

UN Convention on the Rights of the Child: Participation

Ivan ŠIMOVIĆ

ABSTRACT

This chapter examines children's participation rights as fundamental civil and political rights intended for children as sole holders, as envisaged by the Convention on the Rights of the Child. The contemporary perspective is that participation rights encompass the pivotal right of the child to express his or her views freely in all matters that affect him or her (Article 12) and other significant participation rights, such as the right to freedom of expression (Article 13), the right to freedom of thought, conscience and religion (Article 14), and the right to free association and peaceful assembly (Article 15). These rights are considered to be crucial for the "visibility" of the child and his or her respect as an active subject, not a passive object of law, because they contribute to proper participation of the child in his or her political, economic, social and cultural environment. This chapter thoroughly examines the scope, content, relevance and function of children's procedural rights in theory and practice. It explains the interconnection and interdependence of these rights in their realisation, as well as the way the Convention imposes obligations on States Parties to respect, protect and promote these rights. This chapter aims to outline how States Parties to the Convention should create the national legal framework necessary to facilitate children's effective enjoyment of all their participation rights, enabling them to participate in the decision-making process in all matters that affect them, considering their evolving capacities and the principle of the primary protection of their best interests.

KEYWORDS

children's participation rights, the right to express views freely, the right to freedom of expression, the right to freedom of thought, conscience and religion, the right to free association and peaceful assembly, Committee on the Rights of the Child

1. Introduction

Children's rights are a special form of human rights that are directed by their application to every child below the age of the majority, that is, 18 years (Article 1 of the UN Convention on the Rights of the Child (CRC)). An essential feature of children's rights is that they are intended for children as sole holders, belong to them without restrictions and cover all areas of their lives. Accordingly, children have participation rights which can be viewed as the rights of minor members of society (civil rights)

Ivan ŠIMOVIĆ (2024) 'UN Convention on the Rights of the Child: Participation'. In: Márta BENYUSZ – Anikó RAISZ (eds.) *International Children's Rights*. pp. 137–157. Miskolc–Budapest, Central European Academic Publishing. https://doi.org/10.71009/2024.mbar.icr_6

that reflect their position as subjects of law and legal relations, and the need to respect their human dignity.¹ Thus, a child who is capable of forming his or her own views has the right to express those views freely in all matters that affect him or her (Article 12 CRC); the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all types and in all forms (Article 13 CRC); the right to freedom of thought, conscience and religion (Article 14 CRC); and the right to free association and peaceful assembly (Article 15 CRC). These rights regulate children's relationships with family members and, more broadly, with all individuals and institutions with whom they come into contact. The Convention has the greatest influence on the legal formation of children's participation rights. Without understanding the provisions of the Convention, one cannot properly interpret the system of children's rights.

A child's right to express his or her own views freely in all matters that affect him or her is a fundamental principle on which the Convention is based and is considered a crucial right for the "visibility" of the child and his or her respect as an active subject, not a passive object of law.^{2,3} Certainly, Articles following Article 12 – Articles 13, 14, and 15 CRC (expression, thought, conscience, religion, association, peaceful assembly) – are as significant because they point beyond children's participation rights towards their right and capability of altering relationships, effecting changes in decisions (whether they are made by their parents, legal representatives or competent judicial or administrative authorities), and shifting social assumptions and constraints.⁴ Despite their unquestionable importance, children's participation rights are of a relative nature, as they can be limited if there are justified and for legal reasons, such as the age and maturity of the child (in the case of Article 12 CRC), respect for the rights, reputations, or freedoms of others, as well as the protection of

1 Hrabar et al., 2021, pp. 192-196 and 201.; Zermatten, 2010, pp. 483-484 and 493; Committee on the Rights of the Child (2003), General comment No. 5 (2003) – General measures of implementation of the Convention on the Rights of the Child, CRC/GC/2003/5, 27 November 2003, paras. 21. and 66.

2 Child's right to be informed and to express his or her views is also regulated within Council of Europe's and European union's legal sources – European Convention on the Exercise of Children's Rights (ECECR), European Treaty Series No. 160, Art. 1. para. 2, Art. 3 and Art. 6; Charter of Fundamental Rights of the European union (Charter), Official Journal of the European Communities, 2000/C 364/01., Art. 24 para. 1.

3 The Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950, European Treaty Series No. 5. – ECHR) does not contain a separate article on children's participation rights. Nevertheless, the ECHR represents an important source for these rights owing to the unique position of the European Court of Human Rights (ECtHR) and its interpretations of procedural requirements deriving from Article 6 and Article 8 through its case law – *Case C v. Croatia*, Appl. No. 80117/17, 3 October 2020, paras. 73, 76-78 and 81-82; *Case M. and M. v. Croatia*, App. No. 10161/13, 3 September 2015, paras. 129, 171, 181 and 184-187; *Case of N. Ts. and Others v. Georgia*, App. No. 71776/12, 2 February 2016, paras. 72, 78, 80 and 84; *Case M.K. v. Greece*, App. No. 51312/16, 1 February 2018, paras. 74 and 91; *Case E.S. v. Romania and Bulgaria*, App. No. 60281/11, 19 July 2016, paras. 59; See also: Bruning and Mol, 2021, pp. 15. and 17-18; Daly, 2011, p. 441.

4 Freeman, 2020, pp. 38, 45-46, 310 and 314; Hanna, 2023, pp. 43-44.

national security, public order, health and morals (in cases of Articles 13, 14, and 15 CRC). Notwithstanding the possible limitations of these rights, the obligation of the States Parties to respect and ensure the rights set forth in the Convention for each child within their jurisdiction should not be called into question (Article 2 Paragraph 1 CRC). Therefore, the CRC obliges States Parties to publicise the principles and provisions of the Convention to adults and children (Article 42 CRC) and to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the Convention (Article 4 CRC).⁵ To examine the progress made by the State Parties in achieving the realisation of the obligations undertaken in the Convention, the CRC established a special body with a monitoring role – the Committee on the Rights of the Child (Articles 43 and 44 CRC). With these provisions, the State Parties agreed to the control of the United Nations bodies regarding the respect of children's rights in their territory.⁶

Guided by the aforementioned general provisions of the CRC, it can be concluded that children's participation rights and other children's rights prescribed by the Convention, can be realised only within an individual State Party and with the active help of the State in question in the process of realising the rights prescribed (Article 4 and Article 42 CRC).⁷ Moreover, the role of parents or other persons legally responsible for the child in that process is indispensable (Article 5 and Article 18 Paragraphs 1 and 2 CRC).⁸ In doing so, the role of parents in ensuring appropriate direction and guidance in the exercise by the child of the rights recognised in the Convention should always be interpreted through the prism of evolving capacities of the child (Article 5 in connection with Article 14 Paragraph 2 CRC) to achieve a balance between the rights of the child and the rights, duties and responsibilities of his or her parents, which are not absolute in relation to the child.⁹ Thus, parental rights over children are limited, not only by the concept of evolving capacities of the child, but also by the requirement that direction and guidance be "appropriate" (Article 5 CRC), and by the requirement that parents when exercising their parental responsibilities act in the best interests

5 General comment No. 5 (2003), par. 1-2. and 66-70.

6 Hrabar, 1991, p. 25; Khazova and Dawit Mezmur, 2019, p. 306.

7 General comment No. 5 (2003), par. 19-20; Freeman, 2020, pp. 220-221. Freeman also suggests that enforceability of children's rights at domestic level partly depends on whether or not the CRC enjoys the status of national law, that is, whether the provisions of the Convention are incorporated into domestic family law.

8 Freeman, 2020, pp. 8, 241-242 and 390; Khazova and Dawit Mezmur, 2019, pp. 314-315; Aras Kramar et al., 2015, p. 32; Alinčić, 1990, pp. 58-59.

9 The Committee on the Rights of the Child emphasises that 'the child has a right to direction and guidance, which have to compensate for the lack of knowledge, experience and understanding of the child and are restricted by his or her evolving capacities. ... the more experienced the child is ... the more the parent, legal guardian or other persons legally responsible for the child have to transform direction and guidance into reminders and advice and later to an exchange on equal footing'. Committee on the Rights of the Child (2009). General comment No. 12 (2009) – The right of the child to be heard, CRC/C/GC/12, 1 July 2009, par. 84.

of the child (Article 3 CRC).¹⁰ The principle of the best interests of the child offers an answer to the question of the criteria, method and meaning of the comprehensive protection of children's procedural and other rights prescribed by the Convention.¹¹

2. The right of the child to express his or her views freely in all matters that affect him or her – Article 12 CRC

2.1. General principle of the CRC

Article 12 is the pivotal provision in the Convention, as it prescribes the child's right to express his or her views in all matters affecting him or her and has due weight-age attached to these in accordance with the age and maturity of the child. It provides children "a voice", recognizing the dangers of "wrapping them in silence".¹² Consequently, this has significantly contributed to the child's active role in society, particularly within the family.¹³

The Committee on the Rights of the Child pointed to Article 12 as a "fundamental value" of the Convention, being not only a right itself but also one of the four general principles for the interpretation and implementation of all other rights. As a general principle, it is linked to other general principles of the Convention, such as the right to non-discrimination (Article 2), the protection of the best interest of the child as the primary consideration (Article 3), and the right to life, survival and development (Article 6).¹⁴ Some studies conducted to ascertain the influence of the Convention on national legal systems imply that Article 12 is the most incorporated provision after Article 3.¹⁵

2.2. Interconnection and interdependence with Articles 13 and 17 of the CRC

Family law theory often accentuates that the child has the right to be informed and obtain advice before deciding to exercise the right to express his or her views on all matters that affect him or her (particularly in judicial and administrative proceedings). This is because the effective implementation of Article 12 relies on State obligations under Article 13, considering that the child's right to freedom of expression includes the right to impart information and ideas of all types through mass media (in connection with Article 17).¹⁶ The Committee on the Rights of the Child confirms that fulfilment of the child's right to information, consistent with Articles 13 and 17,

10 Khazova and Dawit Mezmur, 2019, p. 315; Vučković-Šahović et al., 2012, p. 160; Zermatten, 2010, p. 488.

11 Hrabar, 1991, p. 29; Aras Kramar et al., 2015, p. 18; Zermatten, 2010, p. 493.

12 Freeman, 2020, pp. 38, 121, 283 and 310; Taylor et al., 2021, pp. 3-4.

13 Khazova and Dawit Mezmur, 2019, p. 313.

14 General comment No. 5 (2003), paras. 12 and 22; General comment No. 12 (2009), paras. 2, 17 and 68.

15 Daly and Rap, 2019, p. 300.

16 Hanna, 2023, p. 46.; Lundy, Tobin and Parkes, 2019, p. 410; Aras Kramar et al., 2015, p. 16.; Majstorović, 2017, p. 57.

is ‘a crucial prerequisite for the effective realization of the child’s right to be heard’.¹⁷ Those responsible for hearing the child must ensure that the child is provided with complete, accessible, and age-appropriate information about the ‘right to express her or his views in all matters affecting the child and about the impact that his or her expressed views will have on the outcome’, this being the basis for the child’s clarified decisions.¹⁸ Feedback on how their participation has influenced the outcome is a guarantee that their views were not heard only as a formality.¹⁹

2.3. Interconnection and interdependence with Article 3 of the CRC

The standpoint of family law theory is that if the child’s opinion is not established because he or she was not provided the opportunity to express his or her views (considerations, thoughts, wishes), then the child cannot be protected, as it will be impossible to determine what is in the child’s best interest and how to protect it.²⁰ Thus, to protect the best interest of the child as the primary consideration is ‘a mirage without knowledge of the child’s perspective’.²¹ Hence, the Committee on the Rights of the Child suggests a strong link between the right of the child to express his or her views freely in all matters that affect him or her (Article 12) and the principle of primary protection of the best interests of the child (Article 3). In this regard, the Committee concludes that:

‘there is no tension between Articles 3 and 12, only a complementary role of the two general principles: one establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing either the child or the children’.²²

Article 3 cannot be appropriately applied if the obligations derived from Article 12 are not respected, making the proper exercise of the child’s right to express his or her views a precondition for the correct assessment and protection of the child’s best interests. Similarly, Article 3 reinforces the functionality of Article 12 and facilitates children’s participatory role in the decision-making process regarding matters that

17 General comment No. 12 (2009), paras. 68, 80 and 82; Interconnection and interdependence of the child’s right to be informed and obtain advice before eventually deciding to express his or her views is even better displayed in the ECECR (Art. 3 and Art. 6), bearing in mind that the Convention in question applies only to family proceedings before a judicial or administrative authority (Art. 1 para. 3 and 4; Art. 2 para.1a).

18 General comment No. 12 (2009), paras. 25, 41, 48 and 134a)

19 Bruning and Mol, 2021, p. 36 and 38.

20 Zermatten, 2010, p. 496; Khazova and Dawit Mezmur, 2019, p. 313-314; Khazova, 2016, pp. 29-30.

21 Freeman, 2020, p. 231.

22 General comment No. 12 (2009), par. 74; Committee on the Rights of the Child (2013). General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, CRC/C/GC/14, 29 May 2013, par. 43.

affect them.²³ Zermatten rightly concludes that ‘Article 3 needs Article 12 just as Article 12 serves the interests of Article 3’.²⁴

2.4. Right of the child, not an obligation

Another legal standpoint emphasised in family law theory is that expressing views is the right of the child, not his or her obligation.²⁵ This implies that children ‘should never be coerced into expressing views against their wishes’ because this would turn their right into a duty and nothing of the sort is intended.²⁶ Furthermore, ‘children should be informed that they can cease involvement at any stage’ because they have the right to opt out of the decision-making process, for example, if the child does not understand relevant facts of the proceeding, if the child is not capable of expressing his or her views, if establishing the views of the child represents danger for the development, upbringing, and health of the child or if the child is exposed to conflict of loyalty or high amount of stress or manipulation (by parents, household members or third persons).²⁷ The jurisprudence of the European Court of Human Rights (ECtHR) and Court of Justice of the European Union (CJEU)²⁸ is in accordance with this standpoint of the Committee on the Rights of the Child.

2.5. Analysis of Article 12 CRC

The full text of Article 12 reads:

‘States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.’

‘State Parties shall assure’

Article 12 prescribes that State Parties “shall assure” the right of the child to express their view, and thus imposes a clear obligation on States Parties to undertake

23 General comment No. 12 (2009), par. 74; General comment No. 14 (2013), paras. 43 and 53.

24 Zermatten, 2010, p. 497.

25 Freeman, 2020, p. 390; Bruning and Mol, 2021, p. 15.; Majstorović, 2017, p. 58.; Aras Kramar et al., 2015, p. 32.; Lucić, 2017, p. 396.

26 General comment No. 12 (2009), paras. 132 and 134b.

27 Ibid.; Freeman, 2020, pp. 126-127.

28 ECtHR, *Case of Iglesias Casarrubios and Cantalapiedra Iglesias v. Spain*, App. No. 23298/ 12, 11 October 2016, par. 36.; CJEU, Case C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v Simone Pelz*, 22 December 2010, par. 64.

appropriate measures for the child to exercise this right and participate in the decision-making process on matters that affect him or her.²⁹

‘to the child who is capable of forming his or her own views’

The right of the child to be informed and to express his or her views in all matters affecting him or her implies that using an individual (case-by-case) analysis it is ascertained that the child has sufficient understanding and is capable of forming his or her own views ‘in a reasonable and independent manner’.³⁰ The Committee on the Rights of the Child stipulates that State Parties should not interpret this provision as a limitation, ‘but rather as an obligation to assess the capacity of the child to form an autonomous opinion to the greatest extent possible’.³¹ A child should be presumed to have the capacity to form a view, meaning that it is not necessary for the child to first prove his or her capacity. This right of the child ‘has no age threshold’ and in addition to that ‘non-verbal communication should be recognised as expressing a view just as verbal communication’.³² The child does not need to have ‘comprehensive knowledge’ of all aspects of the matter to be considered capable of forming his or her own views. His or her sufficient understanding will be adequate.³³ This is of utmost importance, because if a child is deemed incompetent, his or her opportunity to participate is reduced or can even be used to

‘the right to express those views freely’

Children should be able to express their views “freely”, without being unduly influenced or pressurised.³⁴ Clearly, there exists considerable danger of manipulation in the area of procedural rights, particularly in consultations with children who are being provided information and assistance to clarify their views and express them appropriately. Unfortunately, depending on who has consulted the child, and when and how, ‘the will and the views of the child can be created and hence manipulated’, often by those who should be first in line to protect their rights and interests – parents, legal guardians or other persons legally responsible for the child.³⁵ Therefore, the Committee on the Rights of the Child underlines States Parties obligation to ensure an appropriate ‘environment in which the child feels respected and secure when freely expressing her or his opinion’.³⁶ Relying on this standpoint, family law theory concludes that hearing a child in an appropriate environment without undue influence or pressure is a precondition that must be fulfilled by competent authorities

29 General comment No. 12 (2009), paras. 16. and 19.; Bruning and Mol, 2021, p. 15.

30 Majstorović, 2017, p. 57; General comment No. 12 (2009), par. 44.

31 General comment No. 12 (2009), par. 20.

32 Freeman, 2020, p. 180; Hanna, 2023, p. 46; Bruning and Mol, 2021, pp. 29 and 34; Lundy, Tobin and Parkes, 2019, p. 449; Mol, 2019, pp. 84-85.

33 Freeman, 2020, p. 180; Bruning and Mol, 2021, p. 29; General comment No. 12 (2009), par. 21.

34 Freeman, 2020, p. 180; General comment No. 12 (2009), par. 22.

35 Majstorović, 2017, p. 57; Lundy, Tobin and Parkes, 2019, p. 424; General comment No. 12 (2009), paras. 25 and 132.

36 General comment No. 12 (2009), paras. 23, 34, 43 and 132.

(those responsible for hearing the child) to obtain an authentic opinion of the child deprived of any external influences.³⁷ One should not forget that ‘the child has the right to express her or his own views and not the views of others’³⁸

‘in all matters affecting the child’

‘the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child’.

Both paragraphs of Article 12 provide a broad scope of application related to all matters and proceedings affecting children. Paragraph 1 prescribes that the child has the right to express their views in ‘all matters affecting the child’. The Committee on the Rights of the Child emphasises that this ‘condition has to be respected and understood broadly’. This allows the child to express their views ‘if the matter under consideration is affecting them and they are capable of expressing their own views with regard to this matter’, covering even issues not explicitly mentioned in the Convention.³⁹ Such a wide interpretation of matters affecting the child contributes to the child’s more active role in the social processes of their daily lives at home, and within their community and society.^{40, 41}

Paragraph 2 prescribes the opportunity of the child to express their views ‘in any judicial and administrative proceedings affecting the child’, regardless of whether such proceedings were initiated by the child or by other persons. The Committee explains that this implies ‘all relevant judicial proceedings affecting the child, without limitation’. In this regard the Committee mentions as an example, family law proceedings such as the separation of parents, custody, care, and adoption, and proceedings relating to other areas of law – civil, criminal, misdemeanour, social welfare, and asylum law.⁴² Regarding administrative proceedings affecting the child the Committee mentions, as an example, decisions about children’s education, health, environment, living conditions, protection, status in the juvenile justice system or their

37 Freeman, 2020, pp. 181, 231-232 and 390; Bruning and Mol, 2021, pp. 33-34; Majstorović, 2017, p. 57, 65 and 67.; Aras Kramar et al., 2015, pp. 25 and 27.

38 General comment No. 12 (2009), par. 22; General comment No. 5 (2003), par. 12.

39 General comment No. 12 (2009), paras. 26-27; Lundy, Tobin and Parkes rightly conclude that Article 12 Paragraph 1 extends to all matters where the child is the specific and exclusive subject of concern, as well as to matters where the impact on a child is incidental and remote. See: Lundy, Tobin and Parkes, 2019, pp. 408-409.

40 General comment No. 12 (2009), par. 12; General comment No. 5 (2003), paras. 12. and 57; General comment No. 14 (2013), par. 86; Freeman, 2020, p. 180. and 182-183; Bruning and Mol, 2021, p. 19; Khazova and Dawit Mezmur, 2019, pp. 313; Mol, 2019, p. 76.

41 Lundy, Tobin, and Parkes make reference to Committee’s outline of several contexts which involve matters that typically affect a child or a group of children, such as: the family, alternative care, health care, education and school, play, recreation, sports and cultural activities, the workplace, situations of violence, development of prevention strategies, immigration and asylum proceedings, emergency situations and (inter)national settings. See: Lundy, Tobin and Parkes, 2019, p. 410.

42 General comment No. 12 (2009), paras. 32-33.

asylum status.⁴³ Further, it notes that both judicial and administrative proceedings may involve alternative dispute mechanisms such as mediation and arbitration^{44, 45}

‘the views of the child being given due weight in accordance with the age and maturity of the child’.

Children’s right to freely express their views should be considered in accordance with two cumulative conditions: age and maturity. This brings to the forefront the concept of children’s evolving capacities. The ‘right to express one’s views in a way grows with the child’, meaning, as the child ages and matures the weightage of his or her views on the decision-making process increases.⁴⁶ The Committee on the Rights of the Child reiterates that ‘children’s level of understanding is not uniformly linked to their biological age’.⁴⁷ Thus, age can only be an indicator of a child’s presumed level of understanding, and must be considered together with maturity, which must be assessed on an individual (case-by-case) basis.⁴⁸ When both of these conditions are fulfilled and ‘the child is capable of forming his or her own views in a reasonable and independent manner’, the decision maker must: a) seriously consider the views of the child as a factor in the decision-making process; and b) inform the child of the outcome of the process and explain how their views have been considered.⁴⁹ Similar to the Committee on the Rights of the Child, the jurisprudence of the ECtHR also accentuates age and maturity as relevant conditions regarding whether a child should be heard and how much weightage should be accorded to the expressed views⁵⁰

‘the child shall in particular be provided the opportunity to be heard ... either directly, or through a representative or an appropriate body’.

Article 12 Paragraph 2 provides the child with the opportunity to be heard in any judicial and administrative proceedings affecting him or her ‘either directly, or through a representative or an appropriate body’. The Committee on the Rights of the Child confirms that this provision ensures that a child has the choice of how to be heard

43 General comment No. 12 (2009), paras. 32 and 67.

44 General comment No. 12 (2009), par. 32.

45 Lundy, Tobin and Parkes conclude that Article 12 Paragraph 2 applies ‘to the diverse range of formalized decision-making proceedings concerning children irrespective of a) the subject matter, b) the status of the decision maker, c) the form of the proceedings, and d) whether the child initiates the proceedings, or they are initiated by others’. See: Lundy, Tobin, and Parkes, 2019, p. 421.

46 Majstorović, 2017, p. 57; Lundy, Tobin and Parkes, 2019, pp. 411-412.

47 General comment No. 12 (2009), par. 29.

48 Lundy, Tobin and Parkes, 2019, p. 411; Bruning and Mol, 2021, pp. 29-30.; General comment No. 12 (2009), paras. 29, 44 and 52.; General comment No. 14 (2013), par. 44.

49 General comment No. 12 (2009), paras. 30, 44-45 and 85; General comment No. 5 (2003), paras. 12 and 57.

50 Bruning and Mol, 2021, pp. 31; See: *Case C v. Croatia*, App. No. 80117/17, 3 October 2020, paras. 73 and 78; *Case M. and M. v. Croatia*, App. No. 10161/13, 3 September 2015, paras. 184-185; *Case Gobec v. Slovenia*, App. No. 7233/04, 3 October 2013, par. 133; *Case Plaza v. Poland*, App. No. 18830/07, 25 January 2011, par. 71.

if he or she has opted to be heard in a proceeding. Notwithstanding three options available to the child, the Committee recommends that, ‘whenever possible, the child must be given the opportunity to be directly heard’ by the authority conducting the proceeding.⁵¹ Family law theory concurs with the Committee’s standpoint.⁵²

However, the Committee underlines that such direct representation should occur ‘whenever possible’, implying that this may not always be possible for a number of reasons. In such cases, the right to be heard indirectly through a representative or appropriate body ensures that the views of the child are adequately transmitted to the authority conducting the proceedings.⁵³ The Committee points to the scope of persons who can be representatives of the child: parents, lawyers, or other persons (e.g. social workers, teachers, and siblings).⁵⁴ Although the provision of Article 12 Paragraph 2 does not explicitly require that the representative must be “appropriate”, the position of the family law theory is that such a qualification must be implied if the child’s right to representation is to be effective.⁵⁵ For the representative to be considered “appropriate”, the Committee states that there must be an absence of any conflict of interests between the child and the representative.⁵⁶ Similar to this standpoint of the Committee is the jurisprudence of the ECtHR,⁵⁷ and the position of family law theory.⁵⁸

In proceedings (civil, penal or administrative) in which the interests of the child conflict with those of the parents as his or her most common legal representatives, or in cases where there is a risk of such a conflict, hearing the child via a parent(s) risks an infringement of the child’s right to be heard because there is reason to believe that the views of the child are not going to be transmitted correctly to the decision maker. In such situations, the child must be appointed as an objective and impartial representative (guardian *ad litem*).⁵⁹ The appointment of such a representative should prevent the flawed representation of the child, ensure adequate transmission of the views of the child to the decision-maker, and consequently ensure recognition and

51 General comment No. 12 (2009), par. 35.

52 Lundy, Tobin and Parkes 2019, p. 424; Bruning and Mol, 2021, p. 21 and 39.

53 Lundy, Tobin and Parkes, 2019, p. 424.

54 General comment No. 12 (2009), par. 36.

55 Lundy, Tobin and Parkes, 2019, p. 427.

56 General comment No. 12 (2009), par. 36; General comment No. 14 (2013), par. 90.

57 *Case of N.T.s. and Others v. Georgia*, App. No. 71776/12, 2 February 2016, par. 55; *Case of T.A. and Others v. the Republic of Moldova*, App. No. 25450/20, 30 November 2021, par. 33.

58 Lundy, Tobin and Parkes, 2019, p. 427; Mol, 2019, p. 70; Bruning and Mol, 2021, p. 22; Freeman, 2020, pp. 231-232; Aras Kramar et al., 2015, p. 33; Lucić, 2017, pp. 396-397.

59 General comment No. 12 (2009), par. 36; General comment No. 14 (2013), paras. 90 and 96.

protection of the best interests of the child and not the interests of other persons (parent(s), institutions, bodies, or the representative)⁶⁰

‘in a manner consistent with the procedural rules of national law’.

Hearing the child in judicial or administrative proceedings through a representative must be ‘in a manner consistent with the procedural rules of national law’. The Committee on the Rights of the Child states that ‘this clause should not be interpreted as permitting the use of procedural legislation which restricts or prevents enjoyment of this fundamental right’.⁶¹ Contrarily, state parties are encouraged to create domestic procedural rules to facilitate children’s effective enjoyment of their right to participate in judicial and administrative proceedings which affect them.⁶²

3. The right of the child to freedom of expression – Article 13 CRC

‘The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child’s choice.’

Although children’s participation rights are mostly associated with Article 12, they are also embedded in the right to freedom of expression (Article 13), freedom of thought, conscience and religion (Article 14), and freedom of association (Article 15).⁶³ Particularly relevant is a child’s right to freedom of expression (Article 13), a classic civil and political right found in many global and regional human rights treaties.⁶⁴ The scope of this right is broad, and traditionally, discussions related to freedom of expression have focused on issues such as freedom of information, freedom of the

60 General comment No. 12 (2009), par. 37; General comment No. 14 (2013), paras. 90 and 96; Lundy, Tobin and Parkes, 2019, pp. 427-428; Mol, 2019, pp. 70 and 76; Bruning and Mol, 2021, pp. 21-28; Freeman accentuates that there has been vigorous, even heated, debate within academic literature over the role of the representative, posing a question should he or she represent the child’s best interests or advocate for the child’s wishes as a lawyer does when representing an adult? Freeman concludes that the widespread assumption is that the representative’s role is to present the child’s best interests. See: Freeman, 2020, pp. 226-227.

61 General comment No. 12 (2009), par. 38.

62 Lundy, Tobin and Parkes, 2019, p. 431.

63 Freeman, 2020, pp. 38, 45-46, 310 and 314; Hanna, 2023, pp. 43-44; Hrabar et al., 2021, p. 201; Alinčić, 1990, p. 59.

64 For example, Article 10 of the ECHR, prescribes that “everyone” has the right to freedom of expression. Almost identical provision is contained in Article 19 Paragraph 2 of the International Covenant on Civil and Political Rights (UN General Assembly resolution 2200A (XXI), 1966 – ICCPR), as well as in Article 11 of the Charter of Fundamental Rights of the European Union (Charter). The family law theory is clear that all children have always been entitled to this right because they have always been included in term “everyone”. See: Tobin and Parkes, 2019, p. 437; Freeman, 2020, p. 185.

press, censorship, defamation, and hate speech. Family law theory criticises the fact that the application of this right to children has been largely omitted, and points to the absence of a thorough examination of the relevance of this right to issues that are significant for children's personal identity, education, and development. In this context, such issues encompass whether this right entitles a child to obtain access to information concerning his or her adoption or medically assisted procreation, to obtain records about time spent in foster care, to obtain information about sexual and reproductive health, to challenge the requirement to wear a school uniform, or to restrict political comments within a school magazine.⁶⁵

The right of the child to freedom of expression is often confused with the child's right to express his or her views freely in all matters that affect him or her (Article 12) because each performs a distinct yet complementary function.⁶⁶ The right to freedom of expression 'relates to the right to hold and express opinions, and to seek and receive information through any media'.⁶⁷ Furthermore, Article 13 places a negative obligation on States Parties to refrain from interference in the expression of children's views or access to information, meaning that children have the right not to be restricted by States Parties in the opinions they hold and express.⁶⁸ However, Article 12 places a positive obligation on States Parties to create a legal framework necessary to facilitate children's effective enjoyment of their right to participate in the decision-making process in all matters affecting them, as well as to accord due weightage to their views. Therefore,

'although Article 12 involves an active obligation to facilitate the expression of views and to give them due weight, Article 13 places a negative obligation on the state and state authorities to refrain from interference in the expression of a children's views'.⁶⁹

As such, Article 13 allows children to express themselves through a medium and subject of their choice, but also allows for the possibility that this expression does not need to be connected with or dependent on the decision-making process, as in Article 12.⁷⁰

Article 13 is closely related to Article 17 which deals with a child's relationship with mass media. The right of the child to freedom of expression includes the freedom to seek, receive and impart information. One way to receive information and material in a range of contexts is through mass media, access to which State Parties are obliged to ensure for the child (Article 17). Nevertheless, the Convention places a duty on States

65 Tobin and Parkes, 2019, p. 437-438., 440 and 443.

66 General comment No. 12 (2009), paras. 68. and 81; Tobin and Parkes, 2019, p. 438; Hanna, 2023, p. 46.

67 General comment No. 12 (2009), par. 81.

68 Ibid.

69 Hanna, 2023, p. 46; Tobin and Parkes, 2019, pp. 438-439 and 444.

70 Hanna, 2023, pp. 47-48; Tobin and Parkes, 2019, p. 440 and 447-448.

Parties to encourage the development of appropriate guidelines for the protection of children from information and material that could harm their well-being and thus indirectly protect the child from an injurious way of realising the right to freedom of expression (Article 17e) in connection with Article 13).⁷¹ Thus, the provision of Article 3 of the Convention should be used as a tool for rectifying all actions (whether of the child, parent(s), persons legally responsible for the child or the State) that would ultimately oppose the best interests of the child, notwithstanding that these actions are, at first glance, directed towards the realisation of the child's right to freedom to access information as a part of the right to freedom of expression.

Article 13 is also related to Articles 28 and 29 which, among other things, outline the types of information and material which must be provided to children as part of their education.⁷² This further demonstrates that the rights of the child prescribed by the Convention are interconnected and interdependent in their realisation. The child's right to education and freedom of expression are inseparably linked to the role of the parents, who should ensure appropriate direction and guidance in the exercise of those rights by the child (Article 13 and Article 29 Paragraph 1, Subparagraph c) in connection with Article 5). Some authors believe that the role of parents in the education of a child should manifest as their responsibility to enable the child's full intellectual development, which certainly presupposes freedom of expression, access to information and ideas of all types, and respect for the child's views on all matters that affect him or her (Articles 28 and 29 in connection with Articles 12 and 13, as well as Article 5).⁷³

'The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; or (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.'

Article 13 Paragraph 2 prescribes the preconditions under which interference with the child's right to freedom of expression is justified, pointing again to the conclusion that children's participation rights are of a relative nature as they can be subject to limitations. The Convention allows a child's right to freedom of expression to be limited, provided the limitation satisfies three preconditions: a) it must be provided by law; b) it must pursue a legitimate aim (e.g. respect of the rights or reputations of others, protection of national security, public order, public health, or morals); and c) it must be necessary in a democratic society, meaning it must conform to the principle of proportionality (e.g. be the least intrusive possible limitation).⁷⁴ Further, the Convention allows parents and other persons legally responsible for the child to

71 Hrabar, 1991, p. 109; Freeman, 2020, p. 185; Tobin and Parkes, 2019, pp. 439, 443 and 445.

72 Tobin and Parkes, 2019, pp. 439, 443 and 445.

73 Hrabar, 1991, p. 109; Alinčić, 1990, p. 59; Tobin and Parkes, 2019, p. 439.

74 Tobin and Parkes, 2019, pp. 440-441, 443, 445, 451, 455, 457, 458 and 460.

restrict the child's right to freedom of expression where the restriction is necessary to protect the child from harm and secure his or her best interests (Article 13 in connection to Article 5). This is because the Convention provides parents with a wide level of discretion in their assessment of how to provide appropriate direction and guidance to their child in exercising their right to freedom of expression, considering the child's evolving capacities.⁷⁵ The extent and meaning of possible limitations to the child's right to freedom of expression have not yet been analysed in detail by the Committee on the Rights of the Child. So far, the Committee has only made general remarks about its concerns regarding the possible limitations to this child's right.

4. The right of the child to freedom of thought, conscience and religion – Article 14 CRC

'States Parties shall respect the right of the child to freedom of thought, conscience and religion.'

Although Article 12 is the pivotal provision for children's participation rights, it is also enshrined in the right to freedom of thought, conscience and religion (Article 14), and freedom of association (Article 15).⁷⁶ The Convention provides children with a fundamental civil and political right to freedom of thought, conscience and religion which includes the right to manifest beliefs,⁷⁷ simultaneously imposing an obligation on the States Parties to respect, protect and promote this right (Article 14 Paragraph 1 in connection with Article 2 Paragraph 1).⁷⁸ Freeman underlines that 'there is no right which illustrates better the inherent dignity of man than freedom of thought, conscience and religion'.⁷⁹

Similar human rights for adults and children can be found in other important global and regional human rights treaties such as the ICCPR (Article 18), ECHR (Article 9), and Charter (Article 10).⁸⁰ When comparing the provisions of Article 14 of the CRC with those of Article 18 of the ICCPR, Article 9 of the ECHR, and Article 11 of the Charter, one difference is evident. The Convention does not determine the content of

75 Ibid., p. 440-441, 455 and 458.

76 Hanna, 2023, pp. 43-44.; Freeman, 2020, pp. 38, 45-46, 310 and 314; Hrabar et al. 2021, p. 201; Alinčić, 1990, p. 59.

77 Tobin and Pakes argue that any such manifestation of beliefs always falls within the scope of a child's right to freedom of expression, underlining yet again the interconnection and interdependence of children's rights. See: Tobin and Parkes, 2019, p. 439; See also: Langlaude Doné and Tobin, 2019, p. 487.

78 Langlaude Doné and Tobin, 2019, pp. 479-480.

79 Freeman, 2020, p. 186.

80 Langlaude Doné and Tobin argue that children have been and continue to be entitled to the right to freedom of thought, conscience and religion, as provided by the ECHR or the ICCPR, because they have always been included in term "everyone". See: Langlaude Doné and Tobin, 2019, pp. 477 and 487.

a child's right to freedom of thought, conscience and religion. Unlike the Convention, the ICCPR, ECHR, and Charter elaborate in detail what the right in question includes: the freedom to change religion or belief and freedom, either alone or in community with others and in public or private, to manifest religion or belief in worship, teaching, practice and observance. Therefore, Freeman believes that the Convention does not provide the child the right to choose or change his or her religion, in contrast to other authors who believe that one of the objectives of Article 14 should be to create a presumption that the child has the right to choose or change his or her religion in accordance with their evolving capacities.⁸¹ Family law theory also accentuates that more States Parties have expressed reservations to Article 14 than any other article in the Convention, finding this 'concession to Islamic nations which do not accept freedom of religion' contrary to Article 51 Paragraph 2 of the Convention.⁸²

'States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.'

Clearly, the Convention accepts the indispensable role of parents in directing the child to exercise his or her right to freedom of religion, thought and conscience. The influence of parents in shaping their child's religious values and beliefs is recognised as legitimate, provided that several preconditions prescribed by the Convention are fulfilled. First, the role of parents in ensuring appropriate direction and guidance in the child's exercise of the right to freedom of religion, thought and conscience should always be interpreted in a manner consistent with the child's evolving capacities (Article 14 Paragraph 2 in connection with Article 5). Further, the role of parents is also limited by the requirement that direction and guidance be "appropriate" (Article 5 CRC), as well as by the requirement that parents when exercising their parental responsibilities act in the best interests of the child (Article 3 CRC).⁸³ Finally, Article 14 Paragraph 2 when read in conjunction with Article 12, requires parents to seek the views of their children to discover what the right to freedom of thought, conscience and religion means to them and how they wish to manifest their right.⁸⁴

In this context, it is noteworthy that the provision of Article 14 Paragraph 2 is compatible with that of Article 2 of the First Protocol to the ECHR which recognises the importance of States Parties respecting the right of parents to ensure education

81 Freeman, 2020, p. 186; For contrary opinion see: Langlaude Doné and Tobin, 2019, pp. 478 and 489; Hrabar et al., 2021, p. 217.

82 Freeman, 2020, p. 186; Langlaude Doné and Tobin, 2019, pp. 477, 479 and 489; A similar standpoint was taken by the Committee on the Rights of the Child in the General comment No. 5 (2003), par. 15.

83 Freeman, 2020, pp. 8, 241-242 and 390; Khazova and Dawit Mezmur, 2019, p. 315; Vučković-Šahović et al., 2012, p. 488; Langlaude Doné and Tobin, 2019, pp. 477, 479, 486 and 492.

84 Langlaude Doné and Tobin, 2019, p. 493.

and teaching in conformity with their own religious and philosophical convictions.⁸⁵ This confirms the importance of parents' legitimate and appropriate influence on their children's enjoyment of their right to freedom of thought, conscience and religion. However, the Committee on the Rights of the Child points to the ambit of parents influence, noting that 'it is the child who exercises the right to freedom of religion, not the parent, and the parental role necessarily diminishes as the child acquires an increasingly active role in exercising choice throughout adolescence'.⁸⁶

'Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others'

A child's right to manifest freedom of thought, conscience and religion is not absolute and is subject to reasonable limitations. If a State Party wishes to limit a child's rights under Article 14, the limitation will be justified if three requirements are satisfied: a) it must be provided by law; b) it must pursue a legitimate aim (e.g. protection of public safety, order, health or morals, or the fundamental rights and freedoms of others); and c) it must be necessary in a democratic society, meaning it must conform to the principle of proportionality (e.g. it must be the least intrusive possible limitation).⁸⁷ The extent and meaning of possible limitations to the child's right to freedom of thought, conscience and religion have not yet been the object of a General Comment or been analysed in detail by the Committee on the Rights of the Child.⁸⁸

5. The right of the child to freedom of association and to freedom of peaceful assembly – Article 15 CRC

'States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly'

Children's participation rights are viewed as a "cluster of rights" encompassing, among other, the right of the child to freedom of association and peaceful assembly provided

85 A provision similar to the provision of Article 2 of the First Protocol to the ECHR is included in Article 18 Paragraph 4 of the ICCPR.

86 Committee on the Rights of the Child (2016). General Comment No. 20 (2016) – The Implementation of the Rights of the Child during Adolescence, CRC/C/GC/20, 6 December 2016, par. 43.

87 Langlaude Doné and Tobin, 2019, pp. 507-509.

88 For more detailed information on certain aspects of limitations to children's rights to freedom of thought, conscience and religion, for example, the provision of medical treatment in contravention of a child's religious convictions, the restrictions on Islamic headscarves or restrictions on other manifestations of religious beliefs (wearing a Sikh kara bracelet, carrying Catholic rosary beads, having dreadlocks consistent with the principles of Rastafarianism), see: Langlaude Doné and Tobin, 2019, pp. 510-516.

for in Article 15. Family law theory considers this a fundamental civil and political right because it ‘carries the promise of legitimately engaging children in the social and political functions of their communities’.⁸⁹ Article 15 generates an obligation on States Parties to respect, protect and promote this right (Article 15 Paragraph 1 in connection with Article 2 Paragraph 1).⁹⁰ Similar human rights for adults and children can be found in other important global and regional human rights treaties, such as the ICCPR (Articles 21 and 22), the ECHR (Article 11), and the Charter (Article 12).⁹¹

The scope of the child’s right to freedom of association and freedom of peaceful assembly is wide, as it includes the right to form, join, and leave associations of all types, assemble peacefully for a wide range of purposes, and associate freely with friends or others in public or private spaces to share or protect common interests.⁹² Therefore, these rights cover children’s association and assembly with others, including other children, in a wide range of contexts: in the family environment, in school or educational settings (for example, the establishment of student organizations or clubs in school or membership on school councils), in social and other settings (for example, peaceful demonstrations, participating in NGO’s, children organizations in local municipalities such as sport clubs or associations of stamp collectors, various other child and youth organizations, sometimes within larger organizations such as the children’s or youth parliaments or the network of young advisors of the Ombudsman for children), including the child’s enjoyment of public spaces with other children (for example, visiting and playing in parks, schoolyards and playgrounds).⁹³ Considering the scope and content of the child’s right to freedom of association and freedom of peaceful assembly, it is clear that they are closely linked to the exercise of other participation rights of the child, as derived from Articles 12, 13, 14, 17, and 31 of the Convention. Such interconnection and interdependence mean that the effective exercise of these rights will contribute to the proper participation of children in his or her political, economic, social and cultural environments.⁹⁴

‘No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.’

89 Assim, 2019, p. 399.

90 Breen, 2019, pp. 523-524.

91 Breen considers that the rights to freedom of association and peaceful assembly, as provided by the ECHR or the ICCPR, are extended to “everyone”, this including children as holders of these rights. See: Breen, 2019, pp. 517-518 and 534.

92 Breen, 2019, p. 518; Assim, 2019, pp. 403-406.

93 Assim, 2019, pp. 403-406; Breen, 2019, pp. 519, 529-530, 535 and 541.

94 Assim, 2019, p. 403; Breen, 2019, pp. 519-520, 522 and 539-540.

A child's right to freedom of association and freedom of peaceful assembly is not absolute and is subject to reasonable limitations. If a State Party wishes to limit a child's rights under Article 15, the limitation will be justified if three preconditions are fulfilled: a) it must be in conformity with the law; b) it must pursue a legitimate aim (e.g. protection of national security or public safety, order (*ordre public*), health or morals, or the fundamental rights and freedoms of others); and c) it must be necessary in a democratic society, meaning it must be in accordance with the principle of proportionality (e.g. the type and intensity of the limitation must be least intrusive).⁹⁵ The extent and meaning of possible limitations to the child's right to association and freedom of peaceful assembly have not yet been the object of a General Comment or been analysed in detail by the Committee on the Rights of the Child.⁹⁶

⁹⁵ Breen, 2019, pp. 542-549.

⁹⁶ For more detailed information on certain aspects of limitations to children's right to freedom of association and freedom of peaceful assembly, for example, high level of surveillance, punitive youth justice policies or age-related restrictions preventing children from establishing, joining or freely participating in associations including unions, NGO's, political parties or school management committees, see: Breen, 2019, pp. 544-549.

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