Children's Participation in Youth Justice and Civil Court Proceedings

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Abstract

The rights of children in youth justice and civil court proceedings, and in particular the right of children to be heard or to "participate" in such systems, is an area in which there has been much interest in recent years, particularly sparked by Article 12 of the UN Convention on the Rights of the Child. There are a wide variety of proceedings in which children's interests are decided, for example, where they are accused of a crime, where their parents are in dispute on family breakdown and where there are child protection concerns. This chapter examines recent developments in standards at international level concerning children's

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U. Kilkelly, T. Liefaard (eds.), *International Human Rights of Children*,
International Human Rights, https://doi.org/10.1007/978-981-10-3182-3_14-1

participation in proceedings, such as the drafting of General Comment No. 12 of the UN Committee on the Rights of the Child on the right to be heard and the Guidelines on Child-friendly Justice of the Council of Europe. It draws on recent international research in order to provide analysis of the extent to which such standards have affected practice and made a difference for children. It concludes that although the development of such standards is to be welcomed, and although these standards have achieved some improvements at domestic level, the more extensive modifications required for genuine participation of children in the justice system has not occurred.

1 Introduction

In this chapter, standards in children's participation rights in youth justice[1] and civil court proceedings,[2] and their implementation, will be considered. The rights of children in justice systems to be heard – or to "participation" - when decisions are made concerning them is an area in which there has been much interest in recent years. Article 12 of the UN Convention on the Rights of the Child (CRC) enshrines the right of children to be heard, and the right to have their views accorded "due weight" in accordance with their age and maturity, and in particular in judicial and administrative proceedings. This has placed great emphasis on the rights, views, and experiences of children when they come into contact with justice systems, either as suspects or defendants in juvenile justice proceedings, or where the courts are called upon to determine their best interests in their upbringing where adults disagree, such as in family law.

The UN Committee on the Rights of the Child has released General Comment No. 10 on children's rights in youth justice (CRC/C/GC/10 2007) and General Comment No. 12 on the right to be heard (CRC/C/GC/12 2009). There has likewise been extensive attention to the subject from other intergovernmental organizations such as the Council of Europe through its Guidelines on Child-friendly Justice (Council of Europe 2010) and the EU, which has recently conducted several wide-scale studies on children's experiences of justice systems (FRA 2015, 2017; Kennan and Kilkelly 2015).

There have been a number of research studies conducted in the past decade which have sought to ascertain the influence which the CRC has had on national legal systems (see for example Krappmann 2010). It seems that ratification of the CRC has indeed led to the incorporation of at least some provisions into legal systems around the world, and that Article 12 is the most incorporated provision, after Article 3,

[1]The term *youth justice* refers to proceedings against children who are in conflict with the law and who can be held criminally responsible before the law. The term *juvenile justice* has the same meaning in, among others, the US context.

[2]The term *civil court proceedings* refers to court proceedings which do not relate to criminal matters, but for example child protection and family law proceedings.

which states that the best interests of children should be a primary consideration in all actions taken concerning children (Article 3(1) CRC; Lundy et al. 2012).

But what difference has Article 12 really made? It is difficult to tell whether Article 12 CRC has had a significant influence on legal systems. There have been a number of international studies conducted, most recently by the European Union Fundamental Rights Agency (FRA 2017), and Child Rights International Network (CRIN) – the latter sought to identify how and whether children can access justice in each state around the world (CRIN 2016). It was found that 55 states enshrine a right of children to be heard in *all* matters concerning them though this may not apply to judicial proceedings in practice, 84 states guarantee a right to be heard in *certain* types of legal proceedings, and 58 states having no provision for this right.

It is difficult to provide an overall picture of the adequacy of laws and implementation for a number of reasons. First, different legal systems mean that different standards are required in order to meet children's right to be heard. In one system, legal representation may be crucial in order to adequately participate, in another less adversarial system it may not. Secondly, hearing children in criminal and civil law proceedings will require different sets of facilities and skills, in particular because in the criminal realm children's interests may conflict with those of the state. Nevertheless, there are also cross-cutting issues which are of crucial importance to children's experiences of all legal proceedings – adequate information, professionals who are well trained, presence at hearings and systems which are well adapted for children's needs, for example.

It is clear that there is currently considerable discussion about the importance of children's participation. But what about what is happening in practice? In this chapter, the legal standards which are in place when it comes to hearing children – first in youth justice and then civil law proceedings will be considered. Consideration will then be given to how these standards are being implemented in practice. Finally, some analysis will be provided of the global landscape when it comes to children in justice systems and common themes which have emerged across both youth justice and civil law.

2 Children's Participation in Youth Justice Proceedings

International children's rights law and standards have placed much emphasis in recent years on the rights of children in the context of "youth justice."[3] This term is usually understood to refer to child suspects or defendants in criminal justice proceedings. Children who end up in conflict with the law are among the most vulnerable in society. Research in developmental psychology demonstrates that children accused of a crime usually have a limited understanding of the procedures facing them (see for example Driver and Brank 2009; Grisso et al. 2003; Grisso

[3]Parts of this section are based on research conducted in respect of the book Rap 2013. Further references and resources for the points made here can be found in this publication.

2000; Cooper 1997). This raises significant questions about the approach of legal systems to children in conflict with the law, including children's ability to participate adequately in criminal justice proceedings. It is clear therefore that children need special assistance to be heard and to understand justice proceedings when they are in conflict with the law (Rap 2016).

2.1 International Legal Instruments

The first international legal instrument in which the notion of participation of children in the criminal justice process was acknowledged is the 1985 UN Standard Minimum Rules on the Administration of Youth Justice (the Beijing Rules). These rules, which are nonlegally binding, can be seen as a framework and model for national youth justice systems (Van Bueren 1992). Rule 7.1 contains basic procedural safeguards, including "the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses, and the right to appeal to a higher authority" (rule 7.1), whereas rule 14 delves deeper into the right to participation for children in conflict with the law, providing that youth justice proceedings should take place in "an atmosphere of understanding, which shall allow the youth to participate therein and to express herself or himself freely."

Article 40 of the 1989 CRC contains special provisions for the administration of youth justice as well. Article 40 has strengthened the legal position of children in conflict with the law by formulating several due process rights (i.e., minimum guarantees for a fair trial/procedural safeguards) that apply to youth justice proceedings. Most of these procedural safeguards, such as, among others, the presumption of innocence and the right to legal assistance, are not child-specific but apply to children as well as adults (see Article 6 European Convention for the Protection of Human Rights and Fundamental Freedoms (1950, ECHR), Article 14 International Covenant on Civil and Political Rights (1966, ICCPR), arts. 10, 11 Universal Declaration of Human Rights (1948, UDHR)). The provisions which are specific to children are the *trial in camera* principle (para. 2 (b)(vii) CRC) – important for protecting children's privacy – and the particular role assigned to parents or legal guardians (para. 2 (b) (iii) CRC) which is important to ensure that children have the protection of the adults important to them. The fact that Article 40 CRC focuses on children's development distinguishes it from other human rights conventions (see for example article 14 ICCPR and article 6 ECHR), as it states that the child's sense of dignity and worth should be promoted, taking into account the age of the child and promoting his reintegration into society. Article 40 requires that states should keep a steady balance between adapted, informal proceedings in court and the protection of the fundamental procedural rights of the child.

The UN Committee on the Rights of the Child has elaborated on children's rights in criminal justice through its General Comments. In General Comment No. 10 (2007), the Committee states that a fair trial requires the child's effective participation in the proceedings (para. 46). Children in conflict with the law should be given

"the opportunity to be heard in any judicial or administrative proceeding" (para. 43) and during the entire process, from the pretrial stage until the execution of a sanction or measure (para. 44). The Committee also argues that this may also require that courtroom procedures and practices should be modified, depending on the age and maturity of the child (para. 46). Moreover, parents should be present at the proceedings to "provide general psychological and emotional assistance to the child." Parents, however, should not act in defense of their child and should not be involved in the decision-making process (para. 53), which presumably means that they should not have a say in the final outcome of the case, i.e., the determination of guilt and the appropriate disposition. However, the Committee recommends that parents should be involved to the maximum extent possible in proceedings against their child, because this involvement should contribute to an effective response against the child's violation of the law (para. 54).

In General Comment No. 12 (2009), the right to be heard is further elaborated upon. Every judicial procedure concerning minors should be both "accessible and child-appropriate" (para. 34). The meaning of this notion is further specified by the Committee by stating that: "Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of courtrooms, clothing of judges and lawyers, sight screens, and separate waiting rooms" (para. 34). The Committee recommends that the views of children in conflict with the law should be heard through a talk or dialogue, rather than a "one-sided examination" (para. 43). The dialogue can best be held in an environment in which the child feels safe and respected (paras. 23, 60).

A crucial aspect of participation is the right to be properly informed (CRC/C/GC/10 2007, paras. 47, 48). For the child to be able to form his[4] opinion, he should be "informed about the matters, options and possible decisions to be taken and their consequences (. . .). The child must also be informed about the conditions under which she or he will be asked to express her or his views" (CRC/C/GC/12 2009, para. 25). This means that the child should be instructed and prepared before a court hearing on what will be discussed, what the possible outcomes are, and more generally what the procedures in court will look like and who the participants will be (paras. 41, 134 (e)). This enables him to form a well-informed opinion and to share his views on the case with the judge or other decision maker (paras. 25, 60, 82). It is also crucial that "the decision maker has to inform the child of the outcome of the process and explain how her or his views were considered," because this "feedback is a guarantee that the views of the child are not only heard as a formality, but are taken seriously" (para. 45).

[4]For the purpose of uniformity it is chosen to refer to persons with "he" "him" or "his", while meaning "she" or "her" as well.

2.2 Legal Developments in Europe

Although there have been several developments on child participation in youth justice in various regions of the world (see for example the Inter-American Court of Human Rights advisory opinion on children and the law considering the special measures of protection required for children, see Inter-American Court of Human Rights 2002), the most significant developments in the approach to children and criminal (and youth) justice have so far taken place in Europe.

The Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings (2016) is one recent instrument which provides child-specific provisions; for example, it emphasizes that children should be present and enabled to participate effectively in the trial (Article 16) and treated in a manner appropriate to their age, maturity, and needs. Another important development is that the European Court of Human Rights (ECtHR) has developed some critical jurisprudence (Cipriani 2009; Kilkelly 2008b) – of particular note are the cases of T. and V. against the United Kingdom. The Court found in this case "that it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity, and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings" (ECtHR 1999a: para. 84). The Court maintained the view that "the formality and ritual of the Crown Court must at times have seemed incomprehensible and intimidating for a child of eleven" (ECtHR 1999a: para. 86), and the suspects were unable to participate effectively in the criminal proceedings and were denied a fair hearing (ECtHR 1999a: para. 89).

The fact that court procedures should be adapted to the developmental stage of the youth suspect has been further interpreted by the Court in the case of S.C. against the United Kingdom (ECtHR 2004). The hearing in the Crown Court was adjusted to the child's age: he was accompanied by a social worker, he was not required to sit in the dock, the judge did not wear a wig and gown, and frequent breaks were taken (Dohrn 2006). Despite these special arrangements, the Court concluded that S.C. "was unable fully to comprehend or participate in the trial process" (ECtHR 2004: para. 26). However, the Court explained that Article 6 ECHR does not imply that a child should be able to understand every legal detail during the criminal trial. Legal representation serves the purpose in this respect of informing and guiding the child through the trial. The Court explained that "effective participation" should entail the following: the suspect should be able to form a general understanding of the nature of the process, the influence of his appearance and attitude in court on the judge(s), and the outcome of the case and the consequences of a possible sanction or measure (ECtHR 2004: para. 29). The case law generated by the Court has important implications for the concrete interpretation of what a fair trial should entail. Besides the procedural safeguards adopted in Article 6 ECHR, a fair trial also means that a child should be able to participate effectively in his criminal trial, with the assistance of his lawyer.

The Council of Europe in its Guidelines on Child-friendly Justice (Council of Europe 2010) has also contributed to thinking on children's rights in youth justice.

The instrument provides guidance on the right to be heard, the right to legal representation, the protection of privacy, and the role of parents. It states that justice should be "accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity" (para. II, c). Moreover, the guidelines state that "(. . .) specialist courts (or court chambers), procedures and institutions should be established for children in conflict with the law" (para. IV, Article 63). Although the Guidelines can be qualified as a legally weak instrument it can be considered of significant importance, at least in Europe. Also, it builds on principles already to be found in, among other places, the CRC and the case law of the ECtHR, giving it authoritative weight (Liefaard and Kilkelly 2018).

2.3 Implementing Article 12 in Youth Justice Proceedings

The right to be heard, including the presence in court of a child suspect, is internationally considered to be part of his right to a fair trial (CRC/C/GC/10 2007; ECtHR 1994, 1999a, b). Children are therefore generally in attendance at hearings in youth justice proceedings. As a consequence, it is crucial that proceedings are adapted to a child's age, maturity, and understanding. This requires adjusted procedures that are nonhostile and nonintimidating (ECtHR 1999a, b, 2004).

However, in practice systems are not always adapted to children in this way. It is known that small spaces where every participant is within hearing distance of each other best facilitates communication (Rap 2013). Yet many states do not have such a system in which adapted courtrooms for children are used. Commonly, youth justice proceedings take place in general court buildings and in general courtrooms, which are also used for common criminal proceedings. This means that children are confronted with adult defendants, because they have to wait for their case to be called in the same waiting area. Moreover, courtrooms can be very large (with poor acoustics as a consequence), because adult jury trials are held in there as well. This can be seen in the Netherlands, France, Germany, Spain, Scotland, and Ireland (Rap 2013). Furthermore, children can feel distressed during proceedings, for example, feeling embarrassed by being in handcuffs in front of family and upset at having to sit long distances from family during hearings, as: "*. . .[T]his frustrated their own need to be close to their family where they would be able to enjoy their support*" (Kilkelly 2010). A good start is when the child is allowed to sit next to his parents and lawyer in court, so he can experience the emotional support from them. In the English youth court, for example, the child is allowed to sit next to his parents and his lawyer instead of in separated defendant's dock (Judicial Studies Board 2010). This adaptation to the court layout proves positive for the participation of the child.

Another burden to speaking freely in court is when the hearing takes place in a chaotic and busy courtroom. One observation is that the *in camera* principle is often breached in practice. Research shows that in Europe only in Greece and in the Scottish children's hearings system (a welfare system which deals with both care and

delinquency cases, in the latter from the age of 8 to 16, see for example Burman et al. 2010) the hearings are strictly closed to the public. In several other European countries, the *in camera* principle is only loosely applied – in Ireland, Italy, and Scotland (in case of criminal cases of 16- and 17-year-olds); for example, it has been found that lawyers, prosecutors, and others may frequently walk in and out of the courtroom (Rap 2013; Kilkelly 2005, 2008a).

The dominant legal tradition in which the justice system operates also has a major impact on the involvement of the child at the hearing. Legal systems and the procedural traditions employed within legal systems can be distinguished as being either adversarial or inquisitorial by nature. Adversarial systems belong to the common law countries, where the law originates from English common law. Inquisitorial systems can be found for the most part in the civil law countries of continental Europe (Brants and Franken 2009). The adversarial court procedures, revolving around the interaction between the prosecutor and the defense lawyer, have a distinct negative influence on the extent to which the child is able to participate in court procedures. During the hearings, the views of the child hardly play any role, because his legal representative brings forward his position and views. The judge or magistrate rarely asks the young person a question or to comment on certain issues raised. Virtually without exception, every young person who tries to say something during the trial or other type of hearing is cut off by the judge, because his lawyer should fulfil this task (Kilkelly 2005; Plotnikoff and Woolfson 2002). Young people believe that they are not permitted to speak, as one young person says *"You cannot talk in court. Even if you have something really important to say, speaking is against the rules"* (Plotnikoff and Woolfson 2002, p. 29). They see themselves mostly as bystanders in court and they easily get bored. As a consequence, feelings of frustration emerge because they cannot contribute or object to what others bring forward (Hazel et al. 2002; Plotnikoff and Woolfson 2002). Professionals described the engagement of young people in court as "less than observers at their own trials" and "that court is something done to them and over which they have no control" (Plotnikoff and Woolfson 2002, p. 27). It is difficult, therefore, to meaningfully implement participation rights in this specific context.

In Ireland, for example, the Children Act 2001 states that children charged with offences have "a right to be heard and to participate in any proceedings of the court that can affect them" (s. 96). However, hardly any direct interaction between the child suspect and the judge is observed in Ireland. The questions posed by the judge regarding the life of the young person are directed towards the lawyer, and the young person is not engaged in the discussions that take place in court. Kilkelly (2008a) found that in 55% of the observed cases no communication whatsoever took place between the judge and the young person. The young person was frequently referred to by the judge by means of a third-person narrative mode (i.e., as "he" or "she"). In general, the dialogue taking place during the hearing takes place almost exclusively between the judge and the lawyer representing the young person. As stated before, this is the consequence of the manner in which the legal tradition is shaped; the legal representative safeguards the child's rights and therefore talks on behalf of the child suspect, so the child will not jeopardize his own position in the case.

While in the adversarial legal tradition the views of the young person are not personally heard by the judge as proceedings are largely dictated by the prosecutor and lawyer arguing their case, the views of the young person are the center of attention in the inquisitorial legal tradition. During the hearing, the offence and the personal circumstances are often discussed extensively with the young person, which allows him to give his personal views (Rap 2013). The offence is discussed in order to verify the child's statements made in the case at the police interrogation. The judge investigates the case himself and collects and verifies the child's statements and position. Lawyers (should) prepare their clients for this questioning by the judge at the hearing. Also the lawyer gives his oral pleading during the hearing, after the prosecutor has done so, usually highlighting the accountability of the young person, mitigating circumstances, and the – in his and his client's view – most appropriate sentence or measure (Brants and Franken 2009). The judge does also have much regard for the personal circumstances of the child, as the child's situation is taken into consideration as part of the case, before the guilt of the child is established. This is a distinct feature of the inquisitorial tradition, in which the judge decides on the guilt of the suspect and the disposition of the case in a summary case. For example, the judge or prosecutor can ask the child about his home situation, his education, or his friends, as is seen in these examples of questions asked at public prosecutor hearings in Switzerland[5]:

> With whom do you live? Is it going well at home? At what time do you need to be at home at night? (Zurich, Switzerland).
>
> How are you doing at school? Who is your teacher? What are you going to do when this school year is finished? (Glarus, Switzerland).
>
> What do you do in your spare time? (Zurich, Switzerland).
>
> Who are your friends? Do your parents know your friends? (Basel, Switzerland) (Rap 2013, p. 250).

Research indicates that children in youth justice proceedings wish to have the opportunity to speak directly to the judge about the case and their personal life, before others have done so, as they often feel negative comments have already been made about them by the time they are allowed to speak. When they admit their involvement in the case, they particularly wish to express regret and ask the judge for a second chance (Kilkelly 2010). But they do not always feel that they have this opportunity: "*Ten minutes after the judgment has been heard, we are already outside and on our way to the youth centre. When I started speaking to explain my situation, I had the feeling they did not believe me because of their distrustful looks*" (UNICEF Belgium 2010).

[5]The Swiss juvenile justice system has distinct inquisitorial procedures. A youth justice case can be handled by the prosecutor or by a youth court judge. In the first model, the prosecutor has far-reaching powers in dealing with cases and only the most serious offences will be brought to court (see for example Aebersold 2001; Weidkuhn 2009).

Legal representatives play an important role in safeguarding the child's right to be heard. Lawyers have the task to prepare the young person for the hearing and to provide him with explanations both before and after the hearing (ECtHR 2009). As is explained above, the lawyer's role is different depending on the legal tradition he is a part of. Moreover, although the participation of lawyers is self-evident in the adversarial courts, this is not the case in other – more inquisitorial – justice systems. In principle, children in conflict with the law have the right to legal assistance; however in many countries proportionality clauses, possibilities to waive the right to a lawyer, and limited legal aid schemes prevent children from accessing legal representation (see for example Liefaard 2016). The absence of a lawyer is for example observed at youth court hearings in Germany, Greece, and Switzerland and the children's hearings in Scotland in case of less serious offences. In addition, in other countries the appointment of free legal assistance is not guaranteed when diversionary measures are taken by for example the police or the prosecution service. This is, for example, the case in the Netherlands, where free legal assistance depends on the type and severity of the diversionary measure that is taken (Rap 2013). As a consequence, many children lack the assistance of a lawyer when they are involved in youth justice proceedings. To ensure equality of arms child suspects should be provided with legal assistance in every phase of the process (Article 40 (2)(b)(ii)-(iii) CRC). Moreover, with regard to participation, lawyers can contribute to the child's understanding of the process, for example, by providing him with explanations before and after the hearing. The question arises, though, whether the basic procedural safeguard of being assisted by a *lawyer* should be available to every child suspect and in every phase of the youth justice process. The CRC prescribes that every child involved in justice procedures should be guaranteed "to have legal or other appropriate assistance in the preparation and presentation of his or her defense" (Article 40 (2)(b)(ii) CRC) and to have the case handled "in the presence of legal or other appropriate assistance" (Article 40 (2)(b)(iii) CRC). This implies that the assistance does not necessarily have to be provided by a lawyer, but that other persons can also provide such appropriate assistance (see also the ECtHR 2004, para 29; CRC/C/GC/10 2007, para. 50). The CRC Committee (CRC/C/GC/10 2007) argues that others, such as social workers or para-legal professionals, can also provide such assistance "but that person must have sufficient knowledge and understanding of the various legal aspects of the process of juvenile justice and must be trained to work with children in conflict with the law" (para. 49). It is argued here that particularly in serious cases where children are (or can potentially be) deprived of their liberty specialized legal representation is crucial. Moreover, in order to enable the effective participation of children the need for specialized lawyers is of importance, particularly in the adversarial-oriented systems (see also Kilkelly 2005; CRC/C/GC/10 2007, para. 49, 92).

Another crucial matter is how children's views can be given "due weight" in the youth justice context in line with Article 12 CRC. This right involves the requirement that the decision maker informs the child of the outcome of the process and to explain how the child's views have been considered, for example in the matter of why a specific sentence was decided upon (CRC/C/GC/12 2009, para. 45). The fact

that a child is involved in the proceedings as a suspect inevitably influences the extent to which his views can be incorporated in the decision-making. When a decision is taken against the wishes of the child – which is often the case in youth justice proceedings – it is important that there is an explanation given as to how the decision has been reached, to what extent the child's views have played a role in the considerations and what the decision means for the child (Archard and Skivenes 2009). To explain the process and its outcome – such as a sentence – is of great importance, because it might help the child to understand what the consequences are of his behavior and to accept the decision (Cashmore and Parkinson 2007; Tyler 2006). Yet in many countries no special attention is paid to explaining the judgment and the sentence to the child, as insufficient time and opportunity is set aside for it (Rap 2013).

3 Children's Participation in Civil Law Proceedings Concerning Their Interests

The matter of the right to be heard in civil law proceedings has certainly enjoyed an upsurge in interest in recent years.[6] Civil law proceedings in which children are involved include those concerning family breakdown, child protection, and other areas such as where children's medical interests must be decided by the courts.

The UN Committee on the Rights of the Child has clarified in General Comment No. 12 a number of matters concerning the standards that must be met when children are heard in civil law proceedings. There must be a presumption in favor of hearing children (para. 20). States (and therefore judges and other professionals operating on the state's behalf) must also have regard to the best interest principle (para. 70), and all relevant professionals must have received explicit training on the right. An expert such as a guardian *ad litem* should assess their capacity to form views (para. 36). The Committee places significant emphasis on the wishes of the child in relation to the means by which she is heard (para. 35), for example, whether they are heard directly by the decision-maker. Children also have the right to adequate information on the procedures involved and on their own case (para. 34).

There is likely more scope for children to influence decisions in civil proceedings rather than criminal proceedings, because children's interests are less likely to clash with those of the state. When it comes to the matter of weighing their views, the Committee states that children have the right to have their views seriously considered (para. 28). Children's views must be "effectively taken into account" (CRC/C/DNK/CO/3 Denmark 2005 para. 28), and where children can form views "in a reasonable and independent manner" their views must be "a significant factor in the settlement of the issue" (CRC/C/GC/12 2009 para. 44). Children also have the right to have the outcome of a case explained to them (para. 41).

[6]Parts of this section are based on research conducted in respect of the book Daly 2018 forthcoming. Further references and resources relating to the points made here can be found in this publication.

It is particularly difficult to tell, however, whether Article 12 CRC has had a significant influence on legal systems when it comes to children's involvement in civil law proceedings. Even where children *may* be heard, there is usually a large degree of discretion around how and whether a child *will* be heard – much will be determined by beliefs about the types of proceedings in which it is and is not important to hear children, whether or not resources are made available, and the beliefs of the individual decision-maker (Daly 2018, forthcoming).

This is borne-out by the fact that there is research pointing to the failure to implement the right to be heard in all civil proceedings concerning children. Many states have failed to legislate adequately for hearing children in such proceedings – as noted above the CRIN research paints a picture of disparate, or no, provision in many states. Research in 2015 across five European countries[7] found that very few children were being heard in cases concerning international child abduction, in spite of the existence of an EU-level provision mandating this (Beaumont et al. 2015). In 2007 research in 13 states[8] demonstrated that in none of the states examined did children have the opportunity to be heard "a great deal" in family law proceedings (Taylor and Gollop 2007). It is important to note that even in states with a number of avenues through which children can hypothetically participate – via an advocate, speaking privately to the judge, attending proceedings – discretion is such that in spite of the existence of all these options children are often still left unheard altogether, as adults control how and whether participation happens. This global picture appears to have worsened in the past decade with cutbacks in resources for legal budgets. Hearing children, or their broader participation, is simply not commonly perceived as a child's *right* in civil law proceedings (Daly 2018, forthcoming).

3.1 How to Hear Children: Issues of Controversy

In spite of the provision of guidance via General Comment No. 12, there are a number of questions around how children are to be heard, and there has not been a great degree of resolution of how this should happen. Generally, it seems that the manner of hearing children will be in conformity with the norms of the legal system in play, for example, in the civil law tradition it is very common for the judge to meet the child directly, whereas in the common law system a "social report" is the norm and operates in lieu of direct contact between the judge and the child. Is it preferable to shield children from proceedings, or instead to ensure that they have the right to be involved to the extent possible? Such issues have not been adequately resolved.

[7]The five states were Belgium, France, Germany, Italy, and Romania.

[8]The 13 states were Australia, Canada (British Columbia), Costa Rica, England/Wales, New Zealand, Nigeria, Northern Ireland, Republic of Ireland, India, Israel, Japan, Scotland, and the USA (South Carolina).

One key matter is whether children should be present at their own proceedings in civil law matters. There is a strong instinct that children should be kept away from proceedings which are generally unpleasant and challenging for *adults* involved, let alone children. Yet children can have positive experiences when attending. In a 2011 study in the USA, children who attended their foster care hearing generally reported being glad that they had gone to court and were even more likely to view the judge as having made a fair decision than those who had not attended (Weisz et al. 2011). Children's hearings in Scotland (in which child protection cases are dealt with) are notable for the expectation that children will be present – 99% of children with experience of hearing centers felt that they were treated with dignity and respect at the center, and overall 71% felt that they had been the most important person at their most recent hearing (Children's Hearings Scotland 2014), pointing to children being given a sense of importance through their involvement in these proceedings about their lives. There are also barriers to participation, of course. Fear of the unknown, for example, and the power dynamics of attending meetings with a number of adult strangers may prevent children from feeling free to speak. Many children have stated that it would alleviate their fears and worries if they knew who panel members were in advance of the hearing, and that they may wish to meet them before the panel sits (Children's Hearings Scotland 2014).

In recent EU research, many children reported disrespect and rudeness from adults in their interactions during proceedings, for example, from some judges in open court (FRA 2017). One 9-year-old girl in a residence case recalls being called a "spoilt girl" by the judge during proceedings and surmises: "*I also have opinions!. . . I would like to explain things, and not someone [the judge] to tell me I am spoilt and other things*" (FRA 2017, p. 38). The fact that civil proceedings concerning children are often side by side with criminal ones are also a problem, and the lack of appropriate, child-friendly waiting rooms is clear. As a 10-year-old child attending proceedings in Romania expressed: *"[I felt] as if I were in jail [. . .] Well, I don't know what I didn't like. Because I would see people handcuffed, I would see the cuffs. It gave me shivers, I didn't. . . I didn't like it"* (FRA 2017, p. 50). It is the responsibility of adults to make children feel that proceedings are a place where they are important, welcome, and safe. In Norway, it was found that in order for children to have a positive experience when attending their care meetings, those meetings should be tailored to their particular needs (Vis and Thomas 2009). There is extensive evidence that, globally, such preparation for children's attendance is not the norm, with children's presence an incidental factor, rather than something which must be explicitly prepared for (Daly 2018, forthcoming):

> I went to court but I didn't go into court . . . I got taken to court but they said I wasn't needed there in the end so I only just saw the barrister and I didn't even say anything to him then I just went out. (14-year-old boy with experience of family law proceedings, quoted in Douglas et al. 2006, p. 95)

A similar debate exists about whether or not judges should meet children in private in advance of their decision in order to hear children's views and wishes

about their case. The many jurisdictions in which children regularly meet judges include Germany, the Netherlands, New Zealand, and Israel. Children are generally very positive about private meetings with judges. Common law countries regularly exclude children from meeting judges, however, often citing evidentiary problems as inclining against such meetings (Daly 2018, forthcoming, p. 255). It is argued, for example, that if children's views are not shared with parents, parents' fair trial rights may be infringed. This does not ring true however, because children can simply be informed where their views cannot remain confidential. The fact that sometimes children's views are shared with others without warning is unsurprisingly distressing for them: "*I sort of did say to her, 'I wasn't happy at all with the decision you made and everything that was said in that conversation that I thought was confidential'*" (11-year-old girl with experience of family law proceedings, quoted in Douglas et al. 2006, p. 69). Such obstacles can be overcome in order to ensure that children's participation is as positive as possible for both them and parents. In Israel, where children's participation has been mainstreamed in private law proceedings, 77% of parents expressed in pilot research that they were satisfied with the child participation process (Morag et al. 2012, p. 14), even though confidentiality has actually been guaranteed to children in Israel in the views they provide to judges (Morag and Sorek 2015, pp. 26–27). Whether a system guarantees confidentiality for children's views or not, adequate clarity and support for children and parents will resolve procedural difficulties.

In states where judges regularly meet with children in civil proceedings, they tend to be primarily positive about it. Ninety percent of family law judges interviewed in Germany felt that meetings with children were "very" or "fairly" meaningful (Karle and Gathmann 2016), and 75% of judges interviewed in Michigan in the USA felt similarly positive (Clarke 2013). Many judges report that meeting with a child can lead to greater weight being accorded to their views (Morag et al. 2012). It seems therefore that children's presence in civil law proceedings can change the dynamic in decision-making. Yet even in states in which the judicial meeting is very common, judges themselves remain firmly in control of whether it occurs or not – the meeting is not really perceived as a child's *right* per se, rather something which is a possibility in certain circumstances.

Another key question is when children have "representatives" to shield them from court – what exactly is being represented? Is it sufficient for children to have their "best interests" represented to the decision-maker, or should it instead be their wishes? The global landscape indicates that this question has not been answered adequately in most states. In England and Wales, children's guardians represent children's wishes and interests and may not transmit the wishes of the child as they might want (Douglas et al. 2006). In the USA, in most states (69%), rather than taking instructions from their clients, the "guardian *ad litem*" lawyer in a child protection case represents the course of action they deem to be in the best interests of the child (First Star 2007). Children may feel frustrated where they want their wishes represented, but professionals are instead preoccupied with perceived "best interests" (Douglas et al. 2006). They should have a representative who they feel is on their side and arguing for their wishes (Daly 2018, forthcoming).

3.2 "Due Weight" for Children's Views in Civil Law Proceedings

It seems crucial that for Article 12 to be "making a difference for children in proceedings about their best interests, being 'heard' should be influencing the outcomes of individual cases." Yet children consistently report that they feel that even where they have been heard it has not made a difference both in family law (see e.g., McKay 2013; Morag et al. 2012; Darlington 2006) and child protection (Vis and Thomas 2009). Children often express frustration at this: *"They still didn't listen and I started to go down there [to mum's] 'cos I had to in the end"* (14-year-old boy with experience of family law proceedings, quoted in Douglas et al. 2006, p. 96). Even where children *are* heard, the focus of adults is firmly on adult determinations of best interests, rather than on the question of whether children's wishes can be upheld, in spite of the fact that a sense of control and autonomy is crucial to well-being (Daly 2018, forthcoming).

There is a distinct lack of clarity around how to accord weight to children's views in practice, and the Committee's reference to the matter in General Comment No, 21 has not provided much additional guidance (Daly 2018, forthcoming). In particular, systems struggle with cases where children have preferences which incline against the prevailing orthodoxy, such as where they prefer not to see an estranged parent, or to see more of birth families (Daly 2018, forthcoming). Systems regularly order parental contact against children's wishes even where children have good reasons to resist it, such as having witnessed domestic violence at the hands of that parent. As Kyle in Scotland, aged 11, stated: *"It's not that they don't listen, it's just that it doesn't make any difference"* (McKay 2013, p. 4). Young children particularly struggle to have weight accorded to their views (May and Smart 2004), and children frequently receive no explanation as to the basis for the decision made which is particularly problematic when the decision is contrary to their views (Tisdall and Morrison 2012; Kilkelly 2010). It seems highly problematic that there is little transparency in how children's views are "weighed" and that a right to be heard permits so much discretion for overriding children's wishes.

It seems surprising that there has been little effort to prioritize children's autonomy in legal proceedings as we do unquestionably with adults, for example, through a presumption in favor of a child's wishes. Although it is true that we must avoid putting children under pressure in decision-making on matters such as where they will live and with whom they have contact, systems could be designed with this concern in mind (Daly 2018, forthcoming). Daly highlights how the ease with which courts override children's wishes stands in contrast to the way in which the law treats the autonomy of adults, including people with cognitive disabilities. Extreme situations must generally exist before the law can override adult autonomy in their personal lives. It is proposed that a *children's autonomy principle*, respecting children's wishes unless significant harm would likely result, should be applied in civil law proceedings. This would ensure the visibility of children as actors in proceedings concerning them and require a presumption in favor of their wishes (Daly 2018, forthcoming), while still ensuing that they are protected from unsafe decision-making where this is genuinely necessary. Considering the dissatisfaction

of many children with the treatment of their wishes in civil law proceedings determining their best interests, this is an area in which much progress is needed. The harm to children from the pressure of participation, or from potential poor decision-making, must be adequately balanced against the harm from being denied autonomy. At present this is not happening (Daly 2018, forthcoming).

Another crucial point is that outcomes in civil proceedings determining children's best interests are usually seen as very binary – it is ordered that the child will live one place or another, for example. Once the arrangement is in place it may be very difficult or impossible for children to change (Cashmore and Parkinson 2009), short of flouting court orders, in spite of the fact that children want the flexibility to try out arrangements temporarily and change them with evolving needs (Gollop et al. 2000). It is fortunate that there is potential in the area of mediation for greater flexibility of thinking and exchanges. There is a push in favor of mediation and other alternative dispute resolution approaches as an alternative to court proceedings. Yet the participation of children in such processes occurs to an even lower degree in mediation than in formal legal proceedings (see e.g., Ryrstedt 2012), leaving them with an even lower opportunity to influence outcomes. Without explicit obligations at national level that such processes must involve children and that they must give adequate weight to their views, the right to be heard will not prevail in these circumstances.

3.3 Has Article 12 Improved Children's Status in Civil Law Proceedings?

There is a strong Article 12 discourse that now exists in the context of civil law proceedings. It is relatively widely accepted that children should be heard. Yet overall, when examining case law and research from around the world, the picture is not positive: Children are routinely excluded from proceedings about their best interests, and many processes fail to adequately prepare children where they *are* involved or "heard" in such proceedings. All systems appear to struggle greatly with the details of how to hear children. Presumptions about how best to do this also seem misplaced much of the time. For example, the attempts to exclude children on the basis of "protection" is contrary to the positive experiences in Israel, where a presumption in favor of hearing children in private proceedings has worked sufficiently well that an initial pilot study is being extended nationally (Morag 2014).

Many common problems are evident in children's participation in civil law proceedings. The failure to adequately resource avenues for hearing children is possibly the greatest obstacle. Hearing children – particularly in private family law proceedings – is often reduced to an adult discretion rather than a basic human right of children which states are expected to resource. It is inescapable that there appears to be no consistent methodology for demonstrating how and whether children's views have been accorded "due weight" (Daly 2009, 2018, forthcoming). If we cannot be sure that children's views are influencing outcomes, hearing children may be a tokenistic and meaningless exercise.

In spite of the claim that excluding children from proceedings protects them, it is very likely that the real issue is that facilitating them to be involved may be expensive (Daly 2018, forthcoming, p. 229). The other factor, of course, is that adults are reluctant to relinquish the power they hold when whether to hear a child is a matter for an adult to decide, rather than the right of a child. Crucial issues in children's lives, such as where they will live and who they will spend time with, are being decided in these proceedings in which they often remain invisible. Yet children's involvement is a right. An option for genuine participation is crucial to fair proceedings for many children, even if they may not enjoy the outcome they want:

> I know if I got a judgment that I wasn't completely happy with, but I had an active role in the process, I might not have resented it so much, because I would have felt, 'OK at least my voice was properly heard.' (14-year-old girl quoted in Cashmore 2011, p. 517)

4 Conclusions

It is very positive that there has been much attention for the rights of children in youth justice and civil court proceedings in recent years. It is also positive that there has been a focus on developing international standards. Evidently these standards have had some influence on national legal systems in terms of implementation of principles such as Article 12 CRC.

Yet many problems persist. Children want greater opportunities to participate in proceedings concerning them and, unfortunately, they often have a lack of trust in authority (Kilkelly 2010). Most children appear to feel that justice systems are beset with problems, that adults do not adequately communicate with them, and in the words of one child, they perceive that: "*[T]hey work too slow while children suffer*" (Kilkelly 2010). While much research and thinking has occurred in the area of hearing children in private civil law proceedings, greater research is needed into what the right to be heard can and should mean in criminal proceedings, where a potentially punitive approach may mean that the right to be heard goes unrecognized. This is particularly true for adversarial court procedures. Although the child has an autonomous legal position, and he is considered criminally responsible and can be held accountable for his behavior, he cannot always exercise his right to be heard adequately.

Proceedings have largely remained the same as before Article 12 CRC came into force. In spite of useful guidelines (e.g., the Guidelines on child-friendly justice), sweeping child-friendly changes in civil law proceedings have not occurred. Children still lack adequate information, professionals are often not sufficiently well trained and adequate resources are not ensured for children to be heard or for their needs to be adequately provided for. There have undoubtedly been modest changes here and there – in Norway there have been moves towards attempting to hear under-

7s, for example (seven years is usually the cut-off point for being heard), and in England child defendants are allowed to sit next to their parents and lawyer in court (Judicial Studies Board 2010). Yet there is an overwhelming sense that fitting children into adult proceedings is not working, that children often remain unheard and that adults regularly do not relate well to them when they *are* involved (see for example FRA 2017).

Perhaps one major problem is that there is a misplaced emphasis on a "right to be heard" as a gold standard for children, when in reality it is a rather limited tool for ensuring children's autonomy and dignity when crucial matters are being decided about them (Daly 2018, forthcoming). The right to be heard is something which adults often interpret to mean that small modifications to justice systems will be sufficient for children's involvement. In fact the research around children's experiences consistently points to the fact that children are routinely excluded from proceedings about their own interests, even when they very much want to be heard, and that they often feel lost and intimidated in very adult-oriented proceedings when they *are* involved. Youth justice proceedings too often mirror adult criminal court proceedings, in which the developmental level of the child is not taken into account and the emphasis is laid on retribution and punishment, rather than focused on the best interests of the child – a "right to be heard" is of little benefit to children in this context, and arguably a greater focus on due process and autonomy rights is needed.

This points to the need to rethink the position of children in justice proceedings. Civil law proceedings should be made less formal and more emphasis should be placed on what children want. Where children are in conflict with the law, the focus should be on the challenges which led children to that position in the first place, rather than on punishing them. Adversarial systems in particular require serious structural changes in order to be made appropriate for children's rights and interests. In civil law proceedings in adversarial systems, it should not be an evidentiary problem for children to meet the judge, and the binary nature of judgments should be rendered more flexible so that children can make suggestions and try out arrangements. Youth justice proceedings – specifically adversarial court procedures – are insufficiently adapted to the level of understanding of children and the child – as defendant – is not regarded as an actor who should participate autonomously. The adults involved execute the criminal trial and deal with the legal issues at stake, without having sufficient regard for the views of the child. The "right to be heard" must truly be seen as a child's right and should mean more than mere listening. This means that the child's views should be seriously considered and feedback should be given to the child on how his views have been incorporated in the decision-making. It should mean that children have full status as individual rights-holders in our justice systems.

5 Cross-References

► Deprivation of Liberty of Children
► International Children's Rights Law: General Principles

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