

HEARING AND PARTICIPATION OF THE CHILD

HEARING THE CHILD IN COURT PROCEEDINGS: WIDELY DIFFERING APPROACHES

Children who are capable of forming their own views have the right to express those views. The State Parties to the CRC are obliged to provide children with the opportunity to be heard in any judicial and administrative proceedings. “In all matters affecting the child”, their views shall be given due weight in accordance with the age and maturity of the child (art. 12 CRC).

The CRC leaves open whether the child is heard directly or through a representative or an appropriate body. That leaves room for the states to choose, not *whether* the child should be heard, for that is a clear obligation, but *how* this is to be done.

A striking finding of the project *Realising Rights?* (Meysen & Hagemann-White, 2011) is the fact that States not only have their distinct legal frameworks and practices but also take extremely divergent approaches towards hearing the child’s views when court proceedings are involved: at one end of the scale, judges consistently hear the child from the ages of 3 or 4 before every court decision (as in Germany), at the other end, children are almost never heard by judges directly but only through specially trained professionals appointed to represent the child’s interests during court proceedings (for example in Sweden and the United Kingdom).

CHILDREN BETWEEN WITNESSING, BEING HEARD AND PARTICIPATING

The right of the child to be heard is acknowledged in law in all states within or closely linked to the EU, but legal frameworks for realising this right and the effectiveness of its implementation vary greatly, as do the rules and procedures of providing the child with a legal representative of her/his interests in court proceedings.

In some countries, hearing the child seems primarily a matter of giving evidence; as part of the process of collecting information for adults to make informed decisions: In others, it is understood as participation, and from a certain age, protection measures or care plans must take account of the child’s wishes. In some countries, decisions may be invalid if the child has not been heard and those responsible for plans and decisions must make every effort to discern the child’s views. In others, the right to be heard is framed as an option available if the child asks for it. Even where there is a binding legal provision that the child must be heard, this may not happen in practice.

In connection with proceedings about maltreatment, the duty to hear the views of the child sometimes seems to be confused with taking the testimony of a witness, which is a quite different matter. The requirement to hear the child might also be complied with as a formal requirement with little real effect on decisions. Simply hearing the child does not secure her/him the status of a participating person in all proceedings, especially if the child is younger.

From the principles of the CRC it follows that the inclusion of children in proceedings is more than a formal hearing and should be a substantial and concrete participation in all actions related to their rights and needs. Hearing the child should be part of the child’s participation in child protection and child welfare proceedings. In the comparative research, no state could be said to have fully realised this goal in court proceedings. In contrast, administrative child protection proceedings seem to assure more or less qualified participation in some countries, not only legally but also in practice.

Older children are given rights independent of their parents in court proceedings. Some states even take further steps and require the child’s consent, if they are over 14 or 15, to a placement outside the family and their views can only be overruled by a well grounded court or administrative ruling.

CHILDREN EXPRESSING THEIR VIEWS WITH PROFESSIONAL ASSISTANCE AND/OR REPRESENTATION

Appointing a special guardian, curator or supporting professional to stand alongside the child is a measure that can strengthen the child's right to be heard. This minimum standard in court proceedings affecting the child's life is also dealt with in widely different ways across Europe. Usually, such a supporting professional is tasked with representing the interests of the child, and cannot simultaneously be responsible for assessing the child or investigating the maltreatment. Other promising approaches place the professional at the side of the child to advise, counsel and accompany her/him throughout the proceedings and thereby lend the child a voice.

The right of the child to be heard has consequences for the qualification of those who implement this right. Basic knowledge of developmental psychology, of pedagogy and of research knowledge on the dynamics and effects of different forms of violence are needed to hear and understand what children of different ages who have been exposed to different forms of maltreatment can say about their experience and their needs, wishes and aims. In all proceedings, whether they involve working with children and families or bring about court-ordered measures, the key actors – including those in the justice and family law systems – need education and training if they are to safeguard children's fundamental rights. The study found judges in most states, albeit the professionals with the greatest power to decide over the child's life, were the least trained and specialised.

RIGHT TO SEEK HELP AND COUNSELLING WITHOUT PARENTAL CONSENT

Too little attention has been given to the child's right to seek help and advice without immediate parental supervision or control, but this, too, follows from the fundamental right to be heard. Both young children and adolescents need age-appropriate opportunities to reveal their problems and/or conflicts with parents or other carers without the latter knowing that their child is seeking advice. This is necessary, since there is always the possibility that the best interests of the child are in conflict with the wishes or interests of one or both of their parents. Hotlines and internet sites that allow children to talk about their problems confidentially, as well as safe houses where a maltreated child can seek help, seem necessary elements of ensuring the fundamental right to be heard. It is then the responsibility of professionals to assess if, how and when the custodial parents or other carers could best be involved.

BRIDGING THE GAP BETWEEN THE APPROACHES

There is no convergence, nor meaningful debate about the different ways in which the fundamental right of the child to be heard is or should be assured. Reflection and discussion is needed on whether the direct hearing of children in court proceedings (as in Germany and the Netherlands) or hearing through a specially appointed representative (Sweden, United Kingdom) serves the right better. The impacts on children and the quality of participation should be compared across these widely diverging procedures. The existing disparity between approaches should urgently be bridged by comparative research, so that policy can be based on reliable knowledge on the outcomes for children.