rigid, it is common to find that the subjective use of words is usually interpreted as indicative of contradiction and falsehood, disregarding that it is an expected if not inevitable characteristic of a child’s narrative.

⁵⁸ Oral Trial 139/2019 Judicial District Bravos, Chihuahua.

B) EXPECTATION THAT THE CHILD UNDERSTANDS THE EVENTS NARRATED

Adult testimony tends to explain what has happened to the person. Often children who are victims of violence, especially when they are very young, do not understand what has happened to them. Particularly with regard to crimes of a sexual nature, it is common that despite feeling fear and discomfort, they are not able to define what has happened to them as good or bad. Typically, the aggressor uses a combination of justifications and threats with children and adolescents telling them that the abuse has some valid reason and that they should not talk about it. The lack of knowledge on part of the child and the weight of the moral authority of the adult figure, generates confusion in the victim about what has happened and how they should qualify the experience.

It is common to see rulings that incorporate the child's own assessment of an event in order to determine what happened. The judge expects that as an adult victim of a crime, the child should recognize him or herself as aggrieved, but this is not always the case in child testimony.

... In addition to the above, it should be noted that the minor himself said that the practice carried out by his grandfather, he did not consider it inappropriate, and that it was until he spoke with his father about it when more than two years had passed since that event happened, that he knew that his grandfather's actions were inappropriate, as his father told him; As regards this topic, the Court considers that the child's disposition is diminished⁵⁹.

In this case, the judge considers the child's failure to classify the act as inappropriate as an indication of induction in the accusation made. However, this logic can be quite risky regarding children and youth. It is common for young children or even adolescent victims of prolonged abuse, to believe that what they have lived is acceptable and normal in spite of suffering emotional consequences. It is not until they receive validation from a significant adult or are informed regarding violence against children that they come to recognize their own experience as victims.

It is often that judicial assessments consider what a person is expected to know. This may be risky even with adults who vary greatly in their type and degree of knowledge. However, when it regards children it is extremely unreliable. A common example is that the judge expects knowl-

edge to encompass "categories of data" ignoring that when it comes to children, knowledge is personal and subjective. A clear example may be seen in the case of judges who assume that a young girl has general knowledge of the parts of "the body", versus particular knowledge as to her own body.

A collegiate court reasoned on the testimony of a four-year-old girl⁶⁰:

...On the other hand, it should be noted that initially the minor said that "a wand stung her potito", but when asked to explain what the wand was, she said that it is a thing that she does not identify ("a thing", "I do not know, it is something, I don't know"); which doesn't happen when asked to explain what her "potito" is, because she immediately pointed to her vagina and anus...

The court holds an expectation of the knowledge the girl should have and reasoned that if she knows her own body she should then be able to identify the anatomy of the aggressor. In this, as in many other cases, the lack of knowledge on the part of children and adolescents is interpreted as indicative of falsehood.

C) EXPECTATION OF A STEREOTYPICAL EMOTIONAL RESPONSE

The handling of emotions is variable among every person. Particularly when dealing with emotions related to traumatic events, people manifest and manage their emotions in very different ways depending on personal experiences and abilities. However, when it comes to children and adolescents, there are stereotypical ideas about what their emotional expression should be.

During childhood the same individual variability persists as amongst adults regarding emotional expression. There are also important differences in human development during these first 18 years of life that come to bear on the matter. Regarding the assessment of child testimony there are two topics that commonly generate confusion: defense mechanisms and emotional lability.

⁶⁰ Direct amparo in revision 3797/2014 Minister Rapporteur Arturo Zaldivar Lelo de Larrea. Mexico, 2015.

⁵⁹ Oral Trial 166/2020, Morelos Judicial District, Chihuahua.

Emotional expression is a useful indicator in the assessment of child testimony. One of the virtues of methods that allow the direct and free appreciation of the child's narrative is that nonverbal and emotional expression can be observed. The gestures and emotions shown by the person are ways in which what has been lived and its impact, can be perceived. However, it is important to avoid making this consideration based on expectations of stereotypical emotional expression. Individual variability should be considered and the absence of emotional expression is not necessarily indicative of a lack of present feelings.

As stated previously, defense mechanisms appear in children without warning or control. Often these mechanisms can confuse an adult who has some expectation of what emotional response a child or adolescent victim should demonstrate. In particular, mechanisms of emotional evasion and distancing are difficult to understand from an adult-centric perspective. However, such mechanisms are extremely common in boys and girls, and particularly common in adolescents. These are attitudes that seem contrary to emotional affectation such as distraction, the absence of emotion or even negation or minimization of the impact or importance of a traumatic event.

A judge assesses the testimony of a child by reasoning⁶¹:

... However, with regards to the words of the child victim, through the principle of immediacy, it should be noted that this Court did not perceive in the child an emotional state of fear or nervousness, as usually happens in victims who have suffered such crimes, because in general terms the minor was calm, even at the moment of giving his statement, as the defense emphasized, he's speech was structured, because it flowed spontaneously, as it is clear from the audio and video records...

The second issue that, from an adult-centric perspective generates confusion is the emotional lability or sudden changes in the emotional expression of the person. During childhood, concrete thinking causes the person to attend to what is happening in a precise moment in an intense way. To put it simply, the child "lives in the moment". This creates the possibility that emotions are extremely fickle according to what he or she is attending at that precise moment. A little boy or girl may be crying over something that has happened and the next moment become distracted and express happiness or excitement about something else. This same lability or emotional variability can be expressed during testimony and commonly generates confusion in the adult.

⁶¹ Oral Proceedings 166/2020. Morelos Judicial District, Chihuahua.

A judge reasons on the testimony of a girl⁶²:

*In this regard, we must say that, although all psychologists found emotional distress in the minor, which according to the expert **** consisted of a state of dysphoric mood, in which sadness, anxiety and fear predominated, feelings that a person without being versed in psychology can detect by having in sight another person; Thus, the judge was able to observe for more than half an hour, -in the room for protected witness- the behavior presented by the infant during the questioning by the parties, at which time he did not perceive such feelings.*

On the contrary, he appreciated the girl smiling, that while answering, acted freely, without traits of discouragement, reticence or fear.

In this case, the judge expects that the victim will manifest the emotional distress detected by various specialists at all times during her testimony. He does not consider the characteristics of childhood in relation to emotional expression.

In some cases, the lability itself or abrupt changes in emotional expression, may be indicative of a specific affectation. In a case of sexual violence in a preschool the judge reasoned about a three-year-old girl in a manner consistent with age appropriate characteristics:⁶³

... when listening to specialists in psychology and psychiatry who cared for her daughter and who would point out that when they touched topics regarding the school, the girl was anxious, wanted to leave, hide, cry and be with her mother all the time and that, although she can speak, her absence of emotional control prevents her from doing so in the context of the events, because when she speaks of another subject she is participative and calm.

In this case, the inconstancy in the emotional expression of the girl is striking for the judge, as is the coincidence that her silence and anguish is present only when touching the subject of her school. Based on his observation and the opinion of a specialist, the judge rightly understands that the girl's changing emotional expression is natural and does not interpret it as contradictory.

⁶² Trial number 139/2019. Bravos Judicial District, Chihuahua.

⁶³ Oral Proceedings 15/2021. Unitary Trial Court of the Federal Criminal Justice Center in Mexico City.

D) EXPECTATION OF STEREOTYPICAL LANGUAGE

The spontaneous language of children and adolescents greatly enriches the assessment of their statements. It is common for children and adolescents to refer concepts and things in specific ways that are related to their personal experience.

The following expressions denote spontaneity and originality that contributes to the credibility of what is said by a child or adolescent:

... “a spatula like for flipping burgers”⁶⁴

... “honey for hotcakes”⁶⁵

These phrases are characteristic of children because they correspond to their way of thinking. They are easy to recognize as natural by almost any adult who hears them. The subjective structure and content of the child narrative is common to all children and adolescents. However, vocabulary does not correspond to neurological dispositions and therefore may be different in each individual child. There is a wide variety of experiences that determine the vocabulary of a child: the type and degree of formal education in their home, the values within the family, the way in which issues such as sexuality are addressed and the type and quantity of access to media are all factors involved in determining the words used by a child. The vocabulary used is unrelated to common cognitive characteristics and is not universally applicable.

It is risky to assume that there is a typical vocabulary to be expected of a child or adolescent. Commonly the expected language of childhood is based on stereotypes. However, it is often observed that judges incorporate an expectation of vocabulary in the assessment of a child testimony.

*... perceiving in this way, the lack of spontaneity in his testimony, coupled with the language used by the passive, because taking into account that he is a minor, it is notable the use of various words that are not appropriate to the age of a child.*⁶⁶

One can observe the existence of stereotypes regarding how boys and girls talk about sexuality and their own bodies. It is common, but not a generalized rule, that children use informal names to refer to their genitalia. In consequence, when a little girl refers to her “vagina” or a boy

⁶⁴Oral Proceedings 15/2021. Unitary Trial Court of the Federal Criminal Justice Center in Mexico City.

⁶⁵Oral Trial 166/2020, Morelos Judicial District, Chihuahua.

⁶⁶Oral Proceedings 166/2020. Judge of the Accusatory Criminal System of the Morelos Judicial District, Chihuahua.

to his “testicles”, some judges consider the use of this language to be indicative of falsehood. However, evaluating a testimonial based on what is considered to be the expected vocabulary of a certain group of people, constitutes clearly discriminatory treatment. The application of such reasoning to any other group, such as a woman or a person belonging to an indigenous community, would be clearly untenable.

E) EXPECTATION OF PRECISION OF TIME AND PLACE IN ADULT TERMS

On the one hand, children and adolescents are expected to use words that are appropriate to their age but on the other, they are expected to refer time and place as if they were adults. Temporo-spatial accuracy is a consistently difficult task for children and adolescents.

Concrete thinking makes it extremely difficult for a child or adolescent to use abstract concepts such as directions, times and calendar dates. These concepts are social conventions that do not correspond to an object or something tangible. The fact that these are also words that children hear on a daily basis complicates the assessment of a testimonial all the more because they will use these terms but give them a subjective and arbitrary meaning.

Although this feature of human development is widely documented, it is common for authorities to expect that a child, and particularly an adolescent, contribute information specifying time and place in their testimony. It is also common that when a child or adolescent refers a date, time or address it is accepted without verifying by other means the subjective meaning it may have for him or her.

A judge determines that a testimony is robust because the 13-year-old meets the requirements of establishing time and place⁶⁷. This information is accepted without verification of the subjective meaning it might have for the child.

...This portion of the victim’s statement was contextualized because it gave account of the physical environment and situation in which that event occurred, it is so because he informed the date, approximate time and place in which the defendant...

⁶⁷Trial number 118/202. Ciudad Juárez, Bravos Judicial District, Chihuahua

The subjective use of these concepts can be naming a date with a meaning of its own or by using concepts of days as synonymous with “before and after” but without necessarily meaning the course of 24 hours.

... that: “...one day went by, and then the next day we told him while we were eating...”, of the above, it follows that the event had allegedly taken place two days before the complaint was filed, thus, this nullified that the event had taken place in November, but also that it had occurred in the month of December, since, as stated by the parent by December she did not allow her daughters⁶⁸...

The girl uses the term “one day went by.. and then the next day” to refer that “time” passed between the events. It cannot be assumed that it refers to the third day after the narrated event. The exercise of counting and expressing the passage of time using abstract references is somewhat unlikely in a little girl. However, it is very common that children use these terms to express time subjectively

⁶⁸ Oral Proceedings 139/2019. Bravos Judicial District, Chihuahua.



EMOTIONAL DAMAGE TO THE CHILD AND ITS IMPACT ON THE TESTIMONIAL

One of the most sensitive issues regarding child testimony, is the effect it can have on the emotional wellbeing of children and adolescents. Fortunately, specialized testimonials are a win-win situation both for the child and the justice system. Decreased levels of distress during testimony generates more and better information to clarify facts under study in a trial.

The harmful effects of delay, repetition and fear stand out when speaking of the child testimony. It is widely known that repetition is harmful for children and adolescents who must tell over and over again, under frightening conditions, a painful event they have experienced. However, repetition is a constant at the international level regarding child testimony. It is not unusual for a child or adolescent to narrate what has happened up to 7 times before appearing in court. In a review of rulings while assessing the progress regarding child-accessible justice within Mexico, 80% were found to document repetition in children's⁶⁹ testimonies.

As for delay, it is common sense that the passage of time diminishes the memory of children and adolescents. It is also easy to understand that reliving and retelling a traumatic event when years have passed since it occurred, causes suffering and emotional damage to the child victim.

The joint effect of delay, repetition and frightening conditions is not only that emotional harm is caused to the person, the testimonial itself and its legal usefulness as evidence deteriorates or is even destroyed. It is therefore in the interest of protecting children and adolescents as well as justice itself to avoid these harmful practices.

To a certain point, delay is inevitable in justice. Diligent investigation, due defense and the justice process require ample time and cannot be rushed. Likewise, it is inevitable that multiple actors involved in the protection of a child have a legitimate need to know what he or she states to have experienced. Likewise, criminal justice and any trial is a frightening or at least a daunting experience for anyone. The immovable elements of

⁶⁹ Pliego, Y. et al. 2021. Ibid. P. 54.

justice do not imply, however, that children and adolescents must suffer their unbridled consequences. Rather, they imply obligations imposed on the State to find ways to produce child testimony immediately, protected and specialized and to avoid its repetition by meeting the highest standards of evidentiary preservation.

A) REPETITION AND EMOTIONAL DAMAGE

Repetition causes harm to children and adolescents for many reasons. One of the elements to take into account to better understand this damage, is that given their cognitive characteristics, it is very difficult or impossible for a child or adolescents to understand why repetition is necessary.

In most cases, repetition responds to institutional needs. The need for different institutions to hear firsthand a child's testimony is based on formal reasons. Due process, immediacy, etc. are all abstract concepts that will be incomprehensible to children and adolescents.

The cognitive impossibility for children to understand abstract reasons, does not mean they will not arrive at their own explanations. However, the lack of information coupled with egocentric thinking causes these conclusions to land on various versions of "this has to do with me". The most common interpretation of repetition by children and adolescents is that they are not believed.

Feeling that one is not believed generates significant emotional damage. It is an element that confirms in the child and adolescent many of the notions that are themselves the product of victimization. Guilt, shame and learned helplessness are confirmed. In the mindset generated by violence, the child may conclude that he or she is not believed because what took place was deserved. This in turn, fortifies the belief that help is not available and disempowerment is inevitable.

Repetition also generates suffering during the testimony. The child or adolescent will suffer while narrating the traumatic event each time he or she is required to do so. In addition to the suffering at the time of narration, the child or adolescent will live the anguish of anticipation knowing that he or she will have to repeat this narrative again.

It is important to consider that suffering and distress during childhood is not only relevant for the discomfort experienced at a given moment. Stress becomes particularly relevant when present during critical years of development. The person is at a stage where the foundations of one's identity, the rules by which future relationships will be built and the understanding of society and the world are defined. If during these sensitive moments, the person perceives him or herself as guilty, vulnerable, unprotected and surrounded by danger, development will be affected in key ways.

The effects of stress and anguish on child development have been widely documented⁷⁰. Its consequences are physical and emotional, they are severe and can be irreversible. The consequences of suffering are different for children and adolescents than for adults. Hence the reinforced obligation to protect children from re-victimization and repetition that cause and prolong child suffering.

The greater the repetition, the greater the likelihood of interviews occurring in inappropriate conditions. The more actors that intervene, the more difficult it will be to guarantee standards and protected and specialized conditions. Exposure to inappropriate conditions increases the levels of anxiety that the person lives during testimony and therefore greater will be the impact on their development.

B) PASSAGE OF TIME AND CHILDREN'S MEMORY

Delay does not only cause prolonged distress and suffering. The passage of time has a significant impact on the ability of children and adolescents to remember and therefore to narrate what they have experienced. Adult and child memory are different for many reasons, generally the ability to recall increases with age.

One element that affects childhood memory is simply the degree of knowledge⁷¹. People of any age remember better what they understand. Understanding facilitates the creation of associations and meaning that in turn serve as a structure that supports recall.

⁷⁰Bremner, J. Vermetten, E., 2001.

⁷¹Bjorklund, D.F., 1987.

It is of particular importance that adults are able to identify what information is relevant in their testimonial. These details or data may be recorded in memory with special emphasis and thus prolong the possibility of recalling them. Children and adolescents will not only have a less understanding of the events experienced, but little or no understanding of what may be relevant for justice⁷². Without distinction or conscious intention all information of an event is stored in an indistinct and disordered manner. This makes recovery much more difficult.

A key element in the ability to deliver accurate testimony over time is the use of mnemonic tools⁷³. Thanks to abstract thinking, adults can think about their own thinking. So, they manage to think things intentionally. An adult can “help” himself or herself to recover a memory. For example, to remember at what time an event happened, an adult could reconstruct his or her day until the event took place and from this make a fairly accurate estimation of the time of the event. This exercise of “mastering” one’s own thinking is impossible in early childhood and difficult even in early adulthood.

An unfortunate result of this inability to act intentionally or consciously regarding one’s own thinking is that childhood memory is more malleable over time than in the case of adults. The adult, being much more aware of events and interactions and their possible interference with memory, also has a greater ability to discern between perceptions of others and his own memory.

It is not that memory “lasts” less during childhood. The duration of the memory is very similar between adults and children and adolescents. Even very young children demonstrate high levels of recall up to two years after a significant event. The difference is in the tools and abilities that the person has to recover precise and clear memories. The passage of time demands greater efforts and skills for recovery and consequently the child has less tools available when giving testimony⁷⁴.

The fragment of a child testimony presented below clearly shows this difficulty. A 7-year-old boy gives his testimony in trial about events of sexual violence that he lived, along with several of his schoolmates. By the time he was called to testify, three years had passed since the events. The child tries hard to remember, but does not know how to achieve it. In addition to expressing the effort he makes to remember; the child

⁷²Myers, J., Saywitz, K. & Goodman, G., 1996.

⁷³Yu Q, et al. 2018, pp. 162-169.

⁷⁴Fivush and Shukat, 1995.

expresses the importance that talking to the judge has for him and the impact of having waited so long⁷⁵:

PSYCHOLOGIST: *What year are you in now?*

CHILD: *In second grade,*

PSYCHOLOGIST: *Before second grade what year were you in?*

CHILD: *In first grade,*

PSYCHOLOGIST: *What about before first grade?*

CHILD: *I don't know what number I was in, I guess in kindergarten,*

PSYCHOLOGIST: *Do you remember what kindergarten you were in?*

...

PSYCHOLOGIST: *Do you remember what that teacher, xxxx, looked like?*

CHILD: *No, I don't remember, it was like when I was three or four,*

...

CHILD: *I remember that his eyes were like this and his hair was a little long, it's what my brain is trying to remember (He taps his own head with his hands while speaking).*

...

PSYCHOLOGIST: *How do you feel right now that you're talking about this thing that happened in kindergarten XXXX?*

CHILD: *I'm sad and happy because I waited a long time to come here and defend myself...*

c) INABILITY TO GOVERN ANGUISH

One of the most relevant features of emotional development during childhood, is that children and adolescents are not able to govern their own emotions. This means that fear, shame or feelings of anguish disrupt the testimony and affect its quality to a significant degree. Children and adolescents are not only more likely to feel fear, but also less able to control it when they do feel it.

⁷⁵Fivush and Shukat, 1995

Self-control of emotions, and particularly of fear, happens often with adults through metacognition. When frightened, an adult can reason with him or herself about the plausibility of his or her own fears. An adult will be able to use conscious techniques to govern fears and manage to calm down enough to be able to continue with the task that must be performed. A child, lacking the capacity for abstract thinking and with little information about what may or may not happen, will not have access to these methods of control.

Furthermore, boys and girls are more susceptible to fear to begin with. They have less information than an adult about what is and is not possible. Ignorance of what may happen opens the door to extreme fears. A child who feels guilty for the abuse suffered, may be afraid that if he or she talks about what happened they may be punished. The fact that a fear is unfounded makes it no less intense and real for that child. Children generally have much less control over what happens to them. Children's own vulnerability generates a greater sense of lack of control when they are in unfamiliar scenarios. This susceptibility to fear or distress increases the importance of preventing children from coming into contact with people, things or experiences that cause them fear.

During testimony, multiple justice systems expose children to elements that cause fear. In particular, the presence of the accused may result in severe levels of fear and can even render a child unable to speak. Some systems have resolved to use protected witness courtrooms so that all visual and auditory contact between child and other parties is through electronic means. However, the presence of the aggressor, even on a monitor, generates fears that are difficult for children to control.

A ruling recounts the case of a 7-year-old girl⁷⁶ she is asked to give her testimony in a protected witness room. The girl has before her eyes a monitor on which she can see the parties and the accused. The girl is unable to speak and keeps looking at the monitor. The judge, noticing this, asks if she sees anyone he knows. The girl says no and begins to cry. The judge asks her once again in a gentle tone if there is anyone she knows, and the girl now says yes and again breaks down in tears. After distressing minutes and efforts by the psychologist who assists the girl to calm her down, she manages to say "he was the one who hurt me."

Later, her younger sister, still of preschool age, who was also a victim of the same aggressor gives her testimony. Upon entering

⁷⁶ Oral Proceedings 94/2020. Bravos Judicial District, Chihuahua.

the protected witness courtroom, she sees the monitor and bursts into tears. The girl hides her face and cannot speak until the judge orders the box (on the monitor) in which the defense and the accused appear to be removed.

In the case of both girls, the judge tries to appeal to their reason with kindness he attempts to calm them. However, the fear they feel is literally uncontrollable. They cannot incorporate reasonable thoughts that the aggressor cannot hurt them. The visual stimulus is enough to make it impossible for them to speak freely.

In every person, when levels of distress increase in a significant degree, defense mechanisms may appear. These are tools that a person naturally uses to relieve distress and prevent psycho-emotional breaking points. Adults can commonly identify or control their own defense mechanisms. For example, when a person receives painful news such as the death of a loved one, it is common for their first reaction to be to deny the veracity of the news out loud by saying "No!". However, except in very exceptional and worrying cases, the person does not continue to deny the fact and is usually able to express with words this impulse saying things like "I cannot believe it".

Defense mechanisms naturally occur when a child or adolescent feels high levels of distress. The difference is that they will not be able to rule them. The mechanism irrupts into the child testimony without warning or explanation.

One of the most distressing elements for children and adolescents, as for any adult, is uncertainty. Being in a situation in which you do not understand what is happening and do not know what will happen, generates high levels of distress. For any adult, an interrogation without understanding why and for what purpose the questions are asked, would surely be an alarming experience. However, when it comes to child testimony it is often summed that a child does not need this understanding in order to perform. Most children face their testimony with little or no understanding about what will happen.

The lack of understanding with which most children and adolescents give their testimony has two fundamental components. On the one hand they do not understand what is going to happen and on the other they do not have clarity about why they should talk about a painful subject.

Many explanations given to children and adolescents are technical and incomprehensible or simplistic and meaningless. Explaining their rights

and formal procedures does not help even teenagers understand what will happen to them during their testimonial. Nor do well-intentioned but inappropriate gestures such as telling a boy or girl “I am your friend, and you can tell me anything”. Children and adolescents need step by step information on how the testimonial will develop, how long they will be there and where their significant adults be waiting. If there are elements that are thought to cause fear, it will be necessary to explain them.

Of enormous importance for the child is the motivation to speak. Narrating a painful event is an unpleasant experience. Fear, shame, guilt or fear of causing harm to an aggressor who may be a loved one, or receiving a reprisal for having made the accusation are all reasons that weigh on a child victim at the time of testimony⁷⁷. The child or adolescent must have a good reason to talk about what happened, despite his or her reluctance to do so. The fundamental motivation should be the possibility of obtaining protection. This notion, perhaps evident to an adult, is not information that a child or adolescent usually possesses

D) EFFECTS OF RE-VICTIMIZATION ON CHILD TESTIMONY

Repetition, the passage of time and fear have negative consequences for the child and his or her testimony. This revictimization has a direct interference in the quality of a child’s testimonial. The more suffering caused by the conditions, repetition and delay in the narration of a traumatic event, the lower the quality and usefulness of this evidence.

The most obvious consequence is that through time and repetition the memory of the child or adolescent is diminished and even polluted. Oblivion reduces the number of details that he or she can incorporate in the testimonial and these are a fundamental element for the assessment of a child testimony.

In addition, revictimization may cause the child or adolescent to remain silent. Silence, usually expressed as “I don’t know” or “I don’t remember”, is often a means to avoid the suffering generated by the narrative and remembrance of painful events. However, it also has to do with loss of

⁷⁷Lamb, M, et al., 2018. Pp.52-53.

motivation. The primary motivation that leads children and adolescents to reveal an event of violence is the search for protection. More than justice, vengeance or other motives common to the adult, children mostly speak out propelled by the desire to stop that which causes pain. Speaking to adults, particularly to an authority figure is how a child can be active in getting help. Repetition generates a contradictory message. Talking does not seem to be enough. Repetition not only hurts the child emotionally, but may unwittingly discredit the indispensable motivation for a testimony: Speaking out is an effective way to get protection.

Finally, revictimization keeps the traumatic event as an active part of the life of the child or adolescent. A fundamental aspect of emotional healing is reaching a point where the event is placed in the past. It is not part of everyday life or one’s identity, but of personal history. Therapeutic work seeks to recover the resilience forged through a painful experience, to concentrate energy in the future. While the child or adolescent remains anxious about being called once again to narrate what he or she has lived, he or she will not achieve this fundamental step in recovery. Closing a stage and placing the event - and all directly related to it - in the past will not be possible. In this sense, repetition and delay limit the emotional recovery that is the right of every child and adolescent.

2

Specialized model for child testimony



This section focuses on the positive side. It focuses on what has been learned with regard to child testimony, which is quite a bit. Over the years, as the recognition of the rights of children permeates institutional action, accessible justice comes to the forefront.

Local actions, such as those of the Office for the Defense of Children's Rights, are not so different from the many approaches that take place worldwide. Experiences of what does not work and what does work are bound to resemble each other. This is because the immovable foundation are the characteristics of childhood. Since these are structural features, the needs of children and young persons will remain constant in the face of a wide variety of contexts and justice systems.

From these universal characteristics in human development, some indispensable conditions can be identified for any model that seeks a successful child testimony.

This section also describes a model, based on the characteristics of child development, that has been implemented in the state of Chihuahua in Mexico. Finally, the testimonies emanating from this experience are used to make a qualitative assessment of their results.

I. INDISPENSABLE FEATURES IN SPECIALIZED CHILD TESTIMONY

The characteristics of human development throughout the first 18 years of life mean that every child testimony requires certain indispensable conditions in order to be accessible. Different cultures and justice systems may vary in the way in which they address or materialize these requirements, but no model can be accessible to children and adolescents without incorporating these general features.

A JUSTICE PROCEDURES SHOULD BE DIFFERENTIATED AND CHILD-ACCESSIBLE

This requirement seems self-evident. It means that no valid model can propose to “modify” the child or young person so that he or she may be able to participate in the same way as an adult. Any model accessible to children must be based on the recognition that the characteristics of children cannot be changed and that it will therefore be the justice procedure that must be adapted.

B CHILDREN AND ADOLESCENTS NEED A MOTIVATION TO SPEAK

Narrating a painful event in front of strangers will inevitably be an unpleasant experience for a child victim. It is of enormous importance for the type of information obtained and for the experience to promote emotional recovery, that the child or adolescent has a clear motivation to speak. Motivation should make sense of the effort involved in narrating something painful and should consist of more than the imposition of adult authority that requires him or her to speak. The greatest motivation will always be obtaining protection. The greater the internal motivation of a child or young person to speak, the better the information obtained.

C THE MODEL SHOULD ASSESS THE TESTIMONY AND NOT THE INDIVIDUAL

It is the right of any child or young person to have his or her testimony assessed in accordance with the same standards as those governing the as-

essment of any adult testimony. No child testimony model should consider the assessment of the child or adolescent to prejudge his or her testimony. The testimonial must be assessed in and of itself and in relation to the rest of the existing evidence.

D PROVIDE ASSISTANCE IN MANAGING DISTRESS AND FEAR

A child testimony model must assume that if a child or young person feels fear and anguish he or she will not be able to manage it on his or her own. It doesn't matter if the fear is founded or not, if the level of distress escalates, it will inevitably have an effect on the narrative. Therefore, any model that is useful for children must consider how to assist children and young persons to avoid fear and to manage distress during their participation.

E CONSIDER MEANS TO FACILITATE OBTAINING AS MUCH SPONTANEOUS NARRATIVE AS POSSIBLE

The children's narrative will deal with what is subjectively relevant to each child and adolescent. He or she will not be able to take into account the information that will be relevant for justice or that which is necessary to be understood by others. The child describes an experience and does not explain it. Therefore, the broadest and most detailed description of what was experienced is needed. Only then will the adult be able to discern what he or she has lived and its legal implications. The model should provide means to encourage and facilitate children and adolescents to contribute as much free and spontaneous narrative as possible.

F PRESENT QUESTIONS TO THE CHILD ONLY AFTER HAVING OBTAINED THE FREE NARRATIVE

Various systems of justice will require a period of questioning of children and adolescents. Any question, no matter how it is posed, may distract and affect the narrative of the child or adolescent. Therefore, the model should give priority to obtaining and preserving the greatest amount of spontaneous and uncontaminated narrative, before allowing the posing of questions.

G AVOID REPEATING THE CHILD TESTIMONY

Even if it is carried out in suitable conditions, the repetition of the child testimony generates harm to the person and the testimony itself. Every child testimony model must apply the highest standards of validity and preservation of the child’s statement in order for it to be used in all required procedures without the repetition of the child or adolescent’s participation.

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H GUARANTEE DIFFERENTIATED TREATMENT FOR OPINION AND TESTIMONY

Children have the right to express their opinion on any matter affecting them, in addition to their right to give testimony on a controversial matter. The model must ensure that when children and adolescents exercise their right of opinion, they are not required to repeat their testimony. It should also ensure that the testimony is not treated as an opinion. To this end, it must provide for differentiated procedures and methods for child testimony and opinion regarding a particular matter.

.....

I ENCOURAGE RESILIENCE AND PROMOTE EMOTIONAL RECOVERY

Child testimony should not only avoid re-victimization but also be framed as a protective action. The participation of a child or adolescent in a protective procedure represents an opportunity to reinforce experiences and key messages that foster resilience and recovery from the experienced violence. The presence and attentive listening of a figure of authority, along with the validation of the child’s own voice, effectively counteract the traces of victimization. Involvement in a formal justice process emphasizes for the child or adolescent the power they can exercise against violence, the legitimacy of their feelings of grievance and the presence of protective figures.

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II. SAPCOV: METHOD FOR SPECIALIZED CHILD TESTIMONY IN THE STATE OF CHIHUAHUA⁷⁸

A specialized court room for children’s testimony was inaugurated in 2019 in the state of Chihuahua. The court room, called the Court Room for People in Vulnerable Conditions or SAPCOV due to its acronym in Spanish, is at the service of anyone who requires special protection and adjustments for their testimony. However, the judiciary of the State of Chihuahua (TSJCH) began its use for the production of child testimony.

The TSJCH along with the Office for the Defense of Children’s Rights A.C. (ODI, a Mexican NGO) designed a specialized model for child testimony. The effort recognizes that the protected testimony requires more than just adequate spaces. The testimony must be part of child-accessible justice. The model therefore includes a specialized method for interacting with children and adolescents, the adapted use of spaces, as well as procedural adjustments. These three components are indispensable for the development of specialized child testimony.

With the collaboration of the Nation’s Supreme Court of Justice and UNICEF - Mexico, the model involved the training of judges, prosecutors, litigants and specialized personnel from various public and private institutions. The model described below has been successfully implemented since the end of 2019.

A) METHOD FOR INTERACTION WITH CHILDREN AND YOUTH DURING TESTIMONY

The model provides for a specialized method of interaction with children and youth. Its central characteristic is that all interaction takes place through a person specially trained to facilitate the child testimony. This group of people, may be ascribed to a variety of institutions and have different academic backgrounds, the important matter is that they are specifically trained for this task. In the case of the judiciary of the State of Chihuahua, it was decided to appoint psychological staff ascribed to the court to facilitate child testimony in the SAPCOV Chamber.

⁷⁸ Gil, M., Griesbach, M. and Pliego, Y., 2019.

This person accompanies the child from their arrival to court and until he or she leaves. Their participation is as follows:

Preparation to participate without fear

Interaction with children and adolescents begins with their preparation to participate without fear. This is done by having a brief chat held by the specialist who will facilitate testimony alone with the child or adolescent. The facilitator greets the child at the entrance specially designated for child testimony. In Chihuahua the entrance used is the access designated for judicial staff. The main objective is to avoid the child's contact with persons related to their case or other situations that may make the experience more stressful. Together they accompany the mother, father or other significant adult to an area in which he or she can wait. It is important for the child or young person to see where his or her significant adult will be waiting and to know that at the end of the testimony he or she will return to that significant adult. This ensures that the well-being of the accompanying adult is not a factor that causes distress during testimony.

The facilitator and the child or adolescent then move on to the waiting room specially equipped for the child testimony. A short conversation will take place in this space to help children and adolescents participate without fear and build motivation to speak.

Initially, the proposed model provided for broader preparatory work with children and young persons. In this work, games were used to construct the basic notions of testimony as a protective action. In practice, however, the timing and organization of judicial proceedings made it difficult to take time for several sessions. The model was adjusted and at present the preparation takes place during fifteen to twenty minutes before the child testimony begins.

During this time, the facilitator transmits three fundamental messages to children and youth: the motivation to speak; key information to understand the procedure in a protective framework and a clear description of how things will happen.

The preparation begins with the construction of a simple and clear motivation: children come here when something that hurts them has happened so that it stops happening. When children and adolescents are silent about an abuse or violent event that they have suffered, it is commonly because they feel fear. Consequently, children and adolescents speak when they feel con-

fidant that they will be able to receive protection. It is important to emphasize that it is not about trust in the person who facilitates nor a matter of liking the person. The main motivation to speak stems from confidence in the viability of attaining protection. Protection is the most important motivation for children and adolescents to narrate something painful to a stranger. .

Credible protection is possible only if the child or young person understands that the judge, or the authority in charge, is someone who can protect children and youth. In order to construct a motivation, the facilitator does not address what has happened to the child and does not even refer to the existence of violence. The preparation focuses on explaining the role of the judge as a protective and powerful figure. During this discussion, the facilitator refers to other children, generically, who have received protection when speaking to the judge. It is very important for the facilitator to avoid any mention of case specific information in order to avoid any suspicion or possibility of influencing the child testimony

These are very direct and simple messages. For example, a psychologist informs an 11-year-old girl⁷⁹:

The judge is a very special person. She knows a lot about laws that protect children. She, and other people who are here, are used to hearing children when something has happened to them that hurts them or has made them feel very bad. This judge is very special, when someone informs her that they have hurt a boy or girl, she can help. And she helps stop what's happening from happening again.

In addition to building a motivation to speak, preparation should transmit some key messages. The information conveyed to the child or adolescent may seem obvious to an adult and yet, in consideration of the egocentric and concrete thought that characterizes childhood, it is necessary to be made explicit. The key messages conveyed, help children and adolescents understand the nature of the testimony and also encourage them to build resilience and emotional recovery.

The most important message is to clarify that the judge, in order to protect children and adolescents, needs to know what has happened to them. Since he or she was not present when what hurt them took place, it is necessary for the child or adolescent to tell the judge what happened.

There is a situation, as she - the judge - was not in the place when they did something to the girls or boys (who come here), she has to know

⁷⁹Reyes, V., 2021.

*from their own voice. They have to tell her what happened and then the judge finds out and can do things to help*⁸⁰.

It is also important to verbalize fundamental messages that free children to speak. The aim is to inform the child that when something happens to children that has hurt them, the judge knows it is never the fault of the child. Adults should protect children and never hurt them. It is also important to make clear that if questions are asked it is so the adults can better understand and help, it does not mean that they do not believe the child.

Finally, information is transmitted that helps validate and normalize what many children and adolescents may feel during testimony such as fear or shame. The child or adolescent is informed that the adults working in court know how to help children and adolescents and that they can handle the situation even when the child or adolescent is very afraid. Preparation avoids talking about the feelings of the specific child or youth who is present. The recommendation is to provide this information while referring to “the children” who come to this court in a generic fashion.

Using the above-mentioned model for preparation, the psychologist informs the girl⁸¹:

*.....There are children who feel that what happened to them is their fault. But here we don't believe that. We know that whenever an adult hurts a child or adolescent it is the fault of the adult, because the adult has to take care. ... there are many children who sometimes when they come to these places with people they do not know can get nervous... I have seen children who get nervous, some do not speak, they start to move their feet and hands, sometimes they get angry, sometimes they cry. But here we are used to helping children like this. I want to tell you that it's normal if it happens to you and also the judge knows that it's normal.....*⁸²

Finally, the preparation shows the children and adolescents step by step how their testimony will take place. For this, the facilitator uses a model that shows the areas/rooms to be used and how they will move between one and the other. The child or adolescent is informed that the judge will be listening to him or her all the time, even when he or she is not in sight. It will also be clear that in the room for the testimony, only the facilitator and the child will be present and that he or she will not have to see anyone else. He or she will be told that the facilitator has a small earpiece and that by this means he or she will be able to speak with the judge.

⁸⁰ Idem.
⁸¹ Idem.
⁸² Idem.

*In this room you and I are going to sit at this little table.... There are some cameras and I will have an earpiece and I'm going to listen ... to the judge. The judge is going to sit here and she's going to be able to see us through a mirror. We won't be able to see her. This is important so you know that we can focus on what you want to say so we don't get distracted...*⁸³

It is particularly important to emphasize that during preparation, there is no discussion of what the child or adolescent will say. At all times, generic terms are used to talk about children in general, avoiding any comments that might interfere with the content of the testimonial.

When the preparation is completed, the facilitator and the child or adolescent can use the materials available in the waiting area and wait for the moment when the testimony will begin. The testimony is programmed as the first proceeding of the day and all possible eventualities are taken into account in order to avoid delay in its production.

Introduction

Once the judge has completed the necessary formalities, the child or adolescent is asked to move, together with the facilitator, to the room for testimony. When they arrive to this area, a few minutes are taken to generate a less formal atmosphere and relieve the tension that the children will naturally be feeling.

During this time, an informal exchange takes place on issues that are irrelevant to the facts of the trial and it is used both to relieve tension and to make a final sound check. It is suggested the facilitator address irrelevant issues such as pets or movies. It is also suggested that the one who facilitates shares personal information regarding these irrelevant topics rather than only presenting questions to the child or adolescent. The latter with the purpose of humanizing and reducing formality to their own role within the testimonial.

The facilitator must speak naturally with the judge through the earpiece and inform the child or adolescent when the judge asks questions. For example, a facilitator starts the testimony of a girl by verifying that the microphone works correctly:

... ok, now the judge is listening to you attentively, ok? Before begin-

⁸³ Idem.

ning to hear what you want to say to the judge, how about we see if he can hear you ok? Can you count from one to five?... (girl counts out loud) ... Your honor, is everything clear?... (Judge responds through the earpiece) Good, thank you. He says he can hear you very well...⁸⁴

Spontaneous or Free Narrative

Immediately after this brief introduction, the spontaneous or free narrative begins. The facilitator ensures that there is playdough on the table within the reach of the child or adolescent so that he or she can and use it to manage anxiety or to better express an idea. During preparation, the child or adolescent has been informed that the judge is listening and is in communication through the earpiece, so questions posed to him or her should be natural. The free narrative usually begins by verifying with the judge that the testimonial can begin:⁸⁵

... ah yes? that's neat (referring to some irrelevant topic touched upon in the introduction)... ok..Let me ask if it we're ready... Your Honor Can we begin now?...

Once the judge indicates that the testimony can initiate, the facilitator simply invites the child or adolescent to start narrating everything he or she wants the judge to know. Since the motivation to speak has been framed under the protective figure of the judge, the child or adolescent knows that in order receive help – should he or she want it – the judge must learn what has happened. There is no need for the facilitator to make any reference to the facts under study. Children and adolescents will naturally begin to tell whatever they consider relevant to say before a judge. This way of encouraging the beginning of the free narrative is important in order to maintain the absolute neutrality of the facilitator and to avoid any affectation or influence on the words of the child or adolescent.

While the child narrates freely, the facilitator does not interrupt. It does not matter if what is being narrated is confusing, incomprehensible or contradictory. The sole purpose of the facilitator is to enable children and adolescents to narrate as much spontaneous and uncontaminated information as possible.

While the child speaks freely, the facilitator is attentive to signs indicating increased levels of distress. If anxiety increases, the facilitator helps the children and adolescents to manage these emotions in order to continue their

⁸⁴4031/2022 Morelos Judicial District, Chihuahua

⁸⁵Oral Proceedings 247/2019 Morelos Judicial District, Chihuahua

narrative. The facilitator utilizes techniques for managing distress that are minimally invasive, as to not interrupt or distract the child from his or her own train of thought. Some examples of these techniques are:

- Respect silences without haste, express comfort during a prolonged silence
- To signal active listening in a neutral way by expressions such as “hmmm” or “go on”
- Mirroring or engaging an action similar to the one the child or adolescent is doing, such as handling play dough
- Repeating protective messages when a child seems “stuck” and impeded to continue speaking such as: “for many children it can be difficult to speak, but the judge listens to them very carefully”

Only if the anguish generates an emotional crisis and it is considered indispensable, should the facilitator propose a break. The use of a break is not recommended, as it prolongs the testimonial and generates for children and adolescents the need to repeat the challenge of entering the room for testimonial and again beginning their narrative. A break is quite like having to cross a river and upon feeling distressed when reaching the half way point, heading back to shore only to have to start again from the beginning. It is preferable to help him or her continue the narrative until it is finished.

It is usually very obvious when a child or adolescent has finished their free narrative. In the recorded experience, almost without exception the child will indicate verbally that they have come to the end of their spontaneous testimony. After narrating in their own way what they have lived, there comes a moment when, with a change in the tone of voice, the child announces that it is over. In the testimonies developed using the SAPCOV courtroom, some statements with which children and adolescents indicate that they have finished their free narrative are:

- *And that's it (looking up for the first time)*
- *I'm done*
- *And... I want to finish*
- *That was it till now*
- *And that's all I remember*
- *And that was it*
- *And that was both times*
- *And just that*
- *And so... like that*
- *And that's why we're here*
- *It's all*

Sometimes the free narrative is very broad and the facilitator can stop and break in order to go directly to the interrogation/cross-examination phase. However, there are times when free narrative is scarce. This is especially the case with very young children. To help them contribute more information, the facilitator can prompt further free and spontaneous narrative. For this the facilitator only uses words that have been already used by the children and adolescents themselves and simply asks to be told more about them.

It is extremely important to stress that the facilitator should not ask any questions of any kind. This will be the exclusive task of the parties and any questions must be admitted only by the judge. The only purpose at this point in the testimony is to prompt further free narrative. The only intervention allowed to the facilitator is to repeat words mentioned by children and adolescents and then add “tell me more about that”.

To do this, during the free narrative the facilitator must have taken note of some words that may be useful to ask for more free narrative. They must be words that help the child or adolescent to focus on a specific a moment or event and then recall more information. Therefore, the words chosen as prompts must be distinctive. If a child narrates several events and “Raúl” is present in all, it would be useless to ask for more narrative about “Raúl”. But if for example in only one reference the child mentions bringing a sweater, this can be a useful word.

In this example, the facilitator would say:

“You said something about “a sweater”, tell me more about that”

Although it seems unnatural and somewhat robotic, the facilitator cannot use any other words than this very strict script. In all cases the facilitator adheres to:

*“You said something about (WORD USED BY THE CHILD),
tell me more about that”*

This rule is very rigid in order to protect due process along with protecting the child or adolescent. Most justice systems have strict procedures that govern interrogation and cross-examination. The facilitator is not part of the litigation. His or her intervention must remain neutral and at the service of justice.

When the free narrative is exhausted, the facilitator asks the child or adolescent if there is anything else he or she would like to add. If there is no

more information provided spontaneously, a break is requested in order to proceed with the next phase. The child or adolescent has been told that this would happen, and thus the proceeding is not a surprise. The child is reminded that he or she will go to the waiting area and that the facilitator will go and see if someone wants to ask something.

Interrogation and cross-examination

The principle of contradiction is fundamental in criminal proceedings. The parties have the right to ask the witnesses anything that is not proscribed by the law itself. The judge is the only arbiter regarding the admissibility of any questions. In recognition that questions will inevitably affect the narrative of children and adolescents, this action is reserved to take place only when the free and spontaneous narrative has been exhausted and preserved.

Interrogations involving children and adolescents are often marked by miscommunication. Adults want to ask about one thing and the child understands and answers another. The way in which adults ask questions is not necessarily the best way to present it to a child or adolescent.

At this stage, the facilitator is placed at the service of the parties as a kind of translator between the legally admitted inquiry and the way in which the child or adolescent can best understand it. The facilitator is not “on the side” of the child or adolescent, his or her task is only to facilitate communication in an absolutely neutral manner. Even with regard to questions that may be harsh for the child, the facilitator will make suggestions motivated by the recognition that questions that generate distress cannot be freely answered by children and adolescents. The task of the facilitator is to suggest the best way in which the inquiries of each of the parties can be best answered freely by the child or adolescent.

To accomplish this task, the facilitator moves to the courtroom where the parties are located. In silence he or she listens to the questions that the parties propose and the debate about their legal provenance. Even though the facilitator will not intervene until the discussion regarding admissibility has been exhausted, being present during this discussion helps expedite the suggestions that will be made further along.

When the debate has concluded and the judge has determined which questions will be admitted, the facilitator begins his or her intervention. By reviewing only questions that have been legally admitted, the facilitator may make

suggestions for reformulating the questions so that the child or adolescent can better answer them. These are suggestions that must be submitted to the parties and on which the judge will ultimately rule.

By way of example, the discussion regarding the questions put forth to a teenage girl is as follows⁸⁶:

FACILITATOR: *(Reading a question admitted by the judge) What is the name of the friend?... I think she referred to a friend of the family?... of the mother?*

PROSECUTOR: *Yes, the friend she mentioned right now.*

FACILITATOR: *But was he a friend of the family or of the mother?*

PROSECUTOR: *Of the family.*

JUDGE: *Are there any suggestions regarding this question?*

FACILITATOR: *Yes.. What is the name of the friend of your family you mentioned?*

JUDGE: *(Addressing the Prosecutor) Anything to point out counsel?*

PROSECUTOR: *No, it's okay.*

JUDGE: *(Addressing the victim's legal counsel) You sir?*

COUNSEL: *We agree Your Honor*

JUDGE: *The defense?*

DEFENSE: *Nothing... yes.*

JUDGE: *Continue.*

... The facilitator continues reading the admitted questions.

In this example, the suggestion may seem like an unnecessary detail. However, one of the characteristics of childhood that generates confusion during interrogations is the use of pronouns on the assumption that both parties are talking about the same thing. In the adult dialogue, it can be safely assumed that both parties stay on subject and if one begins to refer to a different matter he or she will announce the change. In a dialogue with children and adolescents, it is necessary to explain to whom or what each question refers, avoiding the use of pronouns.

The suggestions made by the facilitator tend to broach matters that commonly cause confusion with children and adolescents. Some of these topics are::

⁸⁶ Oral Proceedings 291/2019. Judicial District, Chihuahua.

• **The order of questions**

It's hard for children and adolescents to jump from one subject to another. The exercise of moving between topics can easily generate confusion, in which the child or adolescent responds with a different topic in mind than that which is assumed in the question asked by the adult. Therefore, a common suggestion is that questions should be presented in thematic clusters.

ORIGINAL FORMULA	SUGGESTED FORMULA
Questions ordered by who inquires. First all the prosecution's questions and then all the questions by the defense.	Questions sorted by subject. All questions, from the prosecution and the defense, on the same subject are presented together.

• **Remove suggestive statements within a question**

Children and adolescents are extremely sensitive to the authority of any adult. Questions containing an affirmation may cause the child to avoid contradicting the adult rather than giving an authentic answer to the query. The suggestion is to remove affirmations and present direct questions only.

ORIGINAL FORMULA	SUGGESTED FORMULA
It's true that Juan came first, isn't it?	Who got there first? Or Was Juan the first to arrive?

• **Language simplification**

Adult dialogue uses words with multiple meanings in a contextual manner. Children and adolescents may understand these words in a subjective manner and it is preferable to clarify them, making an explicit reference to their intended meaning.

ORIGINAL FORMULA	SUGGESTED FORMULA
What was the relationship between your grandmother and G?	<i>(clarify whether it refers to the quality of the relationship, i.e. good or bad, or to kinship)</i> <i>How did your grandmother get along with G?</i> <i>Or What were your grandmother and G to each other?</i>

• **Explicit reference to the information that is desired**

Concrete thinking often causes children, and even adolescents, to answer literally what has been asked. Since the model prevents the facilitator from altering or adding to the questions admitted by the judge, it is necessary to foresee when it will be possible to add an additional question.

ORIGINAL FORMULA	SUGGESTED FORMULA
Do you know why your dad no longer lived with you? (The child can answer yes or no)	Do you know why your dad didn't live with you anymore? (If the answer is affirmative) Why?

• **The use of context to verify references of time and space**

Even teenagers, especially when they are nervous, use calendar dates or locations subjectively. It is always advisable to verify these references when used by a child or adolescent with specific contextual elements.

ORIGINAL FORMULA	SUGGESTED FORMULA
When did what you told us about the bike happen?	How old were you when what you told us about the bike happened? ¿Do you know when that was? ¿When?

• **Avoid causing distress that may affect the ability of children and adolescents to respond**

Questions that generate guilt, confusion or shame may prevent children and adolescents from freely providing all the information they can offer. Both the defense and the prosecution may have a legitimate reason to interrogate regarding graphic or painful aspects of an event. The facilitator must find the best way to put these questions to children and adolescents in order to minimize the distress they may cause.

ORIGINAL FORMULA	SUGGESTED FORMULA
What did you do to defend your brother? (The question could exacerbate feelings of guilt)	While what you told us about your brother happened, tell us what you were doing.

• **Avoid repetitive questions**

When a question is repeatedly put to a child or adolescent, there is a risk of provoking the idea that he or she has responded in an inadequate manner. This may cause a child or adolescent to modify a response in order to satisfy the adult. The facilitator should alert the judge when a query refers to information the child has already given and suggest either avoiding the question or being more precise as to the new details that are sought. If a repetitive question is admitted by the judge, the suggestion is to explicitly relieve the child or adolescent from having given a wrong answer.

ORIGINAL FORMULA	SUGGESTED FORMULA
Where were you when Juan came into your house?	<i>(The suggestion to delete the question is opposed by the asking party and the question is admitted by the judge. The suggestion is to reformulate.)</i> You told us about when John came into your house, but I am not clear about where you were when John came into your house?

• **Request descriptions instead of explanations**

Children and adolescents have difficulty explaining situations or causal relationships between events. From their subjective perspective they will be able to describe more precisely what they have lived.

ORIGINAL FORMULA	SUGGESTED FORMULA
Why did you run away?	You said you ran away. What were you thinking when you ran away?

• **Explicit and precise questions regarding the authenticity of their statement**

It is very common for parties to want to ask the child or adolescent if their statement has been dictated or induced by someone else. The query is valid; however, it is complex and difficult for most children and young persons to understand. The child is often asked: Did anyone tell you what you came here to say? Or did someone tell you to say what you told us? The adult understands that the question refers to the content of the statement and not the act of testifying itself. This may not be what the child understands.

It is normal, even desirable, for children to be told at home that they will talk to a judge about what happened to them. However, that does not mean that they were taught what to say. Using concrete thought many children respond things like “my mother told me or the psychologist told me”, referring to being informed about testifying and not regarding the content of their statement. The suggestion is to reformulate the query in an explicit way.

ORIGINAL FORMULA	SUGGESTED FORMULA
Did someone tell you to say what you told us?	What you told us happened, did that happen to you or did someone tell you about it?

Some suggested changes to the questions appear to be insignificant adjustments and it may seem like they could be made directly by the facilitator while asking the questions. However, it is extremely important that the facilitator only asks what has been agreed between the parties and admitted by the judge. Adherence to the principle of contradiction and the right of the parties to question a witness means that the facilitator is strictly a means through which the parties’ questions are executed. Strict adherence to the words admitted by the judge is an essential part of what gives the model legal viability.

The facilitator returns with the child or adolescent to the room for testimony and asks the questions exactly as they were admitted. Once this is done, he or she informs the child that once again it is necessary to see if more questions are desired. The child or adolescent then returns to the waiting area and the facilitator to the courtroom. Once new questions have been legally admitted and suggestions made by the facilitator, the child returns to the room for testimony and the same dynamic as before is repeated.

After hearing the child’s answers, the parties have the right to ask further questions. While it is advisable that the interrogation/cross-examination should not exceed two rounds, it is the right of the parties to ask as many questions as they wish, provided they are relevant to their claims and avoid repetition. It is noteworthy that in documented cases, when a free narrative is made, the questions are reduced considerably and rarely exceed two rounds.

Closing

Once the parties’ questions have been exhausted, the child or adolescent is thanked for his or her participation. Messages that recognize their courage and effort are once again reinforced.

The judge has been presented to the child as a powerful figure and therefore many children and adolescents have the desire to meet him or her. It is not advisable for the judge to be physically present while the child or adolescent testifies. In spite of the enthusiasm and eagerness expressed to speak directly to the judge, when the time comes the physical presence of such an authority figure often results in intimidating and increases the levels of anguish that affect the person’s capacity to speak freely. Therefore, it is ideal that the child or adolescent meet the judge after having concluded his or her testimony as a way to close the proceeding.

Meeting the judge is often important and motivating for children and adolescents and helps them to close the traumatic experience by leaving it in the hands of the authorities. The importance of the moment can be seen in the testimonial of a 6 year old child who was, along with multiple students of his preschool, a victim of sexual abuse⁸⁷.

JUDGE: Hello

BOY: Hello! I am “xxx”

JUDGE: Nice to see you.

...

CHILD: I’m very excited to meet you.

JUDGE: (laughs) Not everyone is thrilled to meet me, you are the first person who is excited to meet me and I am very happy... You did a great job. You did it for you and your parents.

CHILD: And my friends.

JUDGE: And for your friends. ... you were a star today.

⁸⁷Oral Proceedings 15/2021. Unitary Trial Court of the Federal Criminal Justice Center in Mexico City.

B) PHYSICAL ADJUSTMENTS FOR WHERE THE CHILD TESTIMONY TAKES PLACE⁸⁸

A specialized child testimony requires consideration of the spaces with which children and adolescents will come into contact. During childhood and adolescence, the neuronal development of the person has not yet consolidated the necessary connections for metacognition and conscious self-regulation. This means that the person still cannot think about what he or she is thinking or think about what he or she is feeling efficiently enough for self-control. In conclusion, children and adolescents lack the ability to control their feelings, fears or distractions.

For this reason, the physical areas used for the testimony are extremely important. The elements, spaces or persons that may cause fear in children and adolescents will not only cause the person grievance, but the fear generated by real or erroneous ideas will interfere with their testimony. The same applies to distractions. Unlike the adult who can make a conscious effort to ignore a distracting element, children and adolescents do not achieve this self-control.

It is also important to consider that the things that can generate fear are subjective. Childhood fears are often unfounded. However, the fact that a fear is unfounded does not make it less imposing for a child or adolescent, nor easier to control. Adults use information and experience to “calm themselves down”, for example rationally thinking about whether that which causes fear is truly possible or real. In the case of children, a great many things that cause fear are things that the child does not fully understand, whether it is plausible or not is unknown to him or her. The limited capacity for metacognition implies that even if the child knows something to be untrue, he or she has difficulty in applying reason to govern emotion.

Therefore, the physical environment should avoid anything that may provoke fears and distractions. The environment should also promote the reduction of anxiety caused by the very nature of his or her testimonial. It is necessary to provide him or her with material elements that will serve as tools to reduce anguish and anxiety.

⁸⁸Griesbach, M. 2023.

Physical areas must protect children and adolescents from their own fears and also protect their identity. The effects of publicity regarding victimization are extremely harmful to children. The prohibition of public hearings involving children and adolescents should be extended to all areas with which children come into contact when producing their testimony.

Finally, the physical environment must also be at the service of justice and due process standards. The areas used should give certainty to the parties about what happens and how the testimony is produced, as well as facilitate clear audio and visual preservation of the testimony.

The SAPCOV model considers three types of environments: transit areas, the waiting area and the room for testimony.

Transit areas

The transit areas refer to the entire route through which the child or adolescent must pass from the street to the waiting room and between the waiting room and the room for testimony, as well as the toilets. The aim is to prevent children from having visual or auditory contact with elements or persons that may cause fear.

In the SAPCOV model children and adolescents enter the building through the parking lot intended exclusively for judicial personnel. Since their arrival, the children and adolescents are protected and have access exclusively to administrative areas within the tribunal.

Another element that promotes a sense of safety is that from the parking lot to the waiting area, the route is clearly marked with visual indicators. Color was used on the walls in order to highlight the path to be followed and special graphics indicate the way. The use of clear indicators provides the child with the certainty that he or she cannot get lost within what can be an intimidating building.

The waiting area

The waiting area is the room in which children and adolescents will have the preparatory conversation with the facilitator and where they will wait while questions are admitted and reformulated for the interrogation and cross-examination phase.

It should be a welcoming environment that promotes *calm* and *distraction*. It shouldn't be overly stimulating. The room should have comfortable furniture for adults and for children. Games or materials should be orderly stored in enclosed furniture to prevent multiple materials from being visible at once. The room should not be oversized as open or long spaces are not only stimulating but can also increase anxiety. The room and the furniture themselves are used to generate emotional containment.

The space should generate a sense of relaxation and distraction. Infantile images and motifs are *not recommended* for two reasons: On the one hand, they limit the use of the area to children under 6 or 7 years old and could cause discomfort or even shame for adolescents. On the other hand, many young children live in contexts where images on walls or very striking drawings are extremely unusual. In these and other cases, the images can be over *stimulating*. It is important that the children and adolescents are distracted while waiting, but at the same time remain in a state of calm that allows them to change into a state of concentration when testimony begins. If they are over-stimulated, it will be very difficult for them to govern themselves when it is time for them to give testimony. Over-stimulation could also increase levels of anxiety.

With this in mind, the waiting area should have pleasant and neutral colors. It is not a place with an "institutional" appearance and should be more like a comfortable living room than an office.

While materials in the waiting room should help distract the person, it is essential that they also help him or her to remain calm. Concrete and neutral materials are recommended and stimulating or significant materials should be avoided.

Stimulating materials are those that generate alteration or excitement. Physical activity, combat, or action games, even some fluid materials (paint or water), are inappropriate. Significant materials are those that can generate ideas or emotions in the person through subjective associations. Images of families, couples or social images can have subjective importance for the person and increase their levels of anxiety. Films or magazines often contain topics that may be subjectively significant. Since the effect they will have on each individual is unpredictable, they are not recommended.

The use of concrete games or materials such as construction kits or sequencing games are considered desirable. Games like sudoku, Tetris, puzzles, Lego or word puzzles are concrete and neutral options suitable

for a waiting room. It is important that the space is kept tidy and that each material be stored before using another one. Disorder and lack of limits, exacerbates anxiety.

The room for testimony

The room for testimony is the room in which the children and adolescents will be heard. It is a small room with a transparent table and two chairs. One of the walls is a Gessell chamber or two-way mirror from which the judge can observe and listen to the child or adolescent thus preserving the principle of immediacy. The remaining walls are empty but may be painted in a warm color in order to make the environment less institutional.

It is a room that should promote *calm* and *concentration*. In this sense, the furniture is more functional than aesthetic. The furniture should be as pleasing to the eye and comfortable as possible but, the priority is placed on the way in which the furniture facilitates the accomplishment of a task at hand and not so much the feeling or the atmosphere that it generates. In order to facilitate transparency for the testimony and the observation of the non-verbal expression of children and adolescents, the table should be made of some transparent and safe material.

The room for testimony has no decorative elements and its furniture is limited to the indispensable. It has a small piece of furniture in which the facilitator can keep paper and colors to bring out only if necessary for the child or adolescent to express an idea. The materials should be out of sight while not in use.

The only material that is always in sight should be playdough without its container set on the table. The container is omitted to avoid it being manipulated and making noise that could interfere with the auditory clarity of the testimony. Playdough is an indispensable material. It can be very useful to help expression, but it is mostly used to manage distress. In a consistent manner, all the children and adolescents who have it in their sight, spontaneously take it and manipulate it while narrating what they have lived.

c) PROCEDURAL ADJUSTMENTS

Procedural adjustments refer to the institutionalization and publicity necessary to ensure that the child testimony is produced according to the proposed method. In order for this method and its procedural adjustments to be legally valid, all those involved must know in advance how the testimony will be produced.

If the parties or the judicial staff themselves do not know the procedure, there is a risk that its legal validity could be challenged or that discussions and alterations to the procedure will render it ineffective for children and adolescents.

While the proposed adjustments do not affect the rights of the parties or the principles of due process, they do alter the ordinary course of action. In the experience with the SAPCOV model, it has been indispensable that the protocol and a technical guideline be public and well distributed among all judicial staff and the parties involved.

Institutions that promote specialized models for child testimony should make significant efforts to ensure that the model is publicized. It is in the interests of all parties and, of course, of children and adolescents that testimony should be conducted in an orderly manner with everyone's full understanding of how the hearing will be conducted.

III. RESULTS OBTAINED FROM THE SAPCOV EXPERIENCE

The model for the specialized and protected child testimony developed in the state of Chihuahua, SAPCOV, is a young program that has faced unexpected challenges. It was inaugurated in the winter of 2019. The use of SAPCOV is voluntary, and predictably, it was a gradual process by which judges began to have greater interest in the model and to request its use. As demand for the use of the courtroom grew, 2020 confronted the judiciary with an enormous challenge: the pandemic.

The necessary sanitary measures through 2020 and much of 2021 slowed down the use of the SAPCOV courtroom almost entirely. Together with the world, SAPCOV has gradually resumed a normal rhythm. Much of the interest and acceptance of this new model was lost in the pandemic years and a new impulse was needed to reinvigorate the use of the specialized courtroom.

These factors have limited the scale of the samples used in this book to analyze the results obtained by the SAPCOV model. However, there is enough material to make qualitative approximations of interest. The present publication analyzed 29 hearings in which a child or adolescent gave testimony in the SAPCOV courtroom; 42 rulings were studied of which 25 are first instance rulings and 17 are appeals resolutions. Also 129 questionnaires answered by judges who have used the SAPCOV courtroom were incorporated.

Even more important than the scale of the material, it was essential to define what must be observed in order to assess whether the model has been successful and useful. Initially, it became clear what would NOT serve this purpose.

The outcome of the resolution (Guilty vs Not guilty) is NOT a useful indicator to evaluate a method for child testimony. Specialty does not result in more convictions, but in greater access to the truth. A proper child testimony should provide useful information both in determining a person's guilt or their innocence in the face of the accusation. Therefore, the outcome of the resolution was not used as an indicator to assess the model.

There are two dimensions of analysis that can provide more useful information to assess the model. These are the legal fate of procedural aspects in the cases which have used the SAPCOV courtroom; and the elements used for judicial assessment and reasoning regardless of the outcome and criteria in each case.

a) The legal feasibility of the SAPCOV model

It is an indispensable that the proposed model for child testimony be legally viable. If the model fails to maintain the standards of due process, regardless of how protective it may be of children and adolescents, its efforts will be in vain. Any model that is legally vulnerable will put at risk the very children and adolescents who seek the protection of justice. A central question therefore is whether the experience produced in the state of Chihuahua with the SAPCOV model has been legally viable.

Objections from the defense during the natural trial

The first element considered to assess the legal fate of the model was the defense's response to the judge's initiative to produce the child testimony in the SAPCOV courtroom. In the hearings reviewed, only two defendants expressed doubts about the model. In both cases, following the explanation provided by the judge, the defense expressed their agreement with the proposed method.

While this finding is interesting, the information reviewed could be considered biased. The hearings reviewed are the product of those cases in which the judicial initiative to use the courtroom was upheld after discussion between the parties took place. The present effort therefore does not consider, and does not know how many cases exist, of those matters in which the judge determined not to use the courtroom after hearing the considerations of the parties. It is however of interest to observe that in the material reviewed the discussions involve public and private defenses that consistently do not express opposition to the SAPCOV method.

Opinion of the natural judge

A more robust variable considered was the natural judge's own assessment of the of child testimony using the SAPCOV model. Beyond considering the views of the parties, the judge faces obligations to officiously ensure the principles of due process. In this sense it is of interest to take into account the considerations of the judges once they used the model.

Among the 25 first instance rulings that were reviewed it can be noted that 13 of them explicitly refer to the model in their reasoning. Seven judges comment on the value the model has as a tool for protecting children and adhering to the highest standards required to safeguard their rights. Five judges made an express mention of how the principle of immediacy is safeguarded in the method and three of them also referred to the safeguarding of contradiction and other principles of due process. It is noteworthy that the judges incorporate references to the special conditions in which children and adolescents are heard as elements that strengthen the spontaneity and credibility of the testimonial.

In one case, these conditions reinforce the value that the judge gives to the testimonial in order to reach an acquittal. The girl claims that she has not been the victim of any assault by the accused. The judge reasoned⁸⁹:

... in addition, her free narration and answers were given in a suitable place that provided comfort, security and psychological well-being while being accompanied by a professional in this matter which gave her the opportunity to speak without any external pressure, as might be the influence of some adult that would lead her to declare in a certain way, either by his or her presence or explicit orientation,...

To the contrary, a judge reasoned giving high value to the use of the model in order to arrive to a conviction⁹⁰:

...It is for all these reasons that the foregoing statements have a preponderant value, which translates into clear and forceful statements against the accused, in addition to the fact that this Judge directly perceived the attitude assumed by those affected during the hearing when giving their stories, they denoted: nervousness, anxiety, sadness and shame, despite being accompanied by an emotional health professional and in a suitable environment, since

⁸⁹ Oral Proceedings 309/2019. Morelos Judicial District, Chihuahua.

⁹⁰ Oral Proceedings 125/2019. Morelos Judicial District, Chihuahua.

they were in the specialized courtroom to receive testimony from people in a state of vulnerability (SARCOP (sic)), which suggests that they do not lie when they spoke of the facts that concern us...

In both cases, the right conditions and the absence of external factors that could affect the free narration of a child or adolescent are incorporated as elements that help the judge assess and give credibility to the testimony.

As part of the procedure for the use of the courtroom, the participating authorities were asked to respond to a questionnaire on his or her experience applying this method. 129 judges responded to the questionnaire as follows:

1 being the minimum and 5 the maximum, to what extent:

	NUMBER OF RESPONSES ACCORDING TO A SCALE FROM 1 TO 5				
	Minimal value 1	2	3	4	Maximal value 5
Was the physical and emotional integrity of the witness safeguarded?	0	0	0	4	125
Was the length of the hearing adequate?	0	5	18	22	84
Was the testimony preserved?	0	0	0	3	126
Was the right to a defense respected?	0	0	0	7	122
Were the principles of due process observed?	0	0	3	5	121

Allegations on appeal

An indicator of interest for assessing the legal viability of the model is the number and type of grievances presented by those who file an appeal. In the cases reviewed, it is noted that no appeal expresses grievances that are directly or explicitly related to the method used for child testimony. None of the 25 public or private defense attorneys and prosecutors involved, claim that the conditions in which the testimony was produced constitute a violation of due process.

There is only one appeal in which the defense refers to the SAPCOV model in their allegations. In the case at hand, the defense complains that a unique testimony is produced and used as evidence in two different trials. The victim is an adolescent who refers being a victim of two assaults committed by various persons in separate events. In order to avoid re-victimization of the adolescent, only one testimony was produced before the two judges and respective intervening parties. In this case, the higher court upheld the judgment under appeal, finding that SAPCOV and the sole testimony had preserved the principles of due process and the rights of the defense⁹¹.

...The fact that such a testimony by the victim was received in a single hearing in this and the various trial 225/2019, before the two judges, did not produce information (not specified by the appellant) that transcended the outcome of the judgment. d).- All the information produced in the testimony of the minor, despite the special conditions in which it was received, was heard directly by the judge and assessed in the judgment, so it is considered that the principle of immediacy was not violated. e).- It is true that the minor victim identified three persons as her sexual aggressors. However, regarding the testimonial, only the matters related to the sentenced person were considered, which was not contaminated in any way by facts unrelated to the trial...

The review of rulings emitted by appeals courts indicate that, far from being grounds for complaint, some appellants use the wealth, richness and details of the testimonial obtained by the specialized means to express their grievances. In two cases the defense takes up specific aspects of the free narrative to argue that the natural judge lacked elements to corroborate the child's statement with other evidence⁹². There is a notable appeal in which 13 of the 21 grievances presented by the defense use specific elements of the free narrative and references made by the child that in the consideration of the appellant should generate reasonable doubt in the judge⁹³.

The sample analyzed shows that, far from constituting a factor of grievance, the use of the specialized method provides the defense and prosecution with greater elements to construct their arguments on the facts. More detailed and ample testimonials on part of children and adolescents, contribute to the clarification of the truth.

⁹¹C 42/2020. Sixth Criminal Chamber. Chihuahua, Chihuahua.

⁹²Oral Trial 163/2020 and Oral Trial 21/2021, Morelos Judicial District, Chihuahua.

⁹³Oral Trial 305/2019 Morelos Judicial District, Chihuahua.

Reasoning used by appeals courts

Finally, an important element in assessing the legal feasibility of the model is to be found in the rulings and reasoning of higher courts regarding appeals from cases in which the SAPCOV model was used.

As with respect to the action of the natural judge the outcome of the resolutions of appeal with respect to criminal responsibility are irrelevant to assess the success of the specialized model SAPCOV. It is only of interest to analyze the reasoning that the tribunals use regarding the procedural validity of the SAPCOV model.

In this regard, it can be observed that of the 17 appeals reviewed, three were still sub iudice at the time of this publication. Of those remaining, five judgments modify the contested decision but none reinstate the proceeding because of some procedural fault. All amendments concern the penalty established by the natural judge. One of the judgments revokes the contested decision but does so on the merits of the case. The reasoning behind this reversal, far from detecting any procedural violation, rests heavily on the use of the victim's free narrative to arrive at its conclusion. The remaining eight appeals confirm the acquittal or conviction of the contested decision.

It is also interesting to recover some of the reasoning regarding the child testimony that the higher courts incorporate in their resolutions. One court makes a specific mention of the equality between the parties preserved in the original trial. Another court stated that the specialized method for child testimony not only meets the standards required for the protection of the rights of children and adolescents, but also those arising from the obligation to try sexual offences from a gender perspective.

As expected, the appeals court in lieu of the plaintiff, verifies that the essential principles of due process have been fulfilled. Seven courts expressly referred to that review and, in view of the use of the SAPCOV courtroom, determined that those principles had in fact been duly safeguarded. One court reasons⁹⁴:

... formal examination of the records by this chamber... the parties were, and deployed it, able to question and cross-examine, everything took place in the presence of the judge, who was the only one who intervened, ... the guiding constitutional principles of the accusatorial model were preserved: continuity, concentration, publicity,

⁹⁴ 72/2021 Fifth Criminal Chamber. Chihuahua.

orality and ... also complied with the principle of immediacy...

In particular, four chambers specifically reasoned regarding the adversarial principle and their consideration that the SAPCOV model adequately safeguards the rights of the parties. In this regard, one tribunal reasoned⁹⁵:

... an exemplary diligence in which the victim was able to express himself and be heard ...and that was carried out according to international standards. The United Nations General Assembly issued the Guidelines on Justice for Child Victims and Witnesses of Crime, which set out the measures to be taken to enable the best victim or witness participation in a process. As a result, during the hearing, through a professional trained in the care of minors before administrative and judicial authorities, measures were taken to avoid unnecessary contact with the alleged perpetrator, their defense and other persons not directly involved in the justice process...

In more detail, a tribunal discusses how the model safeguards the components of due process⁹⁶:

*...Even though the testimony of the minor victim, at the request of the Public Prosecutor's Office in the various proceedings 225/2019 against ***, was received in the courtroom for persons in vulnerable conditions (SAPCOV), in consideration of this Chamber, the right to an adequate defense and the principles of immediacy and due process were not violated, as: a).- although there are no special guidelines or rules for this type of action, the production of the evidence is under the conduction of the proponent of the evidence by means of direct examination and control of the quality of the information obtained by direct counter interrogation on part of the opponent. Thus, with this horizontal control the quality of the evidence depends on the litigation skills of the parties, even in cases when protected witnesses testify in a different room with distorted voice and image or, as in this case, in a special room. b).- The conduction of the debate is the responsibility of the natural Judge, who must decide, after hearing the parties, all objections which arise in the course of the interrogations, so that the expert licensed in psychology ***, by means of which the questions were asked to the minor victim, constitutes only a mechanism to receive the testimonial of the minor victim that was not under her control, although she adjusted the questions to his ability to understand and use the*

⁹⁵ C-46/2020. Third Criminal Chamber. Chihuahua, Chihuahua.

⁹⁶ C-83/2021. First Chamber of Penal. Chihuahua, Chihuahua.

language, as these were permitted by the Judge in his above-mentioned leadership role...

In the first, and small, sample analyzed with respect to the experience obtained with the specialized SAPCOV courtroom, a reliable margin of legal feasibility can be observed. Both in trial and on appeal, the parties and the authorities consistently hold the view that the proposed model for specialized child testimony meets the requirements of due process. This first look at a particular experience shows promising data regarding the fulfilment of a primary and necessary objective for the protection of children: the child testimony protected in harmony with the rights of the accused and the accuser

b) The quality of information obtained from children and adolescents

A second element considered useful for evaluating the success of the SAPCOV model is the quality of the information obtained for the purposes of imparting justice. The model based on the characteristics of child development hopes not only to offer a method that protects the person from a re-victimizing experience, but also to obtain more and better information useful to the parties and the judge. The quality of the information obtained cannot be assessed using the quantity or type of information provided by children and adolescents themselves. The amount and type of information will vary depending on the particular case and the facts under study. Therefore, it is considered of greater value to observe the type of elements that judges incorporate in their assessment of the child testimony with independence to their criterion or to the type of data obtained.

Assessment of details that are subjectively important for children and adolescents

As discussed extensively in previous sections, the child narrative is characterized as descriptive and not explanatory. In this sense, children and adolescents often include in their narrative the description of elements that they perceived and that are subjectively important, but not necessarily relevant from an adult or a justice perspective. The presence of these

details in the children's narrative is rapidly identified as indicative of spontaneity. Even without specific training regarding child development, this type of natural language is easily recognized as characteristic of children and adolescents. Several judges incorporate considerations about the presence of these details in their assessment as indications of credibility.

A⁹⁷ judge reasons regarding the child's testimony:

... and even described the position in which he placed it and details of the environment he remembered as daylight, the weather due to having seen the risen sun and his clothes. ...

Another judge considers the mention of details as spontaneous expressions that enrich the assessment of the child testimony⁹⁸. Regarding the narration of a girl who describes a day she went to the pool:

... that "there he jumps like with rabbit legs", plus she made a gesture of doing what we call "Scubas". She said that the pools are very beautiful and that her mother has taken her... that her mother is [A] and that she changes her diaper and that the diaper is white.

The subjectivity of what is described is obtained thanks to the free narrative. Interrogation formats do not deal with matters or details unrelated to the facts. While some references do not directly contribute to how the event happened under study, they do provide elements from the subjective point of view of children and adolescents that enrich and give greater value to their testimonial. In this regard, a⁹⁹ judge reasoned:

... She cried profusely when she narrated that her grandmother felt guilty, consistent with the pain that she said to feel for that circumstance, it called my attention that she expressed that she did not know how to fix it, this as if she assumed that she would have to resolve the guilt experienced by the grandmother, which is congruent with a cognitive, emotional and moral trait in which infants view themselves as responsible for what happened and feel the need to please or comfort the adult...

The free narrative allows children and adolescents to digress in their own words and to provide a mixed narrative of what has been lived. Far from creating confusion, this free narrative allows the judge to perceive the naturalness of the child testimony. In this way, a court reasoned¹⁰⁰:

⁹⁷ Oral Trial 163/2020 Morelos Judicial District, Chihuahua.

⁹⁸ Oral Trial 289/2019 Morelos Judicial District, Chihuahua.

⁹⁹ Oral Trial 305/2019 Morelos Judicial District, Chihuahua.

¹⁰⁰ 59/2021. Fourth Criminal Chamber. Chihuahua, Chihuahua.

...And this quality must be taken into account precisely for their cognitive and emotional development. Therefore, the narrative of lived events can be disordered and interrupted by the memories that are relevant to him, and that are also influenced by the presence of emotions...

The free narrative allows children and adolescents to incorporate forms of expression easily recognized as natural. Such is the case of higher court who, in their resolution, pay attention to the reproduction of dialogues within the narrative and details that lack relevance and may even seem absurd, considering them as indications of spontaneity¹⁰¹. It is noteworthy that judgements evaluating child testimony using the SAPCOV model, explicitly incorporate references to these characteristic aspects of the child.

Assessment of circumstantial contradictions as indicative of spontaneity

From an adult - centric perspective that expects children to express themselves as adults, children's responses containing apparent contradictions, even when dealing with circumstantial and irrelevant details, are interpreted by the judge as indicative of falsehood. It has been documented¹⁰² as a significant obstacle for children when the judge assesses the circumstantial contradiction or variation in the use of words as indicative of falsehood.

It is observed that by using the specialized method and allowing for free narrative by children and adolescents, these contradictions typical of childhood are identified as a sign of spontaneity and veracity. Even though the judge lacks specialized training (as is the case with some of the judges who used the SAPCOV), such contradictions are easily recognized as natural when expressed within a free and uninterrupted narrative. As with the introduction of irrelevant details, within a free narrative, adults generally recognize that this is simply how children and adolescents speak. It does not seem essential to understand why they express themselves in this way. Contradictions traditionally valued as indicative of falsehood, in the case of the SAPCOV model, are recognized as typical of the child narrative.

Several rulings consider that circumstantial variations do not affect the overall coherence of the testimony or its credibility. Almost half of the rulings reviewed explicitly address irrelevant contradictions as typical of a spontaneous narrative.

¹⁰¹133/2021. Fourth Criminal Chamber. Chihuahua, Chihuahua.

¹⁰²Pliego, Y., et al.2022 . Pp. 25- 28

A¹⁰³ judge reasons:

... As for the argument made by the defense regarding inconsistencies, whether she knew the defendant by his voice or by his shoes, it is also inconsequential since we cannot ignore that he is her biological father whom the victim recognized as "xxxx" and that she recognized him at the precise moment when he approached her in the courtyard of the house, although his face was covered...

In another case, a 12-year-old girl shows emotional difficulty talking about what she has lived. When describing part of the events that were particularly difficult for her, she asks for a pause. Her reasoning would seem irrational. The girl asks to stop because she doesn't remember what she's talking about¹⁰⁴. In this case the judge identifies the apparent contradiction as a sign of the naturalness with which the girl expresses herself:

...Later, continuing with her story, she paused again and asked to wait, since she had forgotten what she was saying, so her statement became all too natural and spontaneous, she also made use of the elements available in the courtroom for people in vulnerable conditions -SAPCOV- where she gave her testimony, to support her statement by means of a drawing in which she explained the place where the window through which the accused entered the house was located...

In another example, it can be observed that in her testimony a girl contextualizes the facts in a particular season and then names a date that is incongruous. The judge assesses the apparent contradiction as being indicative of veracity¹⁰⁵:

... far from detracting from the credibility of the girl, it allows us to establish that it is a spontaneous testimony, without inducement. Especially since it will be seen later that when [xxxxx] went to the authorities to report the disappearance, it was there that the adolescent stated the accusations, upon which [xxxx] acted with reservation, as highlighted by [xxx xxx]; Even the teenager herself said she had revealed it on a previous occasion but her mother believed the denial of the fact made by the accused. [Her statement] derives from own experience...

¹⁰³Oral Proceedings 184/2019 Morelos Judicial District, Chihuahua

¹⁰⁴Oral Proceedings 42/2021. Morelos Judicial District, Chihuahua.

¹⁰⁵Oral Proceedings 95/2021. Morelos Judicial District, Chihuahua.

Traditional interrogation-type models strip circumstantial contradictions in the child's narrative of the context that makes them natural. Faced with closed questions, these apparent contradictions tend to be assessed as substantial and indicative of falsehood. The free narrative gives the judge the opportunity to perceive the general congruence of the testimonial and to identify details or circumstances that the child or adolescent narrates in a subjective and variable manner as a natural in the typical child narrative.

Assessment of time and place using age appropriate parameters

Children and adolescents commonly face significant obstacles when it comes to accurately determining time and place. As has been developed in previous sections, children and adolescents will only be able to specify time and place in a subjective manner, using specific and contextualized references. Often, judges have difficulty recognizing this characteristic typical of childhood and their assessments insist on expecting children to define these concepts in adult terms.

It is noted in the rulings assessing testimonials produced with the SAPCOV model, that the judges recover details provided by children and adolescents in their free narrative to determine time and place.

In these cases, judges assess the testimonial in consideration of the limitations inherent in childhood for abstract thought and prioritize the experiential description made by children and adolescents over their subjective use of abstract concepts such as the calendar date¹⁰⁶:

...The accusing body referred the incident took place from January to March of two thousand and sixteen, but the victim referred to the beginning of the cold season; by it being a public fact and notorious that the season departs from these months, that far from beginning, end this season. Which prevents it from being materialized.

In the rulings of both natural trials and appeals regarding procedures where the SAPCOV model has been used, it is observed as a continuous practice that the circumstances of time and place are assessed on

¹⁰⁶Oral Proceedings 95/2021. Morelos Judicial District, Chihuahua.

the basis of specific and subjective references provided by children and adolescents in conjunction with other elements that allow their fixing in calendar dates and approximate locations.

Such is the case of the appeal in which the Chamber takes up the elements used by the girl to establish temporality such as¹⁰⁷:

...at night... (the) time when her mother went to work... (the) time when she went to the United States... long time since she was eight or nine...

And in this regard the court reasoned:

...So considering the age she was at the time of the events and the time since elapsed, asking her for more specificity would be ignoring the conditions proper to her age, moreover she was clear in referring how she referenced each moment, justifying why she confined them to a certain time and that is enough to give veracity to her statement...

Assessment of non-verbal expressions

Remarkably, almost all of the judgments where SAPCOV has been used, incorporate in their reasoning observations regarding the non-verbal expressions of children and adolescents. By expressing themselves within the context of the free narrative, the judge has the opportunity to appreciate the form of expression of the child or adolescent as a whole, while talking about the most trivial and the most difficult aspects of their experience.

A judge, similar to what is found in other rulings, refers to aspects of non-verbal expression as useful in his assessment¹⁰⁸:

..... since, the time that she was in front of the psychologist and the subscriber, she lowered her gaze, she was somewhat nervous, while narrating the very moments of the sexual assault suffered she had to pause and said quietly that she did not know how to say it-so it was heard...

¹⁰⁷186/2021. Fourth Criminal Chamber. Chihuahua, Chihuahua.

¹⁰⁸Oral Proceedings 42/2021. Morelos Judicial District, Chihuahua.

It is observed that the free narrative could allowed the judges to observe more subtle elements than those that could be seen in a common interrogation. The judgments contain observations on various forms of non-verbal expression, such as:

- Continuous movement of legs
- Pauses in narration or changes in the speed with which one speaks
- Lowering their head
- Covering their face with their hands
- Changes in tone of voice
- Need to draw in order not to speak

It is noted that the free narrative format could also help to avoid stereotypical appreciation of emotional manifestation. In other words, it allows the judge to notice different ways in which children and adolescents express distress. Such is the case of a judge who reasoned¹⁰⁹:

...by touching on the subject ...(she) was angry, evasive, scattered, evidently as a mechanism to avoid referring what happened with this the truthfulness with which she conducted herself was observed....

And then he adds:

..... It is important to note that, thanks to the principle of immediacy, this body has become directly aware of the minor's behavior: it caught our attention that her level of stress was to such a degree that moments before the end of her intervention, she broke the toy that was provided to her in order to decrease anxiety, which she manifested through her movements, how she reacted to each question and her desire to know who would be in charge of imparting justice in his case...

¹⁰⁹ Oral Proceedings 163/2020. Morelos Judicial District, Chihuahua. .

Inclusion of developmental characteristics in the evidentiary assessment

When the SAPCOV model is used it is clear that judges, in natural and higher courts, assess the child testimony in view of their particular characteristics. Not only do they cite specific normative frameworks regarding the rights of the child, but they also identify aspects of the child's narrative that reflect these mandates.

Such is the case of a judge who reasons¹¹⁰:

...In this regard, his testimony has convictive relevance and is considered as evidence for this trial, because the thinking of minors, according to the Committee on the Rights of the Child, in their general comment no. 7, paragraph 4, is characterized by self-centeredness "the child processes information about himself or reality by linking external events with subjective events. The center of reference is always in themselves, the own experiences constitute the baggage of information on which they build reality ...

And very clearly the reasoning that is incorporated in another ruling¹¹¹:

...a child who can describe what happened, but cannot explain it, can point or show with specific objects but cannot describe variables of place and location with words alone, he can describe what he felt and lived but cannot put himself in the place of other people or describe what other people did and finally can narrate the events lived according to spontaneous memories and following a subjective thread but cannot narrate objectively, structuring the story with a beginning, a development and an ending and neither control his emotions by reason and will...

Both in order to determine the guilt or acquittal of the accused, the judges acting in matters that used the SAPCOV method appear to make use of the wealth of information obtained from children and adolescents. A higher court expressly observes what is provided in the free narrative¹¹²:

¹¹⁰ Oral Proceedings 95/2021. Morelos Judicial District, Chihuahua.

¹¹¹ Oral Proceedings 128/2020. Morelos Judicial District, Chihuahua.

¹¹² 72/2021. Fifth Criminal Chamber, Chihuahua.

...and in fact, for the above the version of the child affected (xxx) is remarkable, made in a clear, detailed way (even a little more than what is expected of a girl of such a young age, as it is appreciated by this body in terms of judicial experience) ... and those details, we insist exceed what the experience of this Chamber has seen when dealing with minors with similar age...

From what can be seen in this sample of sentences and their qualitative review, it would seem that the set of conditions provided by the SAP-COV model produce child testimony with more useful information for judicial assessment than traditional interrogation formats. The motivation to speak, the management of anguish and the stimulation of the free and uninterrupted narrative, help children and adolescents to be able to express themselves more naturally and thus to manifest elements that the parties and authorities can use to clarify what happened and to better argue their claims

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